UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor Meron, Presiding** **Judge William H. Sekule** **Judge Arlette Ramaroson** **Judge Carmel Agius** **Judge Khalida Rachid Khan**
Registrar:	**Mr. Bongani Majola**
Judgement of:	**16 December 2013**

Grégoire NDAHIMANA

v.

THE PROSECUTOR

Case No. ICTR-01-68-A

JUDGEMENT

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1. The Appeals Chamber of the 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 ("Appeals Chamber" and "Tribunal", respectively) is seised of appeals by Grégoire Ndahimana ("Ndahimana") and the Prosecution against the judgement pronounced on 17 November 2011 by Trial Chamber II of the Tribunal ("Trial Chamber") in the case of *The Prosecutor v. Grégoire Ndahimana*.[1]

I. INTRODUCTION

A. Background

2. Ndahimana was born in 1952 in Rukoko Sector, Kivumu Commune, Kibuye Prefecture, Rwanda.[2] He was elected *bourgmestre* of Kivumu Commune in June 1993, a position he assumed in October 1993 and maintained until he left Rwanda in July 1994.[3] Ndahimana was arrested in the Democratic Republic of the Congo on 11 August 2009, and was transferred to the Tribunal's detention facility in Arusha, Tanzania, on 20 September 2009.[4] He was charged before the Tribunal with genocide, complicity in genocide, and extermination as a crime against humanity for crimes perpetrated in April 1994 in Kivumu Commune, in particular in Nyange Parish.[5]

3. The Trial Chamber, by majority, found Ndahimana guilty of genocide and extermination as a crime against humanity pursuant to Article 6(3) of the Statute of the Tribunal ("Statute") for failing to punish his subordinates from the communal police for the killings perpetrated on 15 April 1994 at Nyange Church, Nyange Parish, Kivumu Commune, and pursuant to Article 6(1) of the Statute for aiding and abetting by tacit approval the killings perpetrated at Nyange Church on 16 April 1994.[6] The Trial Chamber sentenced Ndahimana to 15 years of imprisonment.[7]

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[1] *The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Judgement and Sentence, delivered in public on 17 November 2011, signed on 30 December 2011, filed in writing on 18 January 2012 ("Trial Judgement").
[2] Trial Judgement, para. 1.
[3] Trial Judgement, paras. 1, 2.
[4] Trial Judgement, para. 2.
[5] *See The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-I, Amended Indictment, 18 August 2010 ("Indictment"). On 20 June 2001, the Prosecution filed its original indictment against Ndahimana, charging him with genocide, complicity in genocide, conspiracy to commit genocide, and extermination as a crime against humanity. This indictment was corrected and confirmed on 5 July 2001. It was further amended in February and August 2010. *See* Trial Judgement, Annex A: Procedural History, paras. 1, 7, 9, fn. 2077. The fourth amended indictment, which was filed on 18 August 2010, is the operative indictment in this case.
[6] Trial Judgement, paras. 26-29, 767, 800, 832, 841, 843, 847, 848. *See also* Dissenting Opinion of Judge Florence Rita Arrey.
[7] Trial Judgement, paras. 32, 872. *See also* Dissenting Opinion of Judge Florence Rita Arrey.

B. The Appeals

4. Ndahimana presents 11 grounds of appeal challenging his convictions and sentence.[8] He requests that the Appeals Chamber quash his convictions and sentence, acquit him, and order his immediate release.[9] The Prosecution responds that Ndahimana's appeal should be dismissed in its entirety.[10]

5. The Prosecution presents six grounds of appeal challenging some of the Trial Chamber's findings and the sentence imposed on Ndahimana.[11] It requests that the Appeals Chamber: (i) find Ndahimana guilty of genocide and extermination as a crime against humanity pursuant to Article 6(1) of the Statute in relation to the killings of 15 April 1994; (ii) find Ndahimana guilty of genocide and extermination as a crime against humanity pursuant to Article 6(1) of the Statute on the basis of his participation in a joint criminal enterprise; (iii) find Ndahimana guilty of genocide and extermination as a crime against humanity pursuant to Article 6(3) of the Statute in relation to the killings of 16 April 1994; and (iv) impose a sentence of life imprisonment on Ndahimana or, in the alternative, a substantially longer term of imprisonment.[12] Ndahimana responds that the Prosecution's appeal should be dismissed in its entirety.[13]

6. The Appeals Chamber heard oral submissions regarding these appeals on 6 May 2013.

[8] Ndahimana Notice of Appeal, paras. 7-77; Ndahimana Appeal Brief, paras. 2-349.
[9] Ndahimana Notice of Appeal, para. 77; Ndahimana Appeal Brief, para. 349.
[10] Prosecution Response Brief, para. 231.
[11] Prosecution Notice of Appeal, paras. 1-30; Prosecution Appeal Brief, paras. 3-7, 16-61.
[12] Prosecution Notice of Appeal, paras. 5, 10, 15, 19, 22, 30; Prosecution Appeal Brief, paras. 7, 62.
[13] Ndahimana Response Brief, para. 2 *and* p. 184/H (Registry pagination).

II. STANDARDS OF APPELLATE REVIEW

7. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.[14]

8. Regarding errors of law, the Appeals Chamber has stated:

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[15]

9. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[16] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[17]

10. Regarding errors of fact, it is well-established that the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber:

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[18]

The same standard of reasonableness and the same deference to factual findings of the trial chamber apply when the Prosecution appeals against an acquittal.[19] The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made

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[14] *See, e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 11; *Gatete* Appeal Judgement, para. 7; *Ntabakuze* Appeal Judgement, para. 10.
[15] *Ntakirutimana* Appeal Judgement, para. 11 (internal reference omitted). *See also, e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 12; *Gatete* Appeal Judgement, para. 8; *Ntabakuze* Appeal Judgement, para. 11.
[16] *See, e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 13; *Gatete* Appeal Judgement, para. 9; *Ntabakuze* Appeal Judgement, para. 12.
[17] *See, e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 13; *Gatete* Appeal Judgement, para. 9; *Ntabakuze* Appeal Judgement, para. 12.
[18] *Krstić* Appeal Judgement, para. 40 (internal references omitted). *See also, e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 14; *Gatete* Appeal Judgement, para. 10; *Ntabakuze* Appeal Judgement, para. 13.
[19] *See, e.g.*, *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Seromba* Appeal Judgement, para. 11; *Bagilishema* Appeal Judgement, para. 13.

the impugned finding.[20] However, considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a Defence appeal against conviction.[21] A convicted person must show that the trial chamber's factual errors create a reasonable doubt as to his guilt.[22] The Prosecution must show that, when account is taken of the errors of fact committed by the trial chamber, all reasonable doubt of the accused's guilt has been eliminated.[23]

11. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[24] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[25]

12. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[26] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[27] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[28]

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[20] *See, e.g., Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Seromba* Appeal Judgement, para. 11; *Bagilishema* Appeal Judgement, para. 13.
[21] *See, e.g., Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Seromba* Appeal Judgement, para. 11; *Bagilishema* Appeal Judgement, para. 14.
[22] *See, e.g., Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Seromba* Appeal Judgement, para. 11; *Bagilishema* Appeal Judgement, para. 14.
[23] *See, e.g., Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Seromba* Appeal Judgement, para. 11; *Bagilishema* Appeal Judgement, para. 14.
[24] *See, e.g., Mugenzi and Mugiraneza* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 11; *Ntabakuze* Appeal Judgement, para. 14.
[25] *See, e.g., Mugenzi and Mugiraneza* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 11; *Ntabakuze* Appeal Judgement, para. 14.
[26] Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). *See also, e.g., Gatete* Appeal Judgement, para. 12; *Ntabakuze* Appeal Judgement, para. 15.
[27] *See, e.g., Mugenzi and Mugiraneza* Appeal Judgement, para. 16; *Gatete* Appeal Judgement, para. 12; *Ntabakuze* Appeal Judgement, para. 15.
[28] *See, e.g., Mugenzi and Mugiraneza* Appeal Judgement, para. 16; *Gatete* Appeal Judgement, para. 12; *Ntabakuze* Appeal Judgement, para. 15.

III. ALLEGED VIOLATIONS OF RIGHT TO PRESENT EVIDENCE (Ndahimana Ground 1)

13. Ndahimana submits that the Trial Chamber violated Article 20 of the Statute by denying him the right to present material witnesses and produce evidence of a witness under Rule 92*bis* of the Rules of Procedure and Evidence of the Tribunal ("Rules").[29] Ndahimana contends that the violations were caused by the Trial Chamber's denial of his requests to: (i) vary his witness list to call new witnesses;[30] (ii) allow Defence Witness FB1 to testify via video link; [31] and (iii) introduce a written statement of Defence Witness ND38 pursuant to Rule 92*bis* of the Rules.[32] Ndahimana seeks the reversal of his convictions based on these violations.[33]

14. The Appeals Chamber recalls that trial chambers enjoy considerable discretion in the conduct of proceedings before them,[34] including in their determination of the number of witnesses to be called and the modalities of the presentation of the evidence.[35] This discretion must be exercised consistently with Articles 19 and 20 of the Statute, which require trial chambers to ensure that trials are fair and expeditious.[36] In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a discernible error resulting in prejudice to that party.[37] The Appeals Chamber will only reverse a trial chamber's discretionary decision where it is found to be based on an incorrect interpretation of the governing law, based on a patently incorrect conclusion of fact, or where it is so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[38]

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[29] Ndahimana Notice of Appeal, heading "1st Ground of Appeal" at p. 3 *and* para. 8; Ndahimana Appeal Brief, heading "1st Ground of Appeal" at p. 8, *and* paras. 21, 26, 30, 32, 33, 37-40.
[30] Ndahimana Notice of Appeal, para. 8; Ndahimana Appeal Brief, paras. 21-26.
[31] Ndahimana Notice of Appeal, para. 9; Ndahimana Appeal Brief, paras. 27-33.
[32] Ndahimana Notice of Appeal, para. 10; Ndahimana Appeal Brief, paras. 34-39.
[33] Ndahimana Appeal Brief, para. 40. *See also* Ndahimana Reply Brief, para. 47.
[34] *Setako* Appeal Judgement, para. 19. *See also Rukundo* Appeal Judgement, para. 147; *Nchamihigo* Appeal Judgement, para. 18.
[35] *See Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-AR73(C), Decision on Ngirabatware's Appeal of the Decision Reducing the Number of Defence Witnesses, 20 February 2012, para. 12; *Renzaho* Appeal Judgement, para. 175; *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-00-55C-AR73.2, Decision on Prosecutor's Interlocutory Appeal of Decision not to Admit Marcel Gatsinzi's Statement into Evidence Pursuant to Rule 92*bis*, 8 March 2011, para. 6; *Rukundo* Appeal Judgement, para. 221; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.17, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide Upon Evidence Tendered Pursuant to Rule 92 *bis*, 1 July 2010, para. 8; *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007, paras. 21, 24.
[36] *Setako* Appeal Judgement, para. 19. *See also Nchamihigo* Appeal Judgement, para. 18; *Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 22.
[37] *See, e.g., Setako* Appeal Judgement, para. 19; *Renzaho* Appeal Judgement, paras. 143, 175; *Nchamihigo* Appeal Judgement, para. 18.
[38] *See, e.g., Renzaho* Appeal Judgement, para. 143; *Kalimanzira* Appeal Judgement, para. 14; *Nchamihigo* Appeal Judgement, para. 18.

A. Denial of Request to Call New Witnesses

15. On 16 March 2011, Ndahimana filed a motion requesting leave to vary his witness list to, *inter alia*, add ten new witnesses and reinstate three witnesses whose names were on the original witness list which was filed before he was ordered to reduce the number of his witnesses.[39] On 31 March 2011, the Trial Chamber allowed Ndahimana to call two new witnesses in place of two witnesses he had decided not to call, and to call two additional witnesses if two other witnesses were removed from the list. However, it denied Ndahimana's request to add other witnesses.[40]

16. Ndahimana submits that he sought to vary his witness list in order to adduce eyewitness evidence of the events at Nyange Church on 16 April 1994 and to prove that he was not present during the attack.[41] He argues that by "unfairly" denying this request in its Witness List Decision, the Trial Chamber violated Article 20 of the Statute.[42] Ndahimana also contends that, by its Witness List Decision, the Trial Chamber "ignored the persistent requests by the Defence to have reasonable time to prepare the case as discussed and agreed during the informal meetings held prior to the commencement and during the course of the trial."[43] Ndahimana submits that the Trial Chamber thereby abused its discretion under Rule 90(F) of the Rules and violated Article 20(4)(d) and (e) of the Statute.[44]

17. The Prosecution responds that the Trial Chamber reasonably exercised its discretion in its Witness List Decision and that, given the cumulative nature of the proposed evidence, Ndahimana's ability to present a full and fair defence was not prejudiced by that decision.[45]

18. In reply, Ndahimana points to the Trial Chamber's refusal to reinstate Defence Witnesses ND26 and ND27 who, he claims, would have given first-hand evidence about the attacks

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[39] *The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Extremely Urgent Defence Motion to Vary its Witness List (Pursuant to Rule 73 *ter* (E) of the Rules of Procedure and Evidence) and Request for the Grant of Protective Measures to Witnesses ND36, AM1, AM2, FM1, FM2 and ND37 (Pursuant to Rule[s] 69 and 75 of the Rules of Procedure and Evidence), confidential, 16 March 2011 ("Ndahimana Motion to Vary Witness List"), paras. 12, 15, heading C.2 at p. 7, *and* p. 9. *See also The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Order for the Defence to Reduce its List of Witnesses, 15 December 2010, p. 3.
[40] *The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Decision on Defence Motion to Vary its Witness List and Request for Protective Measures for New Witnesses, confidential, 31 March 2011 ("Witness List Decision"), paras. 33-35, *and* p. 11.
[41] Ndahimana Appeal Brief, para. 23.
[42] Ndahimana Appeal Brief, para. 21.
[43] Ndahimana Appeal Brief, para. 25. *See also* Ndahimana Notice of Appeal, para. 7; Ndahimana Appeal Brief, paras. 17, 19.
[44] Ndahimana Appeal Brief, para. 26. *See also* Ndahimana Reply Brief, para. 26.
[45] Prosecution Response Brief, paras. 2, 21, 28-32.

on Nyange Church.[46] He asserts that depriving him of their "crucial evidence" caused him prejudice as he was convicted for these attacks.[47]

19. The Appeals Chamber notes that Ndahimana has not advanced any arguments to substantiate his assertion that the impugned decision was reached by the Trial Chamber without due regard for his requests for sufficient time to prepare his case or the nature of the evidence, or by abusing the Trial Chamber's discretionary power in some other manner.

20. With respect to Ndahimana's submissions concerning the Trial Chamber's denial of his request to reinstate to his witness list Witnesses ND26 and ND27, the Appeals Chamber notes that the Trial Chamber acknowledged the scope of their expected testimony, specifically as it related to the attacks on Nyange Church.[48] However, the Trial Chamber concluded that Ndahimana had failed to specify how the evidence he wished to add differed from, or strengthened, the substantial evidence the Chamber had already heard in relation to these attacks.[49] On appeal, Ndahimana merely repeats that Witnesses ND26 and ND27 were important witnesses and that their evidence was crucial, without demonstrating how their expected evidence differed from or augmented similar testimony of other Defence witnesses. This is insufficient to demonstrate a discernible error on the part of the Trial Chamber. The Appeals Chamber therefore finds that Ndahimana has failed to demonstrate that, by the Witness List Decision, the Trial Chamber abused its discretion or violated Ndahimana's fair trial rights.

[46] Ndahimana Reply Brief, paras. 18, 19.
[47] Ndahimana Reply Brief, para. 20. In his Reply Brief, Ndahimana further argues that the Trial Chamber abused its discretion by "fail[ing] to indicate whether in a period of one month and [a] half it lacked necessary and reasonable means to hear two witnesses" and "stating that due to the late filing of the motion, it was in the interest of justice to reject it." *See ibid.*, paras. 22, 24. The Appeals Chamber notes that this argument exceeds the scope of Ndahimana's appeal as defined in his Notice of Appeal and considers that, by raising this argument for the first time in the Reply Brief, Ndahimana effectively prevented the Prosecution from making any written submissions on the issues. In these circumstances, the Appeals Chamber declines to consider this argument. The Appeals Chamber notes, however, that, contrary to Ndahimana's submissions, while criticizing the lateness of the request to add certain witnesses, including Witnesses ND26 and ND27, the Trial Chamber specifically considered the motion on its merits "in pursuit of the interests of justice". *See* Witness List Decision, para. 15.
[48] Witness List Decision, para. 28.
[49] Witness List Decision, para. 30.

B. Denial of Request to Call Witness FB1 by Video Link

21. On 27 January 2011, Ndahimana filed a motion requesting that Defence Witnesses BX7 and FB1 be heard by video link,[50] which the Trial Chamber denied on 25 February 2011.[51]

22. Ndahimana submits that the Trial Chamber unfairly denied his request to produce the testimony of Witness FB1 by video link on the ground that he failed to demonstrate that there was an objective basis for the witness's inability or unwillingness to testify in Arusha.[52] He contends that the Trial Chamber applied an incorrect standard of law and abused its discretion, resulting in material prejudice and a miscarriage of justice.[53] In support of this contention, Ndahimana argues that: (i) his request "met the consistent standard of approach taken by the Appeals Chamber";[54] and (ii) the testimony of Witness FB1 would have been crucial to his defence, as it would have clarified whether communal policemen participated in the 15 April 1994 attack on Nyange Church and whether Ndahimana was present at Nyange Parish during the 16 April 1994 attack.[55]

23. The Prosecution responds that the Video Link Decision complied with the legal standard and evinced a reasoned and considered application of established rules for the use of video link testimony.[56] It adds that, since the proposed testimony of Witness FB1 would have been "at best cumulative",[57] Ndahimana fails to demonstrate any actual prejudice to his right to a fair trial.[58]

24. In its Video Link Decision, the Trial Chamber recalled:

> Rule 90(A) provides that "[w]itnesses shall [...] be heard directly by the Chambers." Nonetheless, the Chambers have discretion to hear testimonies via video-link in lieu of physical appearance of witnesses for purposes of witness protection pursuant to Rule 75, or where it is in the interests of justice to do so.[] The jurisprudence of this Tribunal has identified criteria to guide the Chambers in determining whether hearing the testimony of witnesses via video link is in the interests of justice. Such criteria include an assessment of (a) the importance of the evidence; (b) the inability or unwillingness of the witness to travel to Arusha; and (c) whether a good reason has been adduced for that inability and unwillingness. The party making the request bears the burden of proof to demonstrate that the conditions set out above have been met. Hearing testimony via video-link is an exceptional measure, granted only upon sound and legitimate justification based on proper documentation.[59]

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[50] *The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-PT, Ndahimana's Extremely Urgent Confidential Request for the Testimony of Witnesses BX7 and FB1 be Heard via Video-Link, Pursuant to Rules 54 and 71 of Rules of Procedure and Evidence, confidential, 27 January 2011.
[51] *The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Decision on Defence Motion to Hear the Testimony of Witnesses BX7 and FB1 via Video Link, 25 February 2011 ("Video Link Decision"), p. 8.
[52] Ndahimana Notice of Appeal Brief, para. 9; Ndahimana Appeal Brief, para. 30.
[53] Ndahimana Notice of Appeal, para. 9; Ndahimana Appeal Brief, paras. 31-33.
[54] Ndahimana Appeal Brief, para. 31.
[55] Ndahimana Notice of Appeal, para. 9; Ndahimana Appeal Brief, paras. 32, 33. *See also* Ndahimana Reply Brief, paras. 31, 32.
[56] Prosecution Response Brief, para. 37. *See also ibid.*, paras. 2, 21-23, 34-36.
[57] Prosecution Response Brief, para. 38.
[58] Prosecution Response Brief, paras. 38-40.
[59] Video Link Decision, para. 16 (internal reference omitted).

The Appeals Chamber observes that this statement is consistent with the approach the Appeals Chamber has endorsed.[60] Notably, Ndahimana relies on this standard in his Appeal Brief.[61]

25. The Trial Chamber recognised the importance of Witness FB1's potential testimony, given that he was expected to refute the Prosecution's allegations concerning 15 and 16 April 1994 as well as provide alibi and character evidence.[62] However, the Trial Chamber found that Ndahimana had failed to demonstrate that there was an objective basis for Witness FB1's inability or unwillingness to travel to Arusha and accordingly denied his request.[63]

26. The Appeals Chamber notes that Ndahimana merely argues that his request met all the requirements for admission of video link testimony without demonstrating how the Trial Chamber erred in its decision. Likewise, Ndahimana fails to demonstrate that his inability to call Witness FB1 prejudiced his defence and resulted in a miscarriage of justice. He does not identify, for example, what the evidence of the witness would have added to that of the other witnesses who testified on the same matters. The Appeals Chamber therefore finds that Ndahimana has failed to demonstrate that the Trial Chamber committed a discernible error in exercising its discretion not to allow Witness FB1 to testify by video link.

C. Denial of Request to Introduce the Written Statement of Witness ND38 under Rule 92*bis*

27. On 21 April 2011, Ndahimana filed a motion seeking the admission of a written statement of Defence Witness ND38 pursuant to Rule 92*bis* of the Rules in lieu of oral testimony,[64] which the Trial Chamber denied on 3 May 2011.[65] The Trial Chamber found that the request did not meet the requirements of Rule 92*bis* of the Rules given that the proposed statement went directly to the acts and conduct of the accused and was not accompanied by the required written declaration.[66]

28. Ndahimana submits that the Trial Chamber abused its discretion and caused him prejudice by denying his request to produce the material evidence of Witness ND38.[67] He contends, in particular, that the Trial Chamber abused its discretion by: (i) denying his right to have the

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[60] *See*, *e.g.*, *Rukundo* Appeal Judgement, para. 221, *referring to Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Prosecution's Request for Testimony by Video-Conference Link and Protective Measures, confidential, 2 July 2004, p. 3.
[61] *See* Ndahimana Appeal Brief, para. 29; Ndahimana Reply Brief, para. 28.
[62] Video Link Decision, para. 20.
[63] Video Link Decision, paras. 21, 22, *and* p. 8.
[64] *The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Defence's Motion for Admission of Witness Testimony Pursuant to Rule 92*bis*, confidential, 21 April 2011.
[65] *The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Decision on Defence's Motion for the Admission of Witness Testimony Pursuant to Rule 92*bis*, confidential, 3 May 2011 ("Rule 92*bis* Decision"), p. 7.
[66] Rule 92*bis* Decision, paras. 16, 18.
[67] Ndahimana Notice of Appeal, para. 10; Ndahimana Appeal Brief, paras. 37-39.

statement of Witness ND38 certified by an authorised officer in accordance with the established practice of the Tribunal;[68] (ii) "unfairly" denying his request to produce the evidence on the ground that it went directly to his acts or conduct;[69] and (iii) denying his request without giving a reasoned opinion.[70]

29. The Prosecution responds that Ndahimana fails to demonstrate any error or abuse of discretion by the Trial Chamber in this regard, or any actual prejudice.[71]

30. In reply, Ndahimana submits that the Trial Chamber "fail[ed] to rule out if the statement in its entirety goes to prove act and conduct of the Accused".[72] He contends, *inter alia*, that the part of the statement related to a meeting at the communal office, which the witness was going to recount, cannot be considered as intending to prove his acts or conduct as the Trial Chamber concluded that the Prosecution did not prove the relevant paragraphs of the Indictment.[73]

31. Rule 92*bis*(A) of the Rules provides for the admission of the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to the proof of a matter other than the acts and conduct of the accused as charged in the indictment.[74] Rule 92*bis*(B) of the Rules provides, in relevant part, that:

> A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and
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> (i) the declaration is witnessed by:
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> (a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or
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> (b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose;

32. In the present case, the Trial Chamber found that "although part of ND38's statement corroborates the evidence of some previous witnesses that the Accused saved the lives of Tutsis, its primary purpose is to disprove the allegation contained in paragraph 17 of the amended indictment against the Accused and so, goes directly to proof of the acts or conduct of the accused."[75] The Trial Chamber's decision not to admit the statement was also partly based on its finding that the statement was not accompanied by the declaration mandated by Rule 92*bis*(B) of the Rules.[76]

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[68] Ndahimana Appeal Brief, para. 37.
[69] Ndahimana Appeal Brief, para. 38.
[70] Ndahimana Appeal Brief, para. 39. *See also* Ndahimana Reply Brief, para. 46.
[71] Prosecution Response Brief, paras. 44-48. *See also ibid.*, paras. 2, 21-23, 43.
[72] Ndahimana Reply Brief, para. 36.
[73] Ndahimana Reply Brief, paras. 39-42.
[74] *See also Renzaho* Appeal Judgement, para. 175.
[75] Rule 92*bis* Decision, para. 18 (internal reference omitted).
[76] Rule 92*bis* Decision, para. 16.

33. Ndahimana's cursory submissions do not demonstrate that the Trial Chamber abused its discretion in deciding that the written statement of Witness ND38 did not meet the requirements of Rule 92*bis* of the Rules. Ndahimana fails to explain why the proffered statement was not accompanied by the requisite declaration and how the Trial Chamber erred in finding that it was not within the purview of its mandate to direct the Registry to obtain certification of the written statement.[77] Similarly, Ndahimana fails to demonstrate that the Trial Chamber erred in finding that Witness ND38's statement went to the proof of his acts and conduct. Ndahimana's argument that the allegations in the particular paragraphs of the Indictment were not proven is irrelevant to the question of whether the statement related to Ndahimana's acts and conduct. Finally, a review of the Rule 92*bis* Decision also clearly reveals that the Trial Chamber articulated its reasons for the rejection of Ndahimana's request. The Appeals Chamber therefore finds that Ndahimana has failed to demonstrate that the Trial Chamber committed a discernible error in the Rule 92*bis* Decision.

D. Conclusion

34. Based on the foregoing, the Appeals Chamber dismisses Ndahimana's First Ground of Appeal in its entirety.

[77] *See* Rule 92*bis* Decision, para. 16.

IV. ALLEGED ERRORS RELATING TO NDAHIMANA'S RESPONSIBILITY FOR THE KILLINGS OF 15 APRIL 1994

35. The Trial Chamber found that, following the death of President Habyarimana, a joint criminal enterprise came into existence in Kivumu Commune, the purpose of which was to exterminate the Tutsis of the commune ("JCE").[78] It further held that, on 15 April 1994, assailants launched a large-scale attack against Tutsi refugees at Nyange Church as a result of which hundreds of Tutsi refugees were killed.[79] The Trial Chamber, by majority, accepted that Ndahimana was not at Nyange Parish on the morning of 15 April 1994 and during the attack, but concluded that communal policemen of Kivumu Commune over whom he had effective control were implicated in the attack.[80] The Trial Chamber, by majority, convicted Ndahimana for genocide and extermination as a crime against humanity pursuant to Article 6(3) of the Statute for failing to punish his subordinates from the communal police for the crimes they committed on 15 April 1994 at Nyange Church.[81]

36. Ndahimana submits that the Trial Chamber erred in convicting him pursuant to Article 6(3) of the Statute for the killings perpetrated on 15 April 1994.[82] The Prosecution argues that the Trial Chamber erred in acquitting Ndahimana under Article 6(1) of the Statute for these killings based on the erroneous finding that he had an alibi for the whole morning.[83]

A. Alleged Errors Relating to Ndahimana's Responsibility Pursuant to Article 6(3) of the Statute (Ndahimana Grounds 2 through 5)

37. The Trial Chamber held that hundreds of Tutsi refugees were killed as a result of the attack on Nyange Church of 15 April 1994.[84] The Trial Chamber further found that: (i) several communal policemen of Kivumu Commune participated in this attack; (ii) Ndahimana, as the *bourgmestre* of Kivumu Commune, had *de jure* authority and effective control over the communal policemen; (iii) Ndahimana had reason to know of the crimes committed by the communal policemen on 15 April 1994; and (iv) Ndahimana failed to punish his subordinates for those crimes, even though

[78] Trial Judgement, para. 5.
[79] Trial Judgement, paras. 552, 749, 750. The Appeals Chamber observes that both the Trial Judgement and the submissions of the parties consistently use the term "refugee" to describe persons taking refuge. For the sake of clarity, the Appeals Chamber uses the same term throughout this Judgement, even though the term may not accurately reflect the status of these persons under international law. *See also* Trial Judgement, para. 40.
[80] Trial Judgement, paras. 17, 526, 527, 529, 530, 564. *See also ibid.*, paras. 747, 750.
[81] Trial Judgement, paras. 18, 755, 767, 800, 841, 843, 847. The Appeals Chamber notes that Judge Arrey dissented on the appropriate mode of liability.
[82] Ndahimana Notice of Appeal, paras. 11-37; Ndahimana Appeal Brief, paras. 41-176.
[83] Prosecution Notice of Appeal, paras. 1, 2, 5-10; Prosecution Appeal Brief, paras. 16-27. *See also* Prosecution Reply Brief, paras. 3, 7-13.
[84] Trial Judgement, paras. 552, 749, 750.

he had the material ability to punish them through disciplinary measures, such as demotion.[85] The Trial Chamber found Ndahimana guilty of genocide and extermination as a crime against humanity pursuant to Article 6(3) of the Statute in relation to this attack.[86]

38. The Appeals Chamber recalls that for liability of an accused to be established under Article 6(3) of the Statute, the Prosecution must prove that: (i) a crime over which the Tribunal has jurisdiction was committed; (ii) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (*i.e.*, the accused had the material ability to prevent or punish commission of the crime by his subordinate); (iii) the accused knew or had reason to know that the crime was going to be committed or had been committed; and (iv) the accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by the subordinate.[87]

39. Ndahimana submits that the Trial Chamber erred in its findings with regard to: (i) the participation of communal policemen in the 15 April attack;[88] (ii) his effective control over the communal policemen;[89] (iii) his constructive knowledge of their crimes;[90] and (iv) his failure to prevent or punish their criminal conduct.[91] The Appeals Chamber will address these challenges in turn.

1. Commission of Crimes by Communal Policemen

40. The Trial Chamber found that several policemen of Kivumu Commune were present during the 15 April attack and actively participated in it, including by shooting their firearms at Tutsis in Nyange Church.[92] In reaching this conclusion, the Trial Chamber relied upon the testimonies of Prosecution Witnesses CBT, CDK, CBY, CDL, CBI, CBK, CBN, and CNJ, who implicated communal policemen in this attack.[93]

41. Ndahimana submits that the Trial Chamber erred in its assessment of the evidence regarding the communal policemen's participation in the 15 April attack.[94] In particular, he contends that the Trial Chamber erroneously relied on the testimonies of the Prosecution witnesses to establish the

[85] Trial Judgement, paras. 740-755, 761-767.
[86] Trial Judgement, paras. 767, 847.
[87] *See*, *e.g.*, *Setako* Appeal Judgement, para. 269, *referring to*, *inter alia*, *Nahimana et al.* Appeal Judgement, para. 484. The Appeals Chamber further recalls that superior responsibility encompasses criminal conduct by subordinates under all modes of participation under Article 6(1) of the Statute. *See Nahimana et al.* Appeal Judgement, paras. 485, 486. *See also Orić* Appeal Judgement, para. 21; *Blagojević and Jokić* Appeal Judgement, paras. 280, 282.
[88] Ndahimana Notice of Appeal, paras. 12, 20, 21; Ndahimana Appeal Brief, paras. 67, 73-76, 109, 123-142.
[89] Ndahimana Notice of Appeal, paras. 32, 34, 35; Ndahimana Appeal Brief, paras. 108-161.
[90] Ndahimana Notice of Appeal, paras. 11, 13-19; Ndahimana Appeal Brief, paras. 41-79, 116-122.
[91] Ndahimana Notice of Appeal, paras. 22-31, 33, 36, 37; Ndahimana Appeal Brief, paras. 80-107, 162-176.
[92] Trial Judgement, paras. 745, 749, 750, fn. 1402.
[93] Trial Judgement, para. 749.

participation of communal policemen in the attack, as these witnesses were found unreliable on the issue of the policemen's participation and in need of further corroboration.[95] According to him, witnesses who require corroboration cannot corroborate one another as a matter of law; "corroboration from independent witnesses" is necessary.[96] Ndahimana also submits that the Trial Chamber erred in failing to give weight to the testimonies of Defence Witnesses ND11, ND12, and ND34, and Prosecution Witness YAU, and in failing to provide reasons for so doing.[97] He argues that each of those witnesses testified that they did not see communal policemen participate in the 15 April attack and thus raised reasonable doubt about this disputed factual issue.[98]

42. The Prosecution responds that the Trial Chamber's findings regarding the participation of communal policemen in the attack were a reasonable exercise of the Trial Chamber's broad discretion in the assessment of the evidentiary record, including the assessment of the credibility of the witnesses.[99] It submits in this regard that there is no legal requirement that corroborative testimony come from a witness whose evidence is deemed credible and reliable without the need for corroboration.[100] In the Prosecution's view, the witnesses on whom the Trial Chamber relied provided substantially overlapping testimonies and their accounts of the attack were further confirmed by Defence witnesses.[101] The Prosecution also argues that the Trial Chamber reasonably decided not to accord any weight to certain Defence witnesses whose testimonies were problematic and unreliable.[102]

43. The Appeals Chamber recalls that a trial chamber enjoys broad discretion in assessing the credibility of witnesses and in determining the weight to be accorded to each testimony.[103] It is within the discretion of the trial chamber to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.[104]

44. The Appeals Chamber observes that, contrary to Ndahimana's contention, the Trial Chamber did not find that all of the witnesses on whom it relied for its conclusion that communal policemen participated in the attack were unreliable and that their evidence on this point needed

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[94] Ndahimana Notice of Appeal, paras. 12, 20, 21; Ndahimana Appeal Brief, paras. 67, 73-76, 109, 123-142.
[95] Ndahimana Appeal Brief, paras. 67, 109, 123-138. *See also* Ndahimana Reply Brief, para. 63.
[96] Ndahimana Appeal Brief, paras. 51, 207, *referring to Vaijanath v. State*, 1970 Cri. L.J. 91 (vol. 76, para. 29); Ndahimana Reply Brief, paras. 77, 78; AT. 6 May 2013 p. 38. *See also* Ndahimana Appeal Brief, paras. 109, 123.
[97] Ndahimana Appeal Brief, paras. 73, 75, 76, 109, 139-142.
[98] Ndahimana Appeal Brief, paras. 73, 75, 76, 109, 139-142.
[99] Prosecution Response Brief, paras. 4, 5, 86-102.
[100] AT. 6 May 2013 pp. 18, 22, 23.
[101] Prosecution Response Brief, paras. 91, 92, 96, 97, 100.
[102] Prosecution Response Brief, paras. 98, 99, 101, 102.
[103] *See, e.g.*, *Kanyarukiga* Appeal Judgement, para. 121; *Bikindi* Appeal Judgement, para. 114; *Simba* Appeal Judgement, para. 103.
[104] *See, e.g.*, *Munyakazi* Appeal Judgement, para. 71; *Setako* Appeal Judgement, para. 31; *Rukundo* Appeal Judgement, para. 207.

corroboration. The Trial Chamber found that the testimony of Witness CBK was generally "consistent and detailed"[105] and only required corroboration for his testimony regarding Ndahimana's presence at the meeting on the morning of the 15 April attack.[106] The Trial Chamber also expressly concluded that it "may rely" on Witness CBN's testimony "for the purpose of corroborating other evidence in relation to the events of 15 April 1994".[107] The Appeals Chamber additionally notes that, even though the Trial Chamber found that the evidence of Witnesses CBT, CDK, CBY, CDL, CBI, and CNJ required corroboration due to inconsistencies and flaws in their testimonies, those flaws mainly concerned discrepancies regarding Ndahimana's presence at Nyange Parish on 15 April 1994, not the issue of the participation of communal policemen in the attack.[108] On a plain reading of the Trial Judgement, it is clear that the Trial Chamber did not find these witnesses "unreliable" or not credible on this issue. The Appeals Chamber therefore finds no error in the Trial Chamber's reliance on the testimonies of Witnesses CBK, CBT, CDK, CBY, CDL, CBI, CBN, and CNJ to establish the communal policemen's participation in the 15 April attack.

45. The Appeals Chamber also rejects Ndahimana's contention that as a matter of law witnesses who require corroboration cannot corroborate one another.[109] In the Appeals Chamber's view, a finding that a witness's evidence is not sufficiently credible or reliable to be relied upon on its own, and therefore needs corroboration, does not amount to a finding that the witness cannot be relied upon at all, but merely denotes the adoption of a cautious approach by the trial chamber in its evidentiary assessment of the evidence. Absent any contrary finding, a trial chamber's decision to ultimately rely upon the cumulative evidence of witnesses whose evidence required corroboration reflects the trial chamber's determination that, taken as whole, the evidence was sufficiently credible and reliable. This factual determination is an exercise of the trial chamber's discretionary power in assessing the credibility of witnesses and in determining the weight to be accorded to their evidence in which the Appeals Chamber will only interfere where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[110]

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[105] Trial Judgement, para. 462.
[106] *See* Trial Judgement, para. 464. *See also ibid.*, para. 365. By contrast, the Trial Chamber explicitly required corroboration for Witness CBK's testimony with respect to Ndahimana's presence "at a meeting at Nyange presbytery early in the morning of 15 April 1994". *See ibid.*, para. 464. The Appeals Chamber recalls that a trial chamber has "the discretion to accept some but reject other parts of a witness's testimony." *Kanyarukiga* Appeal Judgement, para. 187.
[107] Trial Judgement, para. 480.
[108] *See* Trial Judgement, paras. 441-445 (Witness CBT), 446-450 (Witness CDK), 451-453 (Witness CDL), 454-458 (Witness CNJ), 465-468 (Witness CBY), 477, 478 (Witness CBI).
[109] The Appeals Chamber observes that, in support of this contention, Ndahimana cites a single case from India, which, according to him, stands for the proposition that "the evidence is not sufficient to constitute corroboration if it is such as itself requires corroboration." *See* Ndahimana Appeal Brief, para. 51, fn. 234, *citing Vaijanath v. State*, 1970 Cri. L.J.91 (Vol. 76, paragraph 29). *See also* Ndahimana Reply Brief, para. 77, fn. 64.
[110] *See supra*, para. 10.

46. Ndahimana also fails to demonstrate any error in the Trial Chamber's decision not to credit the testimonies of Defence Witnesses ND11, ND12, and ND34, and Prosecution Witness YAU that communal policemen did not participate in the 15 April attack.[111] The Appeals Chamber recalls that, when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible.[112] The Appeals Chamber will defer to a trial chamber's findings on such issues, including its resolution of disparities among different witnesses' accounts, and will only find an error of fact if it determines that no reasonable trier of fact could have made the impugned findings.[113]

47. Contrary to Ndahimana's claims, the Trial Chamber expressly considered the testimonies of Witnesses ND11, ND12, ND34, and YAU and explained its reasons for rejecting them. In particular, the Trial Chamber concluded that the testimonies of Witnesses ND11 and ND12 were of little probative value due to the high risk of collusion between them,[114] and that Witness ND34's testimony was "of limited probative value with respect to the events of 15 April 1994 as the witness did not arrive at the church until approximately 5 p.m."[115] The Trial Chamber also explained that it could not rely on Witness YAU's testimony absent corroboration due to doubts as to whether the witness was in a position to "actually see all the events she described as having taken place on 15 April 1994."[116] Ndahimana, in fact, points to no error committed by the Trial Chamber in the assessment of the probative value of the evidence of Witnesses ND11, ND12, ND34, and YAU. Ndahimana thus fails to demonstrate that the Trial Chamber erred in the exercise of its discretion in concluding that these witnesses did not offer sufficient evidence to raise reasonable doubt about the communal policemen's participation in the 15 April attack.

48. Accordingly, the Appeals Chamber concludes that Ndahimana has failed to demonstrate that the Trial Chamber erred in finding that communal policemen committed crimes against Tutsi refugees at Nyange Church on 15 April 1994.

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[111] *See* Ndahimana Appeal Brief, paras. 73-76, 109, 139-142.
[112] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, fn. 523; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29 ("Where testimonies are divergent, it is the duty of the [t]rial [c]hamber, which heard the witnesses, to decide which evidence it deems to be more probative, and to choose which of the two divergent versions of the same event it may admit.") (internal reference omitted).
[113] *See*, *e.g.*, *Setako* Appeal Judgement, para. 31.
[114] Trial Judgement, paras. 508-512.
[115] Trial Judgement, para. 501.
[116] Trial Judgement, para. 473.

2. Effective Control over Communal Policemen

49. The Trial Chamber held that Ndahimana had effective control over the communal policemen who participated in the 15 April attack at Nyange Church.[117] In addition to Ndahimana's *de jure* authority over the communal police as the *bourgmestre* of Kivumu Commune, the Trial Chamber pointed to several indicators of effective control, such as: Ndahimana's demotion of Brigadier Christophe Mbakilirehe to the position of ordinary policeman; the promotion of policemen Jean-Bosco Abayisenga to the position of brigadier and Adrien Niyitegeka to the position of deputy brigadier on 29 April 1994; and the fact that Ndahimana ordered communal policemen to undertake tasks in April 1994, and that those orders were obeyed.[118] Relying on this evidence, the Trial Chamber concluded that Ndahimana had the power to give orders to and take disciplinary measures against the communal policemen in April 1994 and that these orders were obeyed and implemented, thus demonstrating his effective control over the Kivumu communal police during that period.[119]

50. Ndahimana challenges the Trial Chamber's finding that he had effective control over the communal policemen who participated in the 15 April attack on Nyange Church.[120] In particular, he contends that the Trial Chamber "wrongly defined the parameters" of effective control by focusing on the power to give orders and take disciplinary measures,[121] and that there was no specific or sufficient evidence on the record from which to infer that he exercised effective control over the communal policemen.[122] Ndahimana argues that his *de jure* authority over the policemen was devoid of any practical meaning during the chaos of the genocide[123] and "in the context of a society that no longer recognized the rule of law."[124] According to Ndahimana, the Trial Chamber also failed to consider that when the attacks against the parish occurred, he lacked the ability to exercise effectively his functions as *bourgmestre* since he had only been in office for a short period of time and because of his affiliation with an opposition party, his lack of an official means of transport, and the limited number of policemen at his disposal.[125] Pointing to the Trial Chamber's finding that during the period in question, he was facing threats against his life, Ndahimana also contends that

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[117] Trial Judgement, para. 747. *See also ibid.*, paras. 740-746.
[118] Trial Judgement, paras. 743-747. The Trial Chamber referred in particular to Ndahimana's assigning policemen to protect the *Les Soeurs de l'Assomption* Convent in Kivumu Commune ("Convent") on 16 April 1994, to escort a Tutsi refugee to safety on the night of 15 April 1994, and to protect a health center housing Tutsi survivors. *See idem.*
[119] *See* Trial Judgement, paras. 742-747.
[120] Ndahimana Notice of Appeal, paras. 32, 34, 35; Ndahimana Appeal Brief, paras. 108, 150.
[121] Ndahimana Appeal Brief, para. 154, *referring to* Trial Judgement, para. 742. *See also* Ndahimana Notice of Appeal, para. 35; Ndahimana Appeal Brief, para. 155.
[122] Ndahimana Notice of Appeal, para. 34; Ndahimana Appeal Brief, paras. 143, 153, 156.
[123] Ndahimana Appeal Brief, para. 157.
[124] Ndahimana Appeal Brief, para. 158.
[125] Ndahimana Appeal Brief, paras. 146, 147.

the Trial Chamber erred in failing to consider how these threats might have negated his command responsibility.[126]

51. The Prosecution responds that Ndahimana had effective control over the communal policemen, pointing to the numerous indicators of effective control relied upon by the Trial Chamber, including the promotion of Adrien Niyitegeka.[127] It disputes that the factors relied upon by Ndahimana posed any obstacles to his ability to exercise effective control over the communal police.[128] The Prosecution also contends that the supposed threats faced by Ndahimana were not established on the record and were in any event too remote to actually impair Ndahimana's effective control over the communal police.[129]

52. Ndahimana replies, *inter alia*, that Niyitegeka was not technically promoted but rather automatically became deputy brigadier when that post became vacant after Ndahimana demoted Brigadier Mbakilirehe.[130] Ndahimana also submits that the orders he issued before the 15 April attack cannot establish his effective control over the communal policemen *during* the 15 April attack as, he argues, he lost control over the policemen "in the situation of total chaos" at Nyange Parish in the course of 15 and 16 April 1994.[131]

53. As the Appeals Chamber has held, "[i]ndicators of effective control are 'more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent [or] punish'."[132] In finding that Ndahimana had effective control over the communal policemen, the Trial Chamber first relied on the fact that Ndahimana possessed *de jure* authority, as *bourgmestre*, over the communal policemen under Rwandan law and that this authority encompassed disciplinary powers.[133] Ndahimana does not dispute that he possessed such *de jure* disciplinary powers,[134] nor does he demonstrate that it was unreasonable for the Trial Chamber to consider his *de jure* authority over the communal policemen as an indicator of his effective control over them. The Appeals Chamber recalls in this regard that the possession of *de jure* authority over

[126] Ndahimana Appeal Brief, paras. 147-149, 159. *See also* Ndahimana Reply Brief, paras. 53-55.
[127] Prosecution Response Brief, paras. 56-61.
[128] Prosecution Response Brief, paras. 62-66.
[129] Prosecution Response Brief, paras. 67, 68.
[130] Ndahimana Reply Brief, para. 52.
[131] Ndahimana Reply Brief, para. 53. *See also ibid.*, para. 52.
[132] *Perišić* Appeal Judgement, para. 87, *referring to*, *inter alia*, *Strugar* Appeal Judgement, para. 254, *referring*, *in turn*, *to Blaškić* Appeal Judgement, para. 69.
[133] *See* Trial Judgement, para. 740, and authorities cited therein.
[134] *See* Ndahimana Appeal Brief, paras. 108-161.

subordinates, while not synonymous with effective control, may suggest a material ability to prevent or punish their criminal acts.[135]

54. The Trial Chamber further cited extensive evidence of Ndahimana's ability to issue binding orders to the communal policemen and the compliance of the policemen with these orders, namely: (i) Ndahimana's order to a communal policeman to escort a Tutsi refugee to safety on the night of 15 April 1994; (ii) Ndahimana's assignment of communal policemen to protect the *Les Soeurs de l'Assomption* Convent in Kivumu on 16 April 1994; (iii) Ndahimana's assignment of communal policemen to protect Tutsi refugees at the health center around 17 April 1994; and (iv) Ndahimana's demotion of Brigadier Mbakilirehe and promotion of Abayisenga and Niyitegeka to brigadier and to deputy brigadier, respectively, on 29 April 1994.[136] Contrary to Ndahimana's contention, the Trial Chamber therefore did not "wrongly define[] the parameters" of effective control by focusing on Ndahimana's power to issue binding orders or take disciplinary measures.[137] The Trial Judgement reflects that the Trial Chamber also relied on the fact that Ndahimana's orders were obeyed and his disciplinary measures implemented.[138] It is well-settled that these factors are indicative of a superior's effective control over his subordinates.[139]

55. Ndahimana does not contest that, between 15 and 18 April 1994, he ordered the communal policemen to carry out certain tasks and that his orders were obeyed.[140] Nor does he dispute that on 29 April 1994, he demoted the then-brigadier of the police and promoted Abayisenga to the post of brigadier and Niyitegeka to the post of deputy brigadier.[141] Ndahimana does not challenge the reliability or credibility of the witnesses cited by the Trial Chamber in support of its finding of effective control, either.[142] In fact, the Appeals Chamber notes that the Trial Chamber relied mostly on the testimonies of Defence witnesses to establish Ndahimana's effective control over the communal policemen.[143] Ndahimana's only direct challenge to the Trial Chamber's assessment of

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[135] *Ntabakuze* Appeal Judgement, para. 169, *referring to Orić* Appeal Judgement, para. 91; *Nahimana et al* Appeal Judgement, para. 625.
[136] *See* Trial Judgement, paras. 743-747.
[137] Ndahimana Appeal Brief, para. 154.
[138] *See* Trial Judgement, paras. 743-747.
[139] The indicators of effective control generally relied upon in the jurisprudence of the Tribunal include a superior's material ability to issue binding orders that are complied with by subordinates, and the material ability to take disciplinary measures to punish acts of misconduct by subordinates. *See Kajelijeli* Appeal Judgement, paras. 90, 91; *Kayishema and Ruzindana* Appeal Judgement, paras. 298, 299. *See also Perišić* Appeal Judgement, paras. 97-111; *Strugar* Appeal Judgement, para. 256; *Hadžihasanović and Kubura* Appeal Judgement, para. 199; *Halilović* Appeal Judgement, paras. 69, 154, 207.
[140] *See* Ndahimana Appeal Brief, paras. 108-161.
[141] *See* Ndahimana Appeal Brief, paras. 169-174.
[142] *See* Ndahimana Appeal Brief, paras. 119-138.
[143] The Appeals Chamber notes that the Trial Chamber relied on: Defence Witness ND17's testimony that on 16 April 1994, two attacks against a convent were repelled by police officers assigned that day by Ndahimana to protect the nuns; Defence Witness ND11's testimony that Ndahimana assigned a police officer to escort him to the river on 15 April 1994; and Defence Witness ND1's testimony that Ndahimana had assigned policemen to protect the Tutsis at the health center. *See* Trial Judgement, paras. 743, 747.

the evidence is that the promotion of Niyitegeka to the post of deputy brigadier was simply an administrative measure taken to fill a position that became vacant due to the demotion of the brigadier.[144] However, the very fact that Ndahimana issued an order demoting the brigadier – irrespective of the reasons for that demotion – and filled the resulting vacancies, combined with the fact that his order was complied with, shows that Ndahimana had the material ability to issue binding orders to the communal policemen.

56. In light of this evidence of Ndahimana's control over the communal policemen, the Appeals Chamber finds no merit in Ndahimana's argument that the Trial Chamber erred in not considering that his short time in office, his party affiliation, the lack of official municipal vehicle, the small number of policemen in the commune, or the overall chaotic situation at Nyange Parish during the genocide evidenced his inability to exercise effectively his functions as *bourgmestre*. Likewise, the Appeals Chamber rejects Ndahimana's unsubstantiated argument that he lost control over the communal policemen during the attacks of 15 and 16 April 1994.

57. The Appeals Chamber also rejects Ndahimana's argument that, because he was under threats against his life, he did not have the ability to control the communal policemen. In a separate section of this Judgement, the Appeals Chamber sets aside the Trial Chamber's finding that Ndahimana was under threat when the events at Nyange Parish were unfolding.[145] In light of this conclusion, the Appeals Chamber rejects Ndahimana's argument that threats impeded his effective control over the communal policemen.

58. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's conclusion that Ndahimana had effective control over the communal policemen who participated in the 15 April attack.

[144] *See* Ndahimana Reply Brief, para. 52.
[145] *See infra*, Section V.C.1.(b), paras. 185, 186.

3. Knowledge of Communal Policemen's Criminal Conduct

59. The Trial Chamber concluded that although Ndahimana was not present during the 15 April attack on Nyange Church, he had reason to know of the communal policemen's participation in the attack.[146] In reaching this conclusion, the Trial Chamber relied on its findings that Ndahimana returned to Nyange Parish "to the exact same place where the killings occurred" on the evening of 15 April 1994 and "would have known that a large scale attack had occurred that day" given the "chaotic" situation in the parish following the attack.[147] The Trial Chamber further relied on evidence of: (i) Ndahimana's meeting with Gaspard Kanyarukiga and Athanase Seromba on the evening of 15 April 1994, two influential figures involved in the 15 April attack and members of the JCE;[148] (ii) Ndahimana's meeting on 16 April 1994 with, *inter alios*, Kanyarukiga, Seromba, and Niyitegeka, a communal policeman who also participated in the 15 April attack; (iii) Ndahimana's sharing drinks with, *inter alios*, communal policemen after the destruction of Nyange Church on 16 April 1994.[149]

60. Ndahimana raises a number of challenges to the Trial Chamber's findings regarding his knowledge of the communal policemen's crimes on 15 April 1994.[150] First, Ndahimana argues that the Trial Chamber effectively reversed the burden of proof by requiring him to establish that he had no reason to know of the communal policemen's crimes, instead of requiring the Prosecution to prove his knowledge beyond reasonable doubt.[151] Second, Ndahimana denies having received any information – either at the meeting with Seromba and Kanyarukiga on the evening of 15 April 1994, or through any other source – about the involvement of communal policemen in the attack.[152] Ndahimana also points to the absence of any evidence on the record or finding by the Trial Chamber that he met with any policemen on the evening of 15 April 1994.[153] Finally, Ndahimana contests the Trial Chamber's findings that he was at Nyange Parish on 16 April 1994 and shared drinks with some of the leaders of the attacks, including policemen, after the demolition of Nyange Church.[154] He asserts that the Trial Chamber's finding that he shared drinks with some of the attackers was improperly based on three witnesses, who could not corroborate one another

[146] Trial Judgement, paras. 749-755.
[147] Trial Judgement, para. 753.
[148] *See* Trial Judgement, paras. 5, 24, 798, 806.
[149] Trial Judgement, paras. 694, 753, 754, 806.
[150] *See* Ndahimana Notice of Appeal, paras. 11, 13-19; Ndahimana Appeal Brief, paras. 41-79, 116-122. *See also* AT. 6 May 2013 pp. 12-16, 35, 36.
[151] Ndahimana Notice of Appeal, para. 14; Ndahimana Appeal Brief, paras. 46-48, *referring to* Trial Judgement, para. 755.
[152] Ndahimana Appeal Brief, paras. 117-121. *See also* Ndahimana Notice of Appeal, paras. 15, 18, 19; Ndahimana Reply Brief, para. 60.
[153] Ndahimana Notice of Appeal, para. 15. *See also ibid.*, para. 19; Ndahimana Appeal Brief, paras. 117, 118, 122; AT. 6 May 2013 p. 14.
[154] Ndahimana Notice of Appeal, paras. 16, 17; Ndahimana Appeal Brief, paras. 52-56, 71, 72.

because their testimonies were found deficient and in need of corroboration, and who had no personal knowledge of what was discussed at the alleged event.[155]

61. In response, the Prosecution submits that the Trial Chamber did not shift the burden of proof with respect to Ndahimana's *mens rea* and reasonably concluded that Ndahimana possessed sufficiently alarming information to put him on notice of the communal policemen's participation in the 15 April attack.[156]

62. Ndahimana replies that the Trial Chamber's finding regarding his constructive knowledge of the communal policemen's crimes was based on insufficient circumstantial evidence.[157]

63. The Appeals Chamber recalls that the *mens rea* of superior responsibility is established when the accused "knew or had reason to know" that his subordinate was about to commit or had committed a criminal act.[158] The "reason to know" standard is met "when the accused had 'some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates'; such information need not provide specific details of the unlawful acts committed or about to be committed by his subordinates."[159]

64. After concluding that Ndahimana had "reason to know" of the communal policemen's participation in the 15 April attack,[160] the Trial Chamber added that it did "not accept the submission that the accused had no reason to know of the participation" of policemen in the attack.[161] The Appeals Chamber finds no merit in Ndahimana's claim that this suggests a reversal of the burden of proof.[162] The Appeals Chamber observes that, in the same section of the Trial Judgement on Ndahimana's *mens rea*, the Trial Chamber correctly recalled that "it is the Prosecution's responsibility to prove the guilt of the accused beyond reasonable doubt."[163] Consistent with this standard, the Trial Chamber explicitly concluded that "the Prosecution has failed to prove beyond reasonable doubt that Ndahimana had reason to know that crimes were about to be committed" on 15 April 1994.[164] Considered in context, the impugned statement cannot

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[155] Ndahimana Notice of Appeal, paras. 16, 17; Ndahimana Appeal Brief, paras. 52-54, 58, 70-72. *See also* Ndahimana Appeal Brief, paras. 55-58; Ndahimana Reply Brief, para. 64. Ndahimana also invokes an alibi for that day. *See* Ndahimana Appeal Brief, para. 53.
[156] Prosecution Response Brief, paras. 4, 70-78, 80. *See also* AT. 6 May 2013 pp. 24-27.
[157] Ndahimana Reply Brief, paras. 56-58. Ndahimana also submits that the Prosecution erroneously defines the relevant *mens rea* standard to be "reason to suspect" rather than "reason to know". *See ibid.*, para. 59.
[158] *Nahimana et al.* Appeal Judgement, para. 791, *referring to*, *inter alia*, *Čelebići* Appeal Judgement, paras. 216-241.
[159] *Nahimana et al.* Appeal Judgement, para. 791, *referring to Bagilishema* Appeal Judgement, paras. 28 ("The 'had reason to know' standard does not require that actual knowledge, either explicit or circumstantial, be established."), 42, *and Čelebići* Appeal Judgement, paras. 238, 241.
[160] Trial Judgement, para. 755 (emphasis omitted).
[161] Trial Judgement, para. 755.
[162] *See* Ndahimana Appeal Brief, paras. 46-48.
[163] Trial Judgement, para. 760.
[164] Trial Judgement, para. 751.

reasonably be interpreted as an indication that the Trial Chamber misunderstood or misapplied the burden of proof on the issue of *mens rea*.

65. Turning to Ndahimana's challenges to the merits of the Trial Chamber's conclusion on his *mens rea*, the Appeals Chamber notes that the Trial Chamber reached its finding on the basis of circumstantial evidence, including evidence that Ndahimana arrived at the crime scene in the evening of 15 April 1994, witnessed the chaotic situation there, held meetings with influential figures of Kivumu involved in the attacks both on that day and the next day, and shared drinks with, *inter alios*, policemen following the demolition of Nyange Church.[165] The Appeals Chamber recalls that, where a finding of guilt is based on an inference drawn from circumstantial evidence, it must be the only reasonable conclusion that could be drawn from the evidence.[166]

66. Ndahimana does not dispute that he went to Nyange Parish after the attack ended on 15 April 1994, even if only for approximately 30 minutes.[167] Nor does he argue that the Trial Chamber erred in finding that he would have known that a large-scale attack had occurred that day given the chaotic situation that reigned at the parish after the attack.

67. Ndahimana challenges the Trial Chamber's finding that he met with Seromba and Kanyarukiga on the evening of 15 April 1994 on the ground that Witnesses CBK and CDJ – on whose testimonies the Trial Chamber premised its finding – could not corroborate each other since they themselves required corroboration.[168] The Appeals Chamber reiterates that Ndahimana's general claim in this regard has no merit.[169] Moreover, Ndahimana fails to appreciate that Witness CDJ's testimony about the 15 April evening meeting was found credible without the need for corroboration.[170] The Appeals Chamber thus finds that Ndahimana does not demonstrate any error in the Trial Chamber's reliance on the testimonies of Witnesses CBK and CDJ that Ndahimana met with Seromba and Kanyarukiga in the evening of 15 April 1994.

68. Ndahimana correctly submits that there is no evidence as to what was discussed at that meeting or whether, during the meeting, Ndahimana received any information about the involvement of communal policemen in the 15 April attack.[171] Ndahimana also points out that he did not meet with any policemen in the evening of 15 April 1994.[172] On this latter issue,

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[165] Trial Judgement, paras. 752-755, and evidence cited therein.
[166] *See, e.g., Mugenzi and Mugiraneza* Appeal Judgement, para. 136; *Renzaho* Appeal Judgement, para. 318; *Ntagerura et al.* Appeal Judgement, para. 306.
[167] *See* Trial Judgement, para. 563.
[168] *See* Ndahimana Appeal Brief, para. 51. *See also ibid.*, paras. 119-121.
[169] *See supra*, para. 45.
[170] *See* Trial Judgement, paras. 469, 470.
[171] Ndahimana Appeal Brief, paras. 119-121; Ndahimana Reply Brief, para. 60; AT. 6 May 2013 p. 14.
[172] *See supra*, fn. 153.

Ndahimana's argument is contradicted by the testimony of Defence Witness ND11 that, on the night of 15 April 1994, Ndahimana ordered a policeman to escort Witness ND11 to safety.[173] In any event, the Appeals Chamber considers that it was reasonable for the Trial Chamber to rely on the fact that Ndahimana met soon after the 15 April attack with two influential figures of Kivumu involved in the attack as relevant circumstantial evidence of Ndahimana's knowledge of the communal policemen's participation in the attack.

69. With respect to Ndahimana's challenges to the Trial Chamber's findings on his presence at Nyange Church on 16 April 1994, the Appeals Chamber refers to a separate section of this Judgement below, where it affirms the Trial Chamber's rejection of Ndahimana's alibi for 16 April 1994 and the findings that Ndahimana attended the meeting held at the presbytery on the morning of 16 April 1994 and was present during the destruction of Nyange Church.[174] The Appeals Chamber further notes that Ndahimana does not challenge the Trial Chamber's finding that, although their role in the attack remains unclear, communal policemen, including Niyitegeka, were present during the 16 April attack on Nyange Church.[175]

70. Regarding Ndahimana's role in the events of 16 April 1994, the Trial Chamber also concluded that after the demolition of Nyange Church, Ndahimana shared drinks with Kanyarukiga, Seromba, and "possibly other persons" in the vicinity of the church.[176] Ndahimana's principal challenge is that this finding was unsupported by the evidence, because it was based upon the testimonies of Prosecution witnesses who were found to be unreliable and in need of corroboration.[177]

71. The Trial Chamber's findings on the drink-sharing incident were based on the testimonies of Prosecution Witnesses CBY, CDJ, and CBK.[178] In an earlier part of the Trial Judgement, the Trial Chamber had found that the testimonies of these witnesses on this incident could be relied upon only where corroborated.[179] As stated above, the Appeals Chamber considers that this determination did not bar the Trial Chamber from considering these testimonies to be sufficiently corroborative of one another as to those facts on which all of these witnesses concurred.[180] Accordingly, the Appeals

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[173] Witness ND 11, T. 18 January 2011 pp. 35, 37, 38, *relied upon by the Trial Chamber in* Trial Judgement, para. 747.
[174] *See infra*, Section V.A.2, paras. 139, 140.
[175] *See* Trial Judgement, paras. 686, 687, 689, 759. The Appeals Chamber observes that, although Ndahimana's challenges against the Trial Chamber's finding on *mens rea* lack clarity at times, Ndahimana, in essence, merely alleges that the Trial Chamber erred in finding that Niyitegeka and policemen shared drinks with Ndahimana after the attack. *See* Ndahimana Appeal Brief, paras. 52-54. *See also* Ndahimana Response Brief, paras. 83-93; Ndahimana Reply Brief, para. 64.
[176] Trial Judgement, para. 695. *See also ibid.*, paras. 694, 754, 757.
[177] *See* Ndahimana Appeal Brief, paras. 52-54, 70-72. *See also* Ndahimana Reply Brief, para. 64.
[178] *See* Trial Judgement, paras. 690-693.
[179] Trial Judgement, paras. 639, 646, 647. *See also ibid.*, para. 658.
[180] *See supra*, para. 45.

Chamber finds no error in the Trial Chamber's cumulative reliance on Witnesses CBY, CDJ, and CBK to establish that Ndahimana shared drinks with Seromba and Kanyarukiga in the evening of 16 April 1994.

72. The Appeals Chamber observes that the Trial Chamber did not make a conclusive finding in the "Factual Findings" section of the Trial Judgement as to whether communal policemen were among the people who shared drinks with Ndahimana on the evening of 16 April 1994.[181] However, when making its legal findings on Ndahimana's responsibility, the Trial Chamber expressly referred to the testimony of Witness CBY as establishing the presence of policemen during the drink-sharing incident, and unambiguously relied on the presence of policemen as circumstantial evidence of Ndahimana's knowledge of the participation of policemen in the 15 April attack.[182] The Trial Chamber did not expressly explain how Witness CBY's testimony – which it found could be relied upon only where corroborated – was corroborated on the issue of the policemen's presence in the drink-sharing incident when relying on his evidence.[183] Ndahimana is nonetheless incorrect in his assertion that Witness CBY's testimony was not corroborated on this point;[184] as indicated by the Trial Chamber, Witness CBK testified that he also saw Brigadier Mbakilirehe sharing drinks with Ndahimana.[185] Contrary to Ndahimana's submission,[186] these aspects of Witnesses CBK's and CBY's evidence were not rejected by the Trial Chamber,[187] which was only "reluctant to rely on the witnesses' *interpretation* of the event" as to the reasons for the drink-sharing.[188] While the Trial Chamber's finding as to the presence of policemen in the drink-sharing incident with Ndahimana after the attack on 16 April 1994 lacks clarity,[189] the Appeals Chamber finds no error in this regard.

73. The Appeals Chamber considers that the absence of any evidence as to what was discussed at the meetings on 15 or 16 April 1994 does not undermine the Trial Chamber's conclusion that Ndahimana "had reason to know" of the crimes committed by his subordinates.[190] The Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that the only reasonable inference to be drawn from the record was that, having (i) visited the crime scene after the attack

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[181] *See* Trial Judgement, paras. 694 ("the Majority observes that the evidence does not clearly and precisely show where the authorities shared the drinks or with whom, although it is established that Kanyarukiga and Seromba were present, along with Ndahimana"), 695 ("Ultimately, the Majority finds proven beyond reasonable doubt that the accused shared drinks with Kanyarukiga, Seromba *and possibly other persons* after the killings on 16 April 1994.") (emphasis added).
[182] Trial Judgement, para. 754.
[183] Trial Judgement, paras. 639, 754.
[184] *See* Ndahimana Appeal Brief, para. 54.
[185] Trial Judgement, para. 691; Witness CBK, T. 3 November 2010 p. 20.
[186] *See* Ndahimana Appeal Brief, para. 54.
[187] Trial Judgement, paras. 690-695.
[188] Trial Judgement, para. 695 (emphasis added).
[189] In addition to the absence of a clear finding that policemen were present during the drink-sharing incident, the Appeals Chamber notes that in another part of its Legal Findings section, the Trial Chamber erroneously mentions Witness CBY's testimony as "the only evidence tending to show that the policemen were present after the attack on 16 April 1994". *See* Trial Judgement, para. 757.

and met with Seromba and Kanyarukiga on the evening of 15 April 1994 and on 16 April 1994, (ii) attended the meeting on 16 April 1994 where the destruction of Nyange Church was decided, as well as having been present later that day during the destruction of the church, and (iii) shared drinks alongside communal policemen after the attack, Ndahimana would have been put on notice of the communal policemen's participation in the 15 April attack on Nyange Church.

74. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's conclusion that Ndahimana had reason to know of the communal policemen's participation in the 15 April attack.

4. Failure to Take Measures to Prevent or Punish

75. As part of its discussion on Ndahimana's failure to prevent or punish, the Trial Chamber concluded that Ndahimana's material ability to prevent the crimes committed by the communal police had not been established beyond reasonable doubt.[191] By contrast, the Trial Chamber found that Ndahimana had the material ability to punish the policemen's crimes through disciplinary measures, such as demotion.[192] After expressing serious doubts that Ndahimana would have reported the killings of 15 April 1994 to the prefect, as alleged by Defence Witness Clément Kayishema, the Trial Chamber concluded that Ndahimana was liable as a superior because he failed to use his disciplinary powers to punish the crimes committed by communal policemen on 15 April 1994 at Nyange Church.[193]

76. Ndahimana submits that the Trial Chamber erred in not finding that he took reasonable and necessary measures to prevent the commission of the crimes.[194] He further disputes the conclusion

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[190] Trial Judgement, para. 755 (emphasis omitted).
[191] Trial Judgement, para. 767. In connection with this conclusion, the Trial Chamber held that: (i) it was not able to infer the actual purpose of Ndahimana's travel to Kibuye Prefecture in the afternoon of 15 April 1994 (the purpose of which, according to Ndahimana, was to request the prefect to dispatch more *gendarmes* to Kivumu to avert an escalation of the insecurity situation in the commune); and (ii) in any event, Ndahimana's alleged requests for the help of gendarmes did not show that he took any measures to prevent the 15 April attack. *See ibid.*, para. 762.
[192] Trial Judgement, para. 767.
[193] Trial Judgement, paras. 18, 764, 767. The Appeals Chamber notes that the Trial Chamber's analysis in this regard is unclear. The Trial Chamber made an explicit finding that Ndahimana had the material ability to punish his subordinates, but did not make an explicit finding that Ndahimana failed to punish his subordinates in the Legal Findings Chapter. *See ibid.*, para. 767. The exercise of Ndahimana's disciplinary powers after the attacks of 15 and 16 April 1994 is only discussed in the Trial Judgement in connection with the assessment of effective control. *See ibid.*, paras. 744-747. The Appeals Chamber considers, however, that the Trial Chamber found not only that Ndahimana had the material ability to punish the communal policemen, but also that he failed to properly use his powers in order to punish the crimes committed by the policemen on 15 April 1994. Such a finding is mentioned summarily at the very beginning of the Trial Judgement, in the Summary of the Case Section (*see ibid.*, para. 18), and can otherwise be clearly inferred from the Trial Chamber's legal analysis of Ndahimana's failure to punish. *See ibid.*, paras. 761-767.
[194] Ndahimana Appeal Brief, para. 90. Specifically, Ndahimana submits that the Trial Chamber erred in: (i) holding that it could not infer the actual purpose of his travel to Kibuye prefecture; (ii) concluding that the fact that he requested gendarmes did not show that he took any measure; (iii) failing to give weight to the evidence that one of the decisions taken at the meeting held on 11 April 1994 was to request the deployment of gendarmes to protect refugees at Nyange Church; (iv) failing to consider the evidence that only a limited number of gendarmes were deployed to Kivumu; and (v) failing to consider its finding that he took positive actions to preserve security in the commune. *See* Ndahimana Notice of Appeal, paras. 22, 23, 27-30; Ndahimana Appeal Brief, paras. 80-100, 148, 167, 168.

that he had the material ability to punish the communal policemen who participated in the 15 April attack.[195] In this regard, Ndahimana contends that the Trial Chamber erred in discrediting the testimony of Prefect Kayishema that he received reports from Ndahimana on the security situation in Kivumu Commune and in expressing doubts that Ndahimana reported the 15 April killings.[196] Ndahimana also contends that the Trial Chamber erred in not giving weight to evidence on the record that he took measures to punish perpetrators of earlier attacks in his commune and to his submissions that following the events of 15 and 16 April 1994, he opened an investigation into the potential involvement of communal policemen and eventually demoted the then-brigadier Mbakilirehe to the position of policeman on 29 April 1994.[197] Ndahimana adds that soon after the April 1994 events, the Rwandan Patriotic Front ("RPF") invaded Rwanda, which caused chaos in the country and deprived him and other authorities of the ability to carry out "significant investigations."[198]

77. The Prosecution responds that Mbakilirehe was demoted for internal reasons, unrelated to the events of 15 April 1994, and that Witness Kayishema did not testify that he received reports containing any information about the involvement of communal policemen in the 15 April attack.[199] In the Prosecution's view, the evidence establishes that Ndahimana failed to conduct any investigations, report the policemen's crimes to higher authorities, or use his disciplinary measures to punish the communal policemen implicated in the 15 April attack.[200]

78. In reply, Ndahimana submits that he did take measures to punish the culpable policemen "within his limited powers in the prevailing situation", noting in particular the demotion of the brigadier.[201] Ndahimana also contends, *inter alia*, that, by focusing on the deficiencies of his case regarding measures to punish the communal policemen, the Prosecution essentially seeks to shift the burden of proof to the Defence instead of undertaking an investigation itself to ascertain whether he took any measures to punish the communal policemen.[202]

79. The Appeals Chamber observes that a great portion of Ndahimana's submissions before the Appeals Chamber is devoted to explaining the various measures that he took to prevent the attacks

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[195] Ndahimana Notice of Appeal, paras. 26, 36; Ndahimana Appeal Brief, paras. 162-176.
[196] Ndahimana Notice of Appeal, paras. 24, 25, 31; Ndahimana Appeal Brief, paras. 101-106, 165, 166, 168. Ndahimana submits that he fulfilled his obligation to punish "as the reports made to the *préfet* by him, in the ordinary course, would have led an investigative judge and the public prosecutor to properly investigate the alleged communal police's criminal conduct." *See* Ndahimana Appeal Brief, para. 165. *See also* Ndahimana Reply Brief, para. 69.
[197] Ndahimana Appeal Brief, paras. 169-174. *See also* Ndahimana Notice of Appeal, para. 37; Ndahimana Appeal Brief, para. 153; Ndahimana Reply Brief, para. 69.
[198] Ndahimana Appeal Brief, para. 175.
[199] Prosecution Response Brief, paras. 126-129.
[200] Prosecution Response Brief, paras. 124-128. *See also* AT. 6 May 2013 p. 27.
[201] Ndahimana Reply Brief, paras. 66-69.
[202] Ndahimana Reply Brief, para. 69. *See also* AT. 6 May 2013 p. 16.

against the Tutsi refugees in Nyange Church,[203] or the measures that he took to punish before or while the 15 April attack was unfolding.[204] However, Ndahimana was not convicted for failure to *prevent* the crimes perpetrated by the communal policemen on 15 April 1994, but for his failure to *punish* the communal policemen for those crimes.[205] The Appeals Chamber recalls that failure to punish is a legally distinct concept and a separate basis for incurring criminal responsibility as a superior than failure to prevent.[206] A conviction on the basis of superior responsibility pursuant to Article 6(3) of the Statute due to a superior's failure to punish his subordinates for their criminal conduct is based on the superior's failure to take measures *after* the commission of the crimes, while a conviction for a superior's failure to prevent crimes by subordinates is premised on the superior's failure to take measures *before* the commission of the crimes.[207] The Appeals Chamber, therefore, fails to see how Ndahimana's argument that he took measures to prevent the 15 April attack, even if accepted, would invalidate his conviction on the basis of superior responsibility under Article 6(3) of the Statute for failing to punish his culpable subordinates.

80. Equally irrelevant and without merit are Ndahimana's contentions regarding his alleged reports to Prefect Kayishema. Indeed, nothing in Defence Witness Kayishema's testimony or in any other piece of evidence invoked by Ndahimana indicates that the alleged reports were sent *after* the 15 April attack and mentioned the participation of policemen in the attack.[208] As only measures taken by Ndahimana *after* the 15 April attack would have been relevant to the question whether he took measures to punish his subordinates, it was reasonable for the Trial Chamber not to consider the reports as evidence that Ndahimana did take such measures.

81. The only measure Ndahimana claims to have taken in the aftermath of the 15 April attack is the demotion of Brigadier Mbakilirehe on 29 April 1994.[209] The Appeals Chamber observes that the brigadier's demotion is not disputed.[210] The parties do dispute, however, the reasons for that

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[203] *See* Ndahimana Notice of Appeal, paras. 22, 23, 27-30; Ndahimana Appeal Brief, paras. 80-100, 148, 167, 168.
[204] *See* Ndahimana Appeal Brief, paras. 166-168, 170, 171; Ndahimana Reply Brief, paras. 66, 69, *referring to* Ndahimana's alleged request to the prefect on 11 April 1994, the steps he took to punish perpetrators of pre-15 April attacks, and his meeting with the prefect in the afternoon of 15 April 1994.
[205] *See* Trial Judgement, para. 767.
[206] *See Hadžihasanović and Kubura* Appeal Judgement, para. 259.
[207] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 642; *Hadžihasanović and Kubura* Appeal Judgement, para. 259; *Blaškić* Appeal Judgement, para. 83.
[208] *See* Ndahimana Appeal Brief, paras. 101-106, 165, 166, 168, *referring to* Exhibit D1, Exhibit D13, Witness ND13, T. 17 January 2011 pp. 17, 18, *and* Clément Kayishema, T. 18 April 2011 p. 41.
[209] *See* Ndahimana Appeal Brief, paras. 169-175. In the Trial Judgement, the Trial Chamber also refers to and dismisses as vague and uncorroborated allegations made by Prefect Kayishema during his testimony that he received reports by Ndahimana on the killings perpetrated on 15 and 16 April 1994. *See* Trial Judgement, para. 764. Ndahimana, however, does not mention any such post-attack reports on appeal. The only reports he claims to have submitted to the prefect about the perilous condition of the Tutsi refugees were submitted either during a meeting held on 11 April 1994 or in the afternoon of 15 April 1994, *before* Ndahimana was informed about the commencement of the attacks against the Tutsis at Nyange Parish. *See* Ndahimana Appeal Brief, paras. 166-168; Ndahimana Reply Brief, paras. 66-69. *See also* Ndahimana Appeal Brief, paras. 92-100.
[210] Ndahimana recognises that the brigadier was demoted on 29 April 1994. *See* Ndahimana Appeal Brief, para. 173.

demotion. While Ndahimana alleges that he demoted the brigadier because of his participation in the 15 April attack,[211] the Prosecution points to evidence showing that the demotion was not a disciplinary measure.[212] The Appeals Chamber notes evidence on the record contradicting Ndahimana's view; two witnesses, Defence Witness Kayishema and Prosecution Witness CDL, indeed denied that the brigadier was demoted as a punishment for taking part in the 15 April attack.[213] Witness CDL even testified that the brigadier was punished because he was not "active enough during the attacks", not because he participated in them.[214]

82. The Trial Chamber discussed the evidence on the record on the demotion of Brigadier Mbakilirehe as part of its discussion on Ndahimana's effective control. In that section, the Trial Chamber found that neither the evidence relied upon by the Prosecution nor the evidence supporting Ndahimana's position was conclusive, holding that "whether [the brigadier] was actively participating in the killings or whether he was reluctant to do so is not clearly established by the evidence, nor are the reasons for his demotion."[215] On appeal, Ndahimana repeats the arguments he made before the Trial Chamber regarding the reasons for the brigadier's demotion, but he does not make any argument as to why the Trial Chamber's aforementioned finding was erroneous and should be set aside. Absent any arguments as to why the Trial Chamber's relevant finding should be overturned, the Appeals Chamber rejects Ndahimana's contention that the demotion should have been considered by the Trial Chamber as a genuine measure to punish the brigadier for his participation in the 15 April killings.

83. Finally, the Appeals Chamber considers that Ndahimana's contention that the chaotic situation in Rwanda "after the RPF invaded the country" deprived him of control over his subordinates and posed objective difficulties in any effort to discipline them[216] relates to the issue of effective control, which the Trial Chamber found that Ndahimana possessed even after 15 April 1994.[217] In any event, irrespective of the reasons for the demotion, the very fact that Ndahimana could order the demotion of Brigadier Mbakilirehe on 29 April 1994 evinces his material ability to impose disciplinary sanctions on his subordinates in the aftermath of the 15 April attack.

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[211] *See* Ndahimana Appeal Brief, paras. 169-174.
[212] *See* Prosecution Response, para. 129.
[213] Witness CDL, T. 12 November 2011 pp. 22, 23 *and* Clément Kayishema, T. 18 April 2011 pp. 39, 40, *cited in* Trial Judgement, para. 745.
[214] Witness CDL, T. 12 November 2011 pp. 22, 23, *cited in* Trial Judgement, para. 745.
[215] Trial Judgement, para. 745.
[216] *See* Ndahimana Appeal Brief, para. 175.
[217] *See supra*, Section IV.A.2.

84. As a result, the Appeals Chamber concludes that Ndahimana has not demonstrated an error in the Trial Chamber's finding that he failed to punish the communal policemen for their participation in the 15 April attack.

5. Conclusion

85. In light of the foregoing, the Appeals Chamber finds no error in the Trial Chamber's conclusion that Ndahimana is responsible as a superior for genocide and extermination as a crime against humanity pursuant to Article 6(3) of the Statute in relation to the killings perpetrated at Nyange Church on 15 April 1994. Ndahimana has failed to demonstrate that the Trial Chamber erred in concluding that policemen of Kivumu Commune were not only present during the attack on Nyange Church on 15 April 1994, but were also active participants in the assaults. Likewise, he has not shown that the Trial Chamber's conclusions regarding Ndahimana's effective control over the communal policemen, his knowledge of the policemen's participation in the killings, and his failure to punish them were unreasonable. Accordingly, the Appeals Chamber dismisses Ndahimana's Second through Fifth Grounds of Appeal in their entirety.

B. Alleged Errors Relating to Ndahimana's Responsibility Pursuant to Article 6(1) of the Statute (Prosecution Grounds 1 and 2)

86. The Prosecution charged Ndahimana with genocide, complicity in genocide, and extermination as a crime against humanity pursuant to Articles 6(1) and 6(3) of the Statute based on his involvement in meetings and attacks on Tutsis taking place in Kivumu Commune on or about 15 April 1994.[218]

87. The Trial Chamber noted that Ndahimana presented an alibi for 15 April 1994, which placed him in Rufungo, preparing for and attending a funeral and later travelling to see Prefect Kayishema in Kibuye Town.[219] The Trial Chamber found that the alibi was reasonably possibly true and accepted that, on 15 April 1994, Ndahimana was in Rufungo from 5 or 6 a.m., left Rufungo at around 1 p.m. to go to Kibuye Town, returned to Rufungo at approximately 6 or 7 p.m., and only then went to Nyange Parish.[220] It also held that the Prosecution evidence that Ndahimana attended a meeting at Nyange Presbytery on the morning of 15 April 1994 and participated in the attack on Nyange Church on the same day was not sufficiently corroborative or credible to overcome the reasonableness of the alibi.[221] The Trial Chamber therefore found that Ndahimana could not be held responsible for the crimes committed at Nyange Church on 15 April 1994 pursuant to Article 6(1) of the Statute.[222]

88. The Prosecution submits that the Trial Chamber erred in acquitting Ndahimana under Article 6(1) of the Statute for the 15 April attack on Nyange Church based on the erroneous finding that he had an alibi for the whole morning, and therefore could not have participated in the morning meeting of 15 April 1994 at the presbytery at which the attack was allegedly planned.[223] The Prosecution contends that Ndahimana's alibi had gaps and did not reasonably account for the period between 7 and 11 a.m., when the Prosecution evidence established that Ndahimana attended the meeting.[224] In its view, the Trial Chamber – like Defence Witness Thérèse Mukabideri – incorrectly assumed that, because Ndahimana was seen in Rufungo around 5 or 6 a.m. and then again around 11:00 a.m. or noon, Ndahimana must have remained in Rufungo during the intervening time.[225] The Prosecution argues that the gap in Ndahimana's alibi is significant in light

[218] Indictment, paras. 8-12, 25-27, 34-38.
[219] Trial Judgement, paras. 17, 325.
[220] Trial Judgement, paras. 17, 526, 527, 529, 530, 564. *See also ibid.*, para. 750.
[221] Trial Judgement, paras. 532-548, 552-557.
[222] Trial Judgement, paras. 18, 26, 27, 750.
[223] Prosecution Notice of Appeal, para. 8; Prosecution Appeal Brief, paras. 16-19. *See also* AT. 6 May 2013 pp. 42-44, 58.
[224] Prosecution Notice of Appeal, para. 9; Prosecution Appeal Brief, paras. 18, 19, 27. *See also* Prosecution Reply Brief, paras. 3, 7, 8.
[225] Prosecution Notice of Appeal, para. 8; Prosecution Appeal Brief, paras. 17, 18.

of the Trial Chamber's finding that the distance between Rufungo and Nyange could be covered in about one hour.[226]

89. The Prosecution further submits that the Trial Chamber erred in finding that the evidence of Ndahimana's attendance at the 15 April morning meeting was not corroborative in terms of "precise time, location, or consequences of the meeting."[227] It contends that the Trial Chamber failed to apply the correct standard for corroboration[228] and "exaggerated minor discrepancies in the witness's recollection of the precise time and location of a meeting that occurred 17 years earlier".[229] The Prosecution therefore requests that the Appeals Chamber find Ndahimana guilty of genocide and extermination as a crime against humanity pursuant to Article 6(1) of the Statute based on his participation in the 15 April morning meeting at Nyange Presbytery at which the 15 April attack was allegedly planned.[230]

90. Ndahimana responds that the Trial Chamber's finding that his alibi for 15 April 1994 was reasonably possibly true was "amply supported by the evidence."[231] He argues that the Prosecution misrepresents the testimony of Witness Mukabideri and fails to demonstrate that the Trial Chamber erred in its assessment of the Prosecution evidence.[232]

91. The Appeals Chamber recalls that an accused does not bear the burden of proving his alibi beyond reasonable doubt.[233] Rather, he must simply produce evidence tending to show that he was not present at the time of the alleged crime.[234] If the alibi is reasonably possibly true, it must be

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[226] Prosecution Appeal Brief, para. 19. *See also* Prosecution Reply Brief, paras. 9-12.
[227] Prosecution Appeal Brief, para. 20, *referring to* Trial Judgement, para. 535.
[228] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, para. 21.
[229] Prosecution Appeal Brief, para. 21. The Prosecution submits that all three witnesses testified that the meeting took place in the morning and that there was no material discrepancy in their recollection of where the meeting took place. *See ibid.*, paras. 22-24. The Prosecution also contends that the Trial Chamber "ignored" that the only reasonable inference to be drawn from the evidence is that the attacks on the refugees were decided at that meeting. *See ibid.*, paras. 21, 25, 26.
[230] Prosecution Notice of Appeal, paras. 5, 10; Prosecution Appeal Brief, para. 27. *See also* Prosecution Reply Brief, para. 13.
[231] Ndahimana Response Brief, para. 34.
[232] Ndahimana Response Brief, paras. 4, 28-34, 36, 37. Ndahimana also argues that the Prosecution's arguments are wrongly premised on the Dissenting Opinion of Judge Florence Rita Arrey and should be dismissed as such. *See ibid.*, paras. 35, 38. The Appeals Chamber notes that, while the Prosecution indeed refers to Judge Arrey's Dissenting Opinion in its Appeal Brief, Ndahimana's contention that the Prosecution's appeal submissions are "premised" on it is mistaken.
[233] *See, e.g.*, *Nchamihigo* Appeal Judgement, para. 92; *Zigiranyirazo* Appeal Judgement, para. 17; *Nahimana et al.* Appeal Judgement, para. 414.
[234] *See, e.g.*, *Nchamihigo* Appeal Judgement, para. 92; *Zigiranyirazo* Appeal Judgement, para. 17; *Musema* Appeal Judgement, para. 202.

accepted.[235] Where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.[236]

92. The Appeals Chamber considers that the Prosecution does not demonstrate that the Trial Chamber erred in accepting Ndahimana's alibi for the morning of 15 April 1994. Contrary to the Prosecution's submission, Witness Mukabideri, the host of the funeral ceremony,[237] did not "assume" that Ndahimana was present in Rufungo from 5 or 6 a.m. to 11 a.m. or noon, but was, in fact, clear that Ndahimana *remained* in Rufungo until the afternoon.[238] In light of this testimony, as well as the evidence of other Defence witnesses that Ndahimana was busy organising the funeral in Rufungo when they arrived there between 11 a.m. and noon,[239] the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that Ndahimana's alibi for the morning of 15 April 1994 was reasonably possibly true.

93. Turning to the Prosecution's contention regarding the assessment of its evidence, the Appeals Chamber recalls that a trial chamber has full discretionary power to assess the credibility of witnesses and determine the weight to be accorded to their testimony.[240] The Appeals Chamber also recalls that two *prima facie* credible testimonies need not be identical in all aspects in order to be corroborative and that corroboration may exist even when some details differ.[241] It is ultimately within the discretion of the trial chamber to evaluate inconsistencies that may arise amongst witnesses' testimonies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.[242]

94. The Trial Chamber held that Prosecution Witnesses CBY, CBK, and YAU, who testified that Ndahimana attended a meeting in Nyange Parish on the morning of 15 April 1994,[243] "d[id] not

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[235] *See*, *e.g.*, *Nchamihigo* Appeal Judgement, para. 92; *Zigiranyirazo* Appeal Judgement, para. 17; *Nahimana et al.* Appeal Judgement, para. 414.
[236] *See*, *e.g.*, *Nchamihigo* Appeal Judgement, para. 93; *Zigiranyirazo* Appeal Judgement, para. 18; *Karera* Appeal Judgement, para. 330.
[237] *See* Trial Judgement, para. 526.
[238] Thérèse Mukabideri, T. 7 February 2011 p. 68 ("On the 15th of April, Ndahimana came back to our home very early in the morning because he had to finalise the organisation of the burial. And he remained there until – I would say until the afternoon"), *cited in* Trial Judgement, para. 393. As for the Prosecution's argument at the appeals hearing that the Trial Chamber applied contradictory approaches to its assessment of Ndahimana's alibi evidence, the Appeals Chamber highlights that none of the alibi witnesses who testified that Ndahimana was seen at the Convent on 16 April 1994 testified that he remained there. *See* AT. 6 May 2013 p. 44.
[239] *See* Trial Judgement, paras. 524, 526.
[240] *See*, *e.g.*, *Gatete* Appeal Judgement, para. 138; *Kanyarukiga* Appeal Judgement, para. 121; *Bikindi* Appeal Judgement, para. 114.
[241] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 150; *Ntawukulilyayo* Appeal Judgement, para. 24; *Nahimana et al.* Appeal Judgement, para. 428.
[242] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 71; *Setako* Appeal Judgement, para. 31; *Rukundo* Appeal Judgement, para. 207.
[243] *See* Trial Judgement, paras. 532-534.

corroborate each other regarding the precise time, location or consequences of the meeting."[244] Consequently, the Trial Chamber found that the testimonies of these witnesses did not sufficiently corroborate each other to prove that Ndahimana attended a meeting at Nyange Presbytery on the morning of 15 April 1994. As a result, it concluded that the alibi stood.[245]

95. The Trial Judgement reflects that the Trial Chamber conducted a careful and detailed examination of the evidence of Witnesses CBY, CBK, and YAU.[246] The Appeals Chamber also notes that the Trial Chamber was correct in identifying discrepancies amongst the testimonies of Witnesses CBY, CBK, and YAU regarding the precise time, location, and consequences of the alleged meeting.[247] While these discrepancies were minor, it was within the Trial Chamber's discretion to consider that the Prosecution witnesses did not sufficiently corroborate each other on the precise time, location, and consequences of the alleged meeting.[248] In addition, the Trial Chamber had general reservations as to the reliability of the testimonies of Witnesses CBY, CBK, and YAU on the events of 15 April 1994.[249] In light of those reservations and the discrepancies in the witnesses' accounts of the meeting, the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that their evidence was insufficient to establish beyond reasonable doubt that, despite the alibi, the allegation that Ndahimana participated in a meeting at Nyange Presbytery on the morning of 15 April 1994 was nevertheless true.

96. Accordingly, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in accepting Ndahimana's alibi for the morning of 15 April 1994 or in assessing the Prosecution evidence in this regard, and, consequently, in not holding Ndahimana responsible pursuant to Article 6(1) of the Statute for the attack on Nyange Church of 15 April 1994. The Appeals Chamber therefore dismisses the Prosecution's First and Second Grounds of Appeal in their entirety.

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[244] Trial Judgement, para. 535 (internal references omitted).
[245] Trial Judgement, para. 548.
[246] *See* Trial Judgement, paras. 532-534, fns. 1021-1023, and references contained therein.
[247] *See* Trial Judgement, paras. 532-534 fns. 1021-1023, and references contained therein; Witness CBY, T. 10 November 2010 p. 30 (closed session); Witness CBK, T. 3 November 2010 p. 12; Witness YAU, T. 15 September 2010 p. 49.
[248] Trial Judgement, para. 535.
[249] *See* Trial Judgement, paras. 463, 464, 466-468, 472, 473.

V. ALLEGED ERRORS RELATING TO NDAHIMANA'S RESPONSIBILITY FOR THE KILLINGS OF 16 APRIL 1994

97. The Trial Chamber did not accept the alibi Ndahimana presented for 16 April 1994 and found that, in the morning, Ndahimana attended a meeting near Nyange Presbytery at which a group of authorities planned and agreed to destroy Nyange Church to kill the Tutsis who had sought refuge there.[250] It also held that Ndahimana was present during the destruction of the church and the killing of the Tutsi refugees that started after the meeting, and then shared drinks with others at Nyange Presbytery after the killings.[251] The Trial Chamber found that almost all of the Tutsis present in Nyange Church on 16 April 1994 were killed as a result of its destruction.[252]

98. The Trial Chamber, by majority, concluded that Ndahimana did not have the requisite *mens rea* to be held responsible for committing the killings through participation in a joint criminal enterprise.[253] It also held that Ndahimana could not be held responsible as a superior in the absence of sufficient evidence of the communal policemen's involvement in these killings.[254] The Trial Chamber, nonetheless, found that Ndahimana's presence during the destruction of Nyange Church and the killings substantially contributed to the attack that was launched, the destruction of the church, and the death of the numerous refugees inside.[255] Accordingly, the Trial Chamber, by majority, held Ndahimana responsible pursuant to Article 6(1) of the Statute for genocide and extermination as a crime against humanity on the basis of aiding and abetting by tacit approval the killings perpetrated at Nyange Parish on 16 April 1994.[256]

99. Ndahimana submits that the Trial Chamber erred in rejecting his alibi for 16 April 1994 and in finding that he was present at Nyange Parish that day.[257] Ndahimana further contends that the Trial Chamber erred in finding that the *actus reus* and *mens rea* requirements for aiding and abetting were proven beyond reasonable doubt.[258]

100. The Prosecution also challenges the Trial Chamber's findings relating to Ndahimana's responsibility for the killings of 16 April 1994. Specifically, the Prosecution submits that the Trial Chamber erred in finding that Ndahimana did not possess the requisite intent to be convicted of committing genocide and extermination as a crime against humanity through participation in a joint

[250] Trial Judgement, paras. 20, 673, 675, 710, 756, 806.
[251] Trial Judgement, paras. 23, 24, 675, 686, 689, 695, 807.
[252] Trial Judgement, para. 698. *See also ibid.*, para. 5.
[253] Trial Judgement, paras. 26, 822.
[254] Trial Judgement, paras. 759, 760, 801.
[255] Trial Judgement, paras. 28, 829-831.
[256] Trial Judgement, paras. 28, 29, 832, 841-843. Judge Arrey dissented on the appropriate mode of liability.
[257] Ndahimana Notice of Appeal, paras. 38, 40-52, 54; Ndahimana Appeal Brief, paras. 177-204, 206-244, 247, 274.
[258] Ndahimana Notice of Appeal, paras. 53, 56-64; Ndahimana Appeal Brief, paras. 245, 249-279, 284-301.

criminal enterprise, and in failing to find Ndahimana guilty pursuant to Article 6(3) of the Statute in connection with the killings of 16 April 1994.[259]

101. The Appeals Chamber will examine the respective submissions of the parties in turn.

A. Alleged Errors Relating to Ndahimana's Presence at Nyange Parish (Ndahimana Grounds 6, 7, and 10 in part)

102. The Trial Chamber noted that Ndahimana presented an alibi for the entire day of 16 April 1994, which placed him in hiding at the *Les Soeurs de l'Assomption* Convent.[260] In support of his alibi, Ndahimana called Defence Witnesses BX3, ND17, and ND35.[261] The Trial Chamber found that the evidence of these witnesses concerning 16 April 1994 was vague and did not account for Ndahimana's whereabouts between 5 a.m., when Witnesses ND17 and ND35 testified that they saw him arrive at the Convent, and 7 p.m. when they testified that he left.[262] The Trial Chamber further expressed doubts as to the reliability of Witnesses ND17 and ND35, finding that their testimonies "present[ed] a risk of recent fabrication of evidence" based upon the late disclosure of their particulars.[263] Witness ND17's explanation for his stay at the Convent was also found to be "troubling".[264] The Trial Chamber concluded that the alibi that Ndahimana was in hiding at the Convent on 16 April 1994 from 5 a.m. to 7 p.m. was not reasonably possibly true.[265]

103. Based on the corroborating evidence of Prosecution Witnesses CBR, CBK, CBY, CDL, and CNJ, the Trial Chamber found that, on 16 April 1994, Ndahimana attended a meeting near Nyange Presbytery which occurred between 9 and 10 a.m. and at which the decision to destroy Nyange Church in order to kill the refugees inside was taken.[266] The Trial Chamber further found that Ndahimana was present during the destruction of the church, which started just after the meeting, and during the killing of the Tutsi refugees on 16 April 1994.[267] The Trial Chamber concluded that

[259] Prosecution Notice of Appeal, paras. 11, 13, 19-22; Prosecution Appeal Brief, paras. 30-34, 46, 48-51.
[260] Trial Judgement, paras. 650, 651.
[261] *See* Trial Judgement, para. 650. *See also ibid.*, paras. 603-612.
[262] Trial Judgement, paras. 652, 656.
[263] Trial Judgement, paras. 652, 656. *See also ibid.*, paras. 53, 55, 650.
[264] Trial Judgement, para. 653.
[265] Trial Judgement, paras. 20, 657.
[266] Trial Judgement, paras. 22, 667, 673, 675, 710, 756, 806. The Appeals Chamber notes that, in paragraph 704 of the Trial Judgement, the Trial Chamber referred to this meeting as taking place "late in the morning". In light of the unambiguous finding of the Trial Chamber that the meeting took place between 9 and 10 a.m., and its reference to Prosecution evidence of an alleged prior meeting taking place earlier that morning, the Appeals Chamber understands that the Trial Chamber used the terms "late morning" in order to distinguish the meeting that took place between 9 to 10 a.m. from the earlier meeting that had allegedly taken place around 7 a.m. *See ibid.*, paras. 660-665, 667, 703, 704.
[267] Trial Judgement, paras. 23, 675, 680-686, 689, 756, 807.

Ndahimana was guilty of genocide and extermination as a crime against humanity for aiding and abetting by tacit approval the killings perpetrated on 16 April 1994.[268]

104. Ndahimana submits that the Trial Chamber erred in rejecting his alibi for 16 April 1994 and in finding that he participated in the morning meeting at the presbytery and was present during the destruction of the church and the killings perpetrated that day.[269] He contends that the Trial Chamber erred in finding that the particulars of Witnesses ND17 and ND35 were disclosed late and in taking this into consideration when assessing the alibi,[270] as well as in its assessment of the evidence.[271] Ndahimana requests that the Appeals Chamber set aside the challenged findings and find him not guilty of genocide and extermination as a crime against humanity in relation to the killings perpetrated on 16 April 1994.[272]

105. The Appeals Chamber will consider Ndahimana's contentions regarding the notice of alibi and the assessment of the evidence in turn.

1. Notice of Alibi

106. On 3 September 2010, Ndahimana filed a notice of alibi alleging that he was hiding in the Convent on 16 April 1994.[273] The Trial Chamber noted that Ndahimana called Witnesses BX3, ND17, and ND35 in support of this alibi.[274] It also observed that only the name and address of Witness BX3 were disclosed in the Supplement to Notice of Alibi, and that Ndahimana did not disclose the names and addresses of Witnesses ND17 and ND35 until April 2011, three months after the start of the Defence case.[275] The Trial Chamber stated that it would take into account the late disclosure of the alibi witnesses' particulars in its assessment of the credibility of the alibi.[276] When assessing the alibi evidence, the Trial Chamber found that "the belated disclosure of Witnesses ND17['s] and ND35's identities may suggest that the Defence has tailored the alibi

[268] Trial Judgement, paras. 28, 29, 832, 841-843.
[269] Ndahimana Notice of Appeal, paras. 38, 40-52, 54; Ndahimana Appeal Brief, paras. 177-204, 206-244, 247, 274.
[270] Ndahimana Notice of Appeal, paras. 38-40, 45; Ndahimana Appeal Brief, paras. 224, 225.
[271] Ndahimana Notice of Appeal, paras. 41, 43, 46, 68; Ndahimana Appeal Brief, paras. 184, 185, 208-213, 215-218, 221, 226, 239-243, 274, 317, 318, 321-324.
[272] Ndahimana Appeal Brief, paras. 219, 244, 325.
[273] *The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Notice of Alibi from the Defence of Ndahimana Grégoire, confidential, 3 September 2010 ("Notice of Alibi"). Ndahimana supplemented his Notice of Alibi on 22 September 2010. *See The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Supplement to the Notice of Alibi Filed on 3rd September 2010, confidential, 22 September 2010 ("Supplement to Notice of Alibi").
[274] Trial Judgement, para. 650.
[275] Trial Judgement, paras. 53, 650.
[276] Trial Judgement, paras. 55, 650.

evidence in order to corroborate that of Witness BX3" and stated that it "consider[ed] seriously the risk of recent fabrication in this particular case."[277]

107. Ndahimana submits that the Trial Chamber erred in finding that the particulars of Witnesses ND17 and ND35 were filed late and in taking into account this alleged belated disclosure in its assessment of the alibi evidence.[278] He asserts that the Trial Chamber failed to properly apply Rule 67(A) of the Rules as this rule does not require the disclosure of the names and addresses of the alibi witnesses.[279] According to him, his Notice of Alibi was tendered in a timely manner and fulfilled the applicable requirements.[280] Ndahimana also argues that: (i) he could not provide the particulars of the alibi witnesses because no protective measures were granted when he filed his Notice of Alibi;[281] (ii) his investigations were still in progress during the presentation of the Prosecution and Defence cases, which the Trial Chamber knew;[282] and (iii) he immediately provided the particulars of Witnesses ND17 and ND35 when the information was available to him.[283] He adds that the Trial Chamber failed to take into consideration that the Prosecution was not prejudiced by the late disclosure of the particulars of Witnesses ND17 and ND35, as demonstrated by the Prosecution's failure to complain or seek to meet with these two witnesses.[284]

108. Ndahimana further submits that the Trial Chamber erred in concluding that the evidence of Witnesses ND17 and ND35 presented a risk of fabrication.[285] He contends, in this respect, that the filing of the particulars of Witnesses ND17 and ND35 was done as a result of the ongoing investigations and was not motivated by the desire to obtain a tactical advantage.[286]

109. The Prosecution responds that the Trial Chamber did not err in finding that the particulars were filed late and properly took this into account when assessing the alibi.[287]

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[277] Trial Judgement, para. 652. *See also ibid.*, para. 656.
[278] Ndahimana Notice of Appeal, para. 38; Ndahimana Appeal Brief, paras. 177, 225. *See also* Ndahimana Appeal Brief, para. 194; Ndahimana Reply Brief, para. 73; AT. 6 May 2013 pp. 4, 33, 34.
[279] Ndahimana Appeal Brief, paras. 199, 224. Ndahimana further argues that Rule 67(A) of the Rules does not require the Defence to produce all the evidence supporting the alibi prior to the start of the Prosecution case, but only requires that sufficient detail be given to allow the Prosecution to prepare its case prior to its presentation. *See ibid.*, paras. 193, 199, 200, 224. *See also ibid.*, para. 201.
[280] Ndahimana Appeal Brief, para. 225. *See also* Ndahimana Reply Brief, para. 80.
[281] Ndahimana Appeal Brief, para. 195. *See also ibid.*, para. 189.
[282] Ndahimana Appeal Brief, paras. 189, 190, 197.
[283] Ndahimana Appeal Brief, paras. 190, 197.
[284] Ndahimana Notice of Appeal, para. 40; Ndahimana Appeal Brief, paras. 192, 198, 206. *See also* Ndahimana Reply Brief, para. 85. Ndahimana also argues that the Prosecution failed to discredit Witnesses ND17 and ND35 during cross-examination. *See* Ndahimana Appeal Brief, para. 204. The Appeals Chamber considers that this argument is irrelevant to the challenges that Ndahimana raises regarding the Trial Chamber's assessment of the lateness of his notice of alibi.
[285] Ndahimana Notice of Appeal, para. 45; Ndahimana Appeal Brief, para. 204. *See also* Ndahimana Reply Brief, para. 74.
[286] Ndahimana Notice of Appeal, para. 45.
[287] Prosecution Response Brief, paras. 136-140, 148; AT. 6 May 2013 pp. 28, 29.

110. The Appeals Chamber notes that Rule 67(A)(ii)(a) of the Rules requires the Defence to notify the Prosecution of its intent to enter a defence of alibi "[a]s early as reasonably practicable and in any event prior to the commencement of the trial". This provision expressly stipulates that "the notification shall specify […] the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi". Ndahimana's contention that Rule 67(A) of the Rules does not require the disclosure of the names and addresses of the alibi witnesses is therefore incorrect.

111. The Appeals Chamber observes that Ndahimana's Notice of Alibi (filed on 3 September 2010) and Supplement to Notice of Alibi (filed on 22 September 2010) contained no mention of Witnesses ND17 and ND35 as alibi witnesses. Ndahimana only notified the Trial Chamber of his intention to rely on these witnesses in support of his alibi and disclosed their names and addresses in April 2011,[288] nearly three months after the start of the Defence case.[289] The Trial Chamber therefore did not err in finding that the disclosure of the particulars of Witnesses ND17 and ND35 was belated, and, therefore, that the alibi was not raised in a timely manner.[290]

112. Ndahimana advances a number of arguments to justify the late filing of the particulars, such as the fact that his investigations were ongoing and that he disclosed the particulars as soon as practicable. However, none of these arguments changes the fact that the particulars of alibi Witnesses ND17 and ND35 were disclosed after the commencement of the trial, in violation of Rule 67(A)(ii)(a) of the Rules. In this regard, the Appeals Chamber finds Ndahimana's submission regarding protective measures particularly disingenuous given the fact that neither Witness ND17 nor Witness ND35 was listed as an alibi witness in the Notice of Alibi or the Supplement to Notice of Alibi, and that Ndahimana did provide the names and whereabouts of the alibi witnesses relied upon in the Notice of Alibi in his Supplement to Notice of Alibi.

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[288] *See The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Notice of Alibi Under Rule 67 (A) (ii) of the Rules of Procedure and Evidence, confidential, 7 April 2011; *The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Additional Notice of Alibi Under Rule 67 (A) (ii) of the Rules of Procedure and Evidence, confidential, 13 April 2011.

[289] The Defence case started on 17 January 2011. *See* Trial Judgement, Annex A, para. 15. The Appeals Chamber notes that Ndahimana refers to the fact that Witness ND17 has always been on his witness list. *See* Ndahimana Appeal Brief, para. 191. The Appeals Chamber finds no merit in this argument as Ndahimana had failed to indicate that he intended to rely on Witness ND17 in support of his alibi until 11 April 2011.

[290] The Appeals Chamber notes that, contrary to Ndahimana's argument, the Trial Chamber did not acknowledge that his Notice of Alibi was timely tendered. *See* Ndahimana Notice of Appeal, para. 38; Ndahimana Appeal Brief, para. 177, *referring to* Trial Judgement, paras. 523, 526. The paragraphs of the Trial Judgement to which Ndahimana refers in support of his assertion do not relate to the alibi he advanced for 16 April 1994 but to the alibi he presented for 15 April 1994. Likewise, Ndahimana's arguments regarding the Trial Chamber's reliance on the *Rutaganda* Appeal Judgement stem from a misreading of the Trial Judgement in this respect. *See* Ndahimana Appeal Brief, paras. 186-188; Prosecution Response Brief, para. 147; Trial Judgement, para. 55, fn. 52.

113. The Appeals Chamber recalls that the manner in which an alibi is presented may impact its credibility.[291] It was therefore within the Trial Chamber's discretion to take into account Ndahimana's failure to provide the necessary particulars of alibi witnesses on time in assessing the alibi evidence.[292] Contrary to Ndahimana's suggestion, the Trial Chamber was not required to consider whether the Prosecution suffered prejudice from the belated disclosure.[293]

114. The Appeals Chamber has previously upheld the inference drawn by a trial chamber that failure to raise an alibi in a timely manner suggested fabrication of the alibi in order to respond to the Prosecution case.[294] Ndahimana's arguments that the late disclosure of the particulars was a result of the ongoing investigations and was not motivated by the desire to obtain a tactical advantage fail to demonstrate that such an inference was unreasonable in the present case.

115. Based on the foregoing, the Appeals Chamber finds that Ndahimana has failed to demonstrate that the Trial Chamber erred in holding that the particulars of Witnesses ND17 and ND35 were disclosed late and in taking this into consideration in its assessment of their credibility to conclude that their evidence presented a risk of recent fabrication.

2. Assessment of the Evidence

116. Ndahimana submits that the Trial Chamber erred in its assessment of the alibi evidence and the Prosecution evidence regarding his presence at Nyange Parish on 16 April 1994.[295] Ndahimana also contends that the Trial Chamber failed to apply a uniform standard in assessing Prosecution and Defence evidence and to give weight to the reasonable doubt raised by the Defence witnesses who testified that they did not see Ndahimana at Nyange Church on 16 April 1994.[296]

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[291] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 18; *Kanyarukiga* Appeal Judgement, para. 97; *Nchamihigo* Appeal Judgement, para. 97 ("In certain circumstances, failure to raise an alibi in a timely manner can impact a Trial Chamber's findings, as it may take such failure into account when weighing the credibility of the alibi.") (internal reference omitted). *See also Setako* Appeal Judgement, fn. 500.

[292] *See Munyakazi* Appeal Judgement, para. 18; *Kalimanzira* Appeal Judgement, para. 56.

[293] *See Kanyarukiga* Appeal Judgement, para. 98. The Appeals Chamber notes Ndahimana's submission in reply that the "idea of requiring the Prosecutor to inquire the alibi needs to be revisited." *See* Ndahimana Reply Brief, para. 87. The Appeals Chamber recalls that this issue was considered in detail in the *Nahimana et al.* Appeal Judgement where the Appeals Chamber found that there is no obligation on the Prosecution to investigate an alibi. *See Nahimana et al.* Appeal Judgement, paras. 415-418. The Appeals Chamber notes that not only has Ndahimana failed to raise this contention in his Notice of Appeal or Appeal Brief, but that he also merely states that the issue should be revisited without providing any arguments in support of his contention. The Appeals Chamber therefore declines to consider this contention.

[294] *See Kanyarukiga* Appeal Judgement, paras. 101, 102.

[295] Ndahimana Notice of Appeal, paras. 41, 43, 46, 68; Ndahimana Appeal Brief, paras. 184, 208-213, 215-218, 221, 226, 239-243, 274, 317, 318.

[296] Ndahimana Appeal Brief, paras. 239-243, 321-324.

(a) Alibi Evidence

117. Ndahimana submits that the Trial Chamber erred in finding that the alibi he presented for 16 April 1994 was not reasonably possibly true.[297] In support of his contention, Ndahimana argues that the Trial Chamber erred in concluding that none of the alibi witnesses saw Ndahimana between 5 a.m. and 7 p.m. on 16 April 1994 as Witness ND17 testified that he did not see Ndahimana leave the Convent.[298] Ndahimana also argues that the Trial Chamber erred in finding that Witness ND17's explanation for remaining at the Convent during the period in question was "troubling"[299] and in rejecting the alibi evidence as vague for no reason.[300]

118. Ndahimana further submits that "in choosing not to believe" the alibi evidence, the Trial Chamber contradicted its finding that his presence at Nyange Church on 16 April 1994 might have been motivated by duress.[301] In his view, the Trial Chamber "did not fully appreciate" the threats he faced.[302] Ndahimana adds that the Trial Chamber misapplied the burden of proof when it concluded that the evidence would not prevent him from going to Nyange Church after leaving the Convent since an alibi only needs to raise a reasonable doubt that the accused was in a position to commit the crime, and not to exclude the possibility that the accused committed the crime.[303]

119. The Prosecution responds that the Trial Chamber did not err in its assessment of the alibi evidence.[304]

120. The Appeals Chamber notes that Witness ND17 testified that, on 16 April 1994, Ndahimana arrived at the Convent at approximately 5 a.m. and left at approximately 7 p.m.[305] Ndahimana correctly points out that Witness ND17 testified that he did not see Ndahimana leave the Convent before 7 p.m.[306] However, the Appeals Chamber observes that Witness ND17 also specified that he did not see Ndahimana between the time he saw him arrive in the morning and the time he left.[307] As Witness ND35 only testified to seeing Ndahimana arrive at the Convent at 5 a.m. and

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[297] Ndahimana Notice of Appeal, para. 47. *See also* Ndahimana Appeal Brief, paras. 177, 220.
[298] Ndahimana Notice of Appeal, para. 41; Ndahimana Appeal Brief, paras. 214, 221, 227. *See also* AT. 6 May 2013 pp. 5, 34, 35.
[299] Ndahimana Notice of Appeal, para. 46, *referring to* Trial Judgement, para. 653; Ndahimana Appeal Brief, para. 213. *See also* Ndahimana Reply Brief, para. 75.
[300] Ndahimana Notice of Appeal, para. 44; Ndahimana Appeal Brief, para. 226.
[301] Ndahimana Notice of Appeal, para. 54; Ndahimana Appeal Brief, para. 274.
[302] Ndahimana Appeal Brief, para. 215. *See also ibid.*, para. 184.
[303] Ndahimana Appeal Brief, paras. 216-218. *See also ibid.*, para. 183. *See also* Ndahimana Reply Brief, paras. 83, 84; AT. 6 May 2013 pp. 6, 7, 34.
[304] Prosecution Response Brief, paras. 134, 135, 141-149; AT. 6 May 2013 pp. 29-32.
[305] Witness ND17, T. 3 May 2011 p. 10 (closed session).
[306] Witness ND17, T. 3 May 2011 p. 10 (closed session) ("From the time when he entered and the time when he left the convent in the evening, I did not see him leave the convent."). *See also* Trial Judgement, para. 606.
[307] Witness ND17, T. 3 May 2011 p. 16 ("Subsequently, I did not see Ndahimana. He came, passed by also, and went into the convent. And I was not able to speak to him until the time when he left the convent."). *See also* Trial Judgement, para. 652.

Witness BX3 did not witness Ndahimana's presence at the Convent,[308] the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that none of these witnesses reported having seen Ndahimana at the Convent between 5 a.m. and 7 p.m. on 16 April 1994 and therefore could not account for Ndahimana's whereabouts during that period.[309]

121. As for the assessment of the alibi witnesses' reliability and credibility, the Trial Chamber found "troubling" Witness ND17's explanation that he stayed at the Convent and not with his family in April and May 1994 because the nuns were threatened.[310] Ndahimana fails to provide any argument showing that the Trial Chamber's assessment of the witness's explanation was unreasonable. Likewise, Ndahimana fails to demonstrate that the Trial Chamber erred in finding that the evidence of the alibi witnesses regarding 16 April 1994 was vague, except as to the time Ndahimana arrived at and departed from the Convent. Contrary to his submission, the Trial Chamber conducted a detailed analysis of the alibi witnesses' evidence before finding it vague.[311]

122. Turning to Ndahimana's submission that the Trial Chamber did not fully appreciate the threats he faced, the Appeals Chamber refers to its conclusion below, in the section examining the Prosecution's Fourth Ground of Appeal, that the Trial Chamber erred in finding that Ndahimana was under threat during the period in question and that his presence at Nyange Church on 16 April 1994 might have been motivated by duress.[312] The Appeals Chamber therefore finds that Ndahimana's submission in this regard has become moot and need not be considered.

123. Finally, in the view of the Appeals Chamber, the Trial Chamber's finding that the alibi evidence "would not prevent [Ndahimana] from going to Nyange church after leaving the convent"[313] does not suggest a shift in the burden of proof. This statement merely reflects that the Trial Chamber was not satisfied that the evidence adduced by Ndahimana raised the reasonable possibility that he was not present at Nyange Church at the time of the alleged crime. The Appeals Chamber finds no error in this approach.[314]

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[308] Witness ND35, T. 3 May 2011 pp. 30, 31 (closed session); Witness BX3, T. 23 February 2011 p. 14 (closed session). *See also* Trial Judgement, paras. 608, 612, 651.
[309] *See* Trial Judgement, paras. 652, 656.
[310] Trial Judgement, para. 653.
[311] *See* Trial Judgement, para. 652. *See also ibid.*, paras. 651-654, 656, 657.
[312] *See infra*, Section V.C.1.(b), paras. 185, 186.
[313] Trial Judgement, para. 656.
[314] *See, e.g.*, *Nchamihigo* Appeal Judgement, para. 92 ("An accused does not bear the burden of proving his alibi beyond reasonable doubt. Rather, '[h]e must simply produce the evidence tending to show that he was not present at the time of the alleged crime.'") (internal references omitted); *Zigiranyirazo* Appeal Judgement, para. 17; *Musema* Appeal Judgement, para. 202.

(b) Prosecution Evidence

124. Ndahimana submits that the Trial Chamber erred in relying on the uncorroborated testimonies of Prosecution Witnesses CBK, CBY, CNJ, CDL, and CBR to find that he participated in the 16 April 1994 meeting at which the decision to destroy Nyange Church was taken and that he was present during the destruction of the church.[315] Ndahimana reiterates that, as each of these Prosecution witnesses was not found credible by the Trial Chamber and required corroboration, these witnesses could not corroborate each other.[316]

125. Ndahimana further submits that the Trial Chamber erred in considering that the testimonies of Witnesses CBK, CBY, CNJ, CDL, and CBR were reliable regarding the existence of the morning meeting and Ndahimana's participation therein.[317] In support of this, Ndahimana argues that: (i) Witness CDL was testifying about a meeting that had allegedly taken place earlier in the morning;[318] (ii) the testimonies of Witnesses CDL and CBR raised serious doubts about their credibility;[319] and (iii) the credibility of Witness CNJ's evidence was seriously challenged in cross-examination and the Trial Chamber failed to consider that this evidence was fabricated.[320] Ndahimana also asserts that the Prosecution evidence as to the location and participants of the meeting is contradictory.[321] As regards the location in particular, he argues that Witness CDL testified that the authorities met in front of the secretariat, whereas Witnesses CDR, CBK, and CBY referred to the front of the presbytery, and that the site visit showed that the two buildings were different and could not be confused.[322]

126. In addition, Ndahimana submits that "no link can be drawn" between the alleged morning meeting and the destruction of Nyange Church.[323] In this respect, Ndahimana argues that Witness CBR's testimony on the conversation he heard cannot be relied upon as true since: (i) there was a doubt as to the date the witness was testifying about; (ii) this aspect of his testimony was not

[315] Ndahimana Notice of Appeal, paras. 42, 48, 49, 53; Ndahimana Appeal Brief, paras. 207, 229, 230, 242.
[316] Ndahimana Appeal Brief, para. 51. *See also ibid.*, para. 207; Ndahimana Reply Brief, paras. 77, 78, 82.
[317] Ndahimana Appeal Brief, paras. 230, 232. *See also* AT. 6 May 2013 pp. 5, 6.
[318] Ndahimana Appeal Brief, para. 230.
[319] Ndahimana Appeal Brief, para. 231.
[320] Ndahimana Appeal Brief, para. 234, *referring to* Witness CNJ, T. 5 November 2010 pp. 44, 45. Ndahimana points out that the witness had failed to mention Ndahimana's name in his prior statements and admitted to accepting money to falsely implicate another accused before the Tribunal. *See* Ndahimana Appeal Brief, para. 234.
[321] Ndahimana Appeal Brief, para. 232, *referring to* Trial Judgement, paras. 667-672.
[322] Ndahimana Appeal Brief, para. 233, *referring to* Exhibit C1 (Report on Site Visit, 7 to 10 June 2011) ("Report on Site Visit").
[323] Ndahimana Appeal Brief, para. 235.

corroborated; and (iii) the witness testified that he went to Nyange Parish that day only to participate in the attacks.[324]

127. The Prosecution responds that the Trial Chamber reasonably found on the basis of the eyewitness and corroborated testimonies of Witnesses CBK, CBY, CNJ, CDL, CBR, and CNT that: (i) Ndahimana met with other members of the JCE at Nyange Presbytery on the morning of 16 April 1994; (ii) the decision to destroy Nyange Church was taken at that meeting; and (iii) Ndahimana was present while the church was destroyed.[325] In the Prosecution's view, Ndahimana's arguments are a mere disagreement with the Trial Chamber's assessment, which provides no basis for appeal.[326]

128. The Appeals Chamber notes that, contrary to Ndahimana's contention, the Trial Chamber did not find that Witnesses CBK, CBY, CNJ, CDL, and CBR were not credible; the Trial Chamber expressed concerns regarding their credibility or reliability, but, nonetheless, decided that their evidence on the events of 16 April 1994 could be relied upon where corroborated.[327] The Trial Chamber thus found that, when considered together, the testimonies of these witnesses were sufficiently credible and reliable to be relied upon, despite the partial deficiencies that prompted the Trial Chamber to require corroboration. In this regard, the Appeals Chamber recalls that even if a trial chamber finds that a witness's testimony is inconsistent or otherwise problematic, it may still choose to accept it because it is corroborated by other evidence.[328] Recalling again that a trial chamber has full discretionary power in assessing the credibility of witnesses and in determining the weight to be accorded to their testimony,[329] the Appeals Chamber finds no error in the Trial Chamber's decision to rely on the corroborated aspects of the testimonies of Witnesses CBK, CBY, CNJ, CDL, and CBR.

129. As for the alleged unreliability of these witnesses, a careful review of Witness CDL's testimony shows that Ndahimana is mistaken when he asserts that the witness was testifying about a meeting that had taken place earlier. Witness CDL clearly testified about two different meetings,

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[324] Ndahimana Appeal Brief, paras. 235, 236; Ndahimana Reply Brief, para. 89. The Appeals Chamber notes that in his Appeal Brief, Ndahimana refers the Appeals Chamber to submissions made in his Closing Brief and in Closing Arguments regarding the credibility of Prosecution witnesses. *See* Ndahimana Appeal Brief, para. 238, *referring to The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Defence Final Brief, confidential, 25 July 2011 ("Ndahimana Closing Brief"), Chapter II. The Appeals Chamber recalls that "[m]erely referring the Appeals Chamber to one's arguments set out at trial is insufficient as an argument on appeal." *See Nshogoza* Appeal Judgement, para. 18, *referring, e.g., to Haraqija and Morina* Appeal Judgement, para. 26; *Brdanin* Appeal Judgement, para. 35. The Appeals Chamber will limit its analysis to the submissions developed in Ndahimana's appeal submissions when considering this aspect of his appeal.
[325] Prosecution Response Brief, paras. 150, 153-157, 169-174. *See also* AT. 6 May 2013 pp. 30, 31.
[326] Prosecution Response Brief, para. 151.
[327] *See* Trial Judgement, paras. 634, 637, 639, 641, 646.
[328] *See Kanyarukiga* Appeal Judgement, para. 177; *Ntakirutimana* Appeal Judgement, para. 132.
[329] *See supra*, para. 93.

which the Trial Chamber accurately reflected in its summary of his testimony.[330] The Appeals Chamber observes that the Trial Chamber accurately relied on Witness CDL's evidence regarding the second meeting in support of its conclusion that Ndahimana attended the 16 April meeting at which the decision to destroy the church was taken.[331]

130. The Trial Chamber conducted a detailed and cautious analysis of the credibility of Witnesses CDL and CBR.[332] Ndahimana fails to show how the Trial Chamber erred in its assessment of these two witnesses, beyond asserting that their testimonies "ought not [to] have been relied upon".[333] Likewise, Ndahimana fails to demonstrate that it was unreasonable for the Trial Chamber to rely upon Witness CNJ's corroborative evidence. The Appeals Chamber notes that Ndahimana's arguments that Witness CNJ's evidence could not be reasonably relied upon were all considered in detail by the Trial Chamber.[334] After taking into account that Witness CNJ was a "free man" at the time of his testimony and that he provided significant detail about the 16 April attack and its participants, the Trial Chamber nevertheless concluded that it may only rely on his evidence where corroborated.[335] Ndahimana's arguments are unsubstantiated and fall short of demonstrating an error in the Trial Chamber's exercise of its discretion.

131. The Trial Chamber also expressly discussed the discrepancies in the testimonies of Prosecution witnesses regarding the location of the meeting.[336] It noted that Witnesses CBR, CBK, and CBY all testified that the meeting took place near the presbytery, whereas Witness CDL testified that the meeting began at Kanyarukiga's pharmacy before the authorities moved to Nyange Church to meet with Seromba who was standing in front of the secretariat.[337] The Trial Chamber found that the testimonies were not inconsistent as it appeared that the secretariat and the presbytery "were in very close proximity to one another."[338] The Appeals Chamber observes that the Report on Site Visit does not support Ndahimana's suggestion that all parties noted during the site visit in Rwanda that the two buildings were clearly distinguishable and could not be confused.[339] In the absence of any substantiation, the Appeals Chamber rejects Ndahimana's contention that the Trial Chamber erred in finding that the secretariat and the presbytery were in close proximity to one

[330] Witness CDL, T. 12 November 2010 pp. 19, 20, *and* T. 19 November 2010 p. 16; Trial Judgement, paras. 578-581, 660, 666.
[331] Trial Judgement, paras. 666, 667.
[332] Trial Judgement, paras. 630-637.
[333] Ndahimana Appeal Brief, para. 231.
[334] Trial Judgement, para. 640.
[335] Trial Judgement, para. 641.
[336] Trial Judgement, para. 667.
[337] Trial Judgement, para. 667.
[338] Trial Judgement, para. 667, *referring to* Exhibits P35, P37, P38.
[339] *See* Report on Site Visit. The Appeals Chamber notes that there is no reference to the distance between Nyange Presbytery and the secretariat in the report.

another.[340] The Appeals Chamber also rejects Ndahimana's unsubstantiated claim regarding an alleged contradiction in the Prosecution evidence concerning the participants in the meeting.[341]

132. Finally, the Appeals Chamber finds unpersuasive Ndahimana's arguments regarding the Trial Chamber's reliance on Witness CBR's testimony concerning the "link" between the morning meeting and the destruction of Nyange Church on 16 April 1994. The Appeals Chamber observes that, contrary to Ndahimana's submission, there was no doubt as to which date Witness CBR was testifying about. A review of the witness's testimony reveals that he was testifying about 16 April 1994 when he stated that the decision to destroy Nyange Church was taken during the morning meeting.[342] Ndahimana is also incorrect in his contention that this aspect of Witness CBR's testimony was not corroborated.[343] Similarly, the Appeals Chamber does not find merit in Ndahimana's argument that Witness CBR could not be relied upon because he went to Nyange Parish only to participate in the attacks. The Appeals Chamber fails to see how the reason advanced by the witness for coming to Nyange Church on 16 April 1994 would affect the reliability of his testimony on the decision to destroy the church made at the morning meeting. The Appeals Chamber concludes that Ndahimana has failed to demonstrate that the Trial Chamber erred in finding that the decision to destroy Nyange Church was taken during the meeting held on the morning of 16 April 1994.

(c) Alleged Failure to Apply Uniform Standard and to Give Weight to the Reasonable Doubt Raised by the Defence Evidence

133. Ndahimana submits that the Trial Chamber erred in not applying a uniform standard in assessing Prosecution and Defence witnesses who testified about the destruction of Nyange Church on 16 April 1994.[344] Specifically, he argues that while the Trial Chamber considered that factors such as the number of assailants and refugees, poor positioning, different vantage points, and the chaotic nature of events affected the credibility of Defence witnesses, it failed to consider the same factors when assessing the Prosecution evidence, despite the fact that all witnesses were in the same conditions at the church.[345] Ndahimana contends that, as a result, the Trial Chamber erred in

[340] The Appeals Chamber recalls that minor inconsistencies commonly occur in witness testimony without rendering the testimony unreliable, and that a trial chamber has the main responsibility to resolve any inconsistencies that may arise within or among testimonies. *See*, *e.g.*, *Hategekimana* Appeal Judgement, para. 82; *Ntawukulilyayo* Appeal Judgement, para. 46; *Munyakazi* Appeal Judgement, para. 71; *Setako* Appeal Judgement, para. 31; *Muvunyi* Appeal Judgement of 1 April 2011, para. 44.
[341] *See* Ndahimana Appeal Brief, para. 232, *referring to* Trial Judgement, paras. 667-672.
[342] *See* Witness CBR, T. 2 November 2010 p. 24; Trial Judgement, para. 570.
[343] *See* Trial Judgement, para. 674 ("Turning to the purpose of the meeting, Witnesses CBR, CDL, CBK and CNJ all reported that the decision to destroy Nyange church was taken during this meeting."), fn. 1292, and references contained therein.
[344] Ndahimana Notice of Appeal, paras. 43, 68; Ndahimana Appeal Brief, paras. 208, 212, 317, 321-324.
[345] Ndahimana Appeal Brief, paras. 208-212, 317, 321-324.

concluding that "none of the Defence witnesses were in a good position to be able to monitor all events and persons at the parish carefully."[346]

134. In addition, Ndahimana submits that the Defence evidence that Ndahimana was absent from Nyange Church on 16 April 1994 has "not been properly appreciated by the Trial Chamber."[347] He contends, in particular, that the Trial Chamber erred in failing to attach proper weight to the evidence of Defence Witnesses ND11, ND12, and ND22 that the destruction of Nyange Church began on 15 April 1994, and not on 16 April 1994.[348] This evidence, Ndahimana argues, contradicts the finding that the decision to destroy the church was taken at the 16 April 1994 morning meeting.[349] According to Ndahimana, the Trial Chamber erred in finding that the Defence evidence was of limited probative value and in failing to give weight to the reasonable doubt this evidence cast on his alleged presence during the 16 April attack.[350]

135. The Prosecution responds that the Trial Chamber applied a uniform standard in assessing the reliability and credibility of all witnesses. It argues that the fact that the Trial Chamber chose to credit testimony from witnesses who had a clear view of events over testimony from witnesses whose view was impaired does not show bias.[351]

136. The Appeals Chamber notes that factors such as the positioning of the witnesses, different vantage points, and the chaotic nature of events were expressly considered by the Trial Chamber when assessing the Prosecution evidence.[352] Ndahimana takes issue in particular with the assessment of the evidence on his presence at Nyange Church on 16 April 1994, challenging the finding that "none of the Defence witnesses were in a good position to be able to monitor all events and persons at the parish carefully."[353] Ndahimana, however, does not demonstrate how the Trial Chamber erred in so finding and in taking into consideration the Defence witnesses' positioning and vantage points, as it did in other instances with Prosecution witnesses. The Appeals Chamber therefore finds that Ndahimana has failed to demonstrate that the Trial Chamber did not apply a uniform standard when assessing the evidence of Defence and Prosecution witnesses on 16 April 1994.

137. Turning to Ndahimana's submission regarding the evidence on the destruction of Nyange Church, the Appeals Chamber notes that the Trial Chamber expressly considered the Prosecution

[346] Ndahimana Notice of Appeal, para. 68, *referring to* Trial Judgement, para. 699; Ndahimana Appeal Brief, para. 317.
[347] Ndahimana Appeal Brief, para. 239. *See also ibid.*, 243, 317, 319, 320.
[348] Ndahimana Appeal Brief, para. 240.
[349] Ndahimana Appeal Brief, paras. 240, 319. *See also* Ndahimana Reply Brief, para. 90.
[350] Ndahimana Notice of Appeal, paras. 50, 51; Ndahimana Appeal Brief, paras. 207, 241, 242, 317.
[351] Prosecution Response Brief, para. 152, 158. *See also ibid.*, paras. 159-168.
[352] *See, e.g.*, Trial Judgement, paras. 217, 295, 307, 474, 637, 664.
[353] Ndahimana Notice of Appeal, para. 68, *referring to* Trial Judgement, para. 699; Ndahimana Appeal Brief, para. 317.

and Defence evidence that the destruction started on 15 April 1994 and acknowledged that the destruction "may have been attempted on 15 April 1994."[354] Ndahimana does not show how the latter acknowledgement would invalidate the Trial Chamber's finding that the formal decision to destroy the church was taken by authorities on 16 April 1994.[355] Ndahimana's argument in this respect is therefore rejected.

138. The Trial Chamber concluded that the Defence evidence was of limited value and failed to raise a reasonable doubt as to Ndahimana's presence at Nyange Church on 16 April 1994.[356] Ndahimana's general contention that the Trial Chamber did not properly appreciate the Defence evidence does not demonstrate an error in the Trial Chamber's assessment of that evidence.

(d) Conclusion

139. Accordingly, the Appeals Chamber finds that Ndahimana has failed to demonstrate that the Trial Chamber erred in its assessment of the evidence pertaining to his presence at Nyange Parish on 16 April 1994.

3. Conclusion

140. Based on the foregoing, the Appeals Chamber concludes that the Trial Chamber did not err in rejecting Ndahimana's alibi for 16 April 1994 and in finding that he participated in the morning meeting at Nyange Presbytery and was present during the destruction of Nyange Church and the killings perpetrated that day. The Appeals Chamber dismisses Ndahimana's Sixth and Seventh Grounds of Appeal in their entirety, as well as the relevant part of his Tenth Ground of Appeal.

[354] Trial Judgement, para. 674.
[355] Trial Judgement, para. 675.
[356] *See* Trial Judgement, para. 701.

B. Alleged Errors Relating to Ndahimana's Responsibility for Aiding and Abetting (Ndahimana Grounds 8 and 9)

141. The Trial Chamber found that Ndahimana's presence during the destruction of Nyange Church and the killings perpetrated on 16 April 1994 substantially contributed to the attack that was launched, the destruction of the church, and the death of the numerous refugees inside.[357] It also found that Ndahimana must have known that his presence would have a significant encouraging effect on the perpetrators of the attack and would likely be considered as tacit approval of the attack and killings.[358] The Trial Chamber concluded that Ndahimana was responsible pursuant to Article 6(1) of the Statute for genocide and extermination as a crime against humanity on the basis of aiding and abetting by tacit approval the killings perpetrated at Nyange Church on 16 April 1994.[359]

142. Ndahimana submits that the Trial Chamber erred in finding that he aided and abetted the killings on 16 April 1994 as the *actus reus* and *mens rea* requirements for aiding and abetting were not proven beyond reasonable doubt.[360] Accordingly, he requests that the Appeals Chamber reverse his convictions for genocide and extermination as a crime against humanity in relation to the killings of 16 April 1994.[361]

143. The Appeals Chamber will consider Ndahimana's submissions regarding *actus reus* and *mens rea* in turn.

1. *Actus Reus*

144. The Trial Chamber found that Ndahimana's presence on 16 April 1994 during the destruction of Nyange Church and the killings that followed had an encouraging effect on the principal perpetrators, particularly because he was in a position of authority.[362] In reaching this finding, the Trial Chamber relied on the sense of moral authority exerted by Ndahimana over the population of Kivumu Commune and on the fact that several perpetrators reported the encouraging effect of his presence at Nyange Parish.[363] It also found that Ndahimana's attendance at meetings held prior to 16 April 1994 "conveyed the impression of him as an 'approving spectator'" and that Ndahimana could not have ignored that the fact that he did not openly object to the killings would

[357] Trial Judgement, paras. 28, 829-831.
[358] Trial Judgement, para. 831. *See also ibid.*, para. 842.
[359] Trial Judgement, paras. 28, 29, 827, 828, 830, 832, 841-843.
[360] Ndahimana Notice of Appeal, paras. 53, 56-64; Ndahimana Appeal Brief, paras. 245, 249-279, 284-301.
[361] Ndahimana Appeal Brief, paras. 280, 302.
[362] Trial Judgement, paras. 28, 798, 824-832.
[363] Trial Judgement, paras. 829, 830.

likely be considered by the assailants as tacit approval of the attacks.[364] Considering these findings together, the Trial Chamber found that Ndahimana's presence during the attack on Nyange Church substantially contributed to the attack, the destruction of the church, and the death of the refugees inside.[365] It specified that "Ndahimana's conduct as an approving spectator was limited to giving moral support to the principal perpetrators of the crime, which constitutes the *actus reus* of aiding and abetting" and that "Ndahimana's participation through aiding and abetting by tacit approval most aptly sums up his criminal conduct."[366]

145. Ndahimana submits that the *actus reus* of aiding and abetting was not proven beyond reasonable doubt.[367] Specifically, he argues that there is no evidence showing that his mere presence at the crime scene had an encouraging effect on the perpetrators or substantially contributed to the crimes committed.[368] In his view, no link was established between his presence and the assailants.[369] In this regard, Ndahimana argues that it is "inconceivable" that his presence could substantially contribute to crimes committed by thousands of perpetrators[370] and that there is no evidence that "the 10000 perpetrators even had a time to notice" his presence or that he "was known to 10000 assailants".[371] Similarly, he submits that there is no evidence to support the finding that his attendance at prior meetings conveyed "the impression of him" as an approving spectator.[372] Ndahimana further contends that the Trial Chamber failed to explain or give any reason as to how his presence substantially contributed to the crimes committed on 16 April 1994, "in particular in the face of its finding […] that [he] did not physically participate in the killings."[373] During the appeals hearing, Ndahimana added that the Trial Chamber erred in not considering that no additional encouragement from him was necessary as the assailants were already fully determined to commit the crimes at Nyange Church.[374]

146. The Prosecution responds that Ndahimana's arguments have no merit and should be dismissed.[375] It submits that, regardless of their number, all of the attackers need not necessarily

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[364] Trial Judgement, para. 831.
[365] Trial Judgement, para. 831.
[366] Trial Judgement, para. 832.
[367] Ndahimana Notice of Appeal, para. 56; Ndahimana Appeal Brief, paras. 252, 257.
[368] Ndahimana Notice of Appeal, paras. 55, 56; Ndahimana Appeal Brief, paras. 245, 252-254, 256; AT. 6 May 2013 pp. 9, 11. *See also* Ndahimana Appeal Brief, paras. 285-290; Ndahimana Reply Brief, para. 93. During the appeals hearing, Ndahimana pointed out that the reference provided by the Trial Chamber in support of its finding that several perpetrators reported the encouraging effect of his presence during the attack was erroneous and that no evidence supported the Trial Chamber's finding. *See* AT. 6 May 2013 p. 11.
[369] Ndahimana Appeal Brief, para. 254.
[370] Ndahimana Appeal Brief, para. 254.
[371] Ndahimana Appeal Brief, para. 255.
[372] Ndahimana Notice of Appeal, para. 61; Ndahimana Appeal Brief, paras. 255, 268, 276.
[373] Ndahimana Appeal Brief, para. 263. *See also* Ndahimana Notice of Appeal, para. 57; Ndahimana Appeal Brief, para. 269.
[374] AT. 6 May 2013 pp. 8, 9.
[375] Prosecution Response Brief, paras. 7, 178-183.

have noticed Ndahimana's presence during the attacks and that it does not matter that Ndahimana did not physically participate in the killings, as active participation in the actual crime is not a requirement of aiding and abetting by tacit approval.[376]

147. The Appeals Chamber recalls that the *actus reus* of aiding and abetting is constituted by acts or omissions specifically directed to assist, encourage, or lend moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime.[377] The Appeals Chamber has explained that an individual can be found liable for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.[378] When this form of aiding and abetting has been a basis for a conviction, "it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it."[379]

148. The Appeals Chamber observes that, in holding Ndahimana liable for aiding and abetting, the Trial Chamber did not rely on the accused's mere presence at the crime scene as suggested by Ndahimana, but also relied on the authority he exerted, his prior conduct, and the fact that he did not openly object to the killings.[380] The Trial Chamber also expressly considered that several perpetrators reported the encouraging effect of Ndahimana's presence at Nyange Parish.[381] Although Ndahimana correctly submitted during the appeals hearing that the reference provided by the Trial Chamber in this regard was erroneous,[382] a review of the Prosecution evidence relied upon by the Trial Chamber for the 16 April attack confirms that, despite divergences concerning Ndahimana's specific actions, the testimonies of several witnesses converged regarding Ndahimana's encouraging role.[383]

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[376] Prosecution Response Brief, paras. 181, 182.
[377] *See, e.g.*, *Kalimanzira* Appeal Judgement, para. 74; *Seromba* Appeal Judgement, para. 139; *Muhimana* Appeal Judgement, para. 189. *See also Ntawukulilyayo* Appeal Judgement, para. 214; *Karera* Appeal Judgement, para. 321; *Nahimana et al.* Appeal Judgement, para. 482. *See also Perišić* Appeal Judgement, paras. 25-36, 38, 73.
[378] *Kalimanzira* Appeal Judgement, para. 74; *Muvunyi* Appeal Judgement of 29 August 2008, para. 80; *Brđanin* Appeal Judgement, para. 273.
[379] *Kalimanzira* Appeal Judgement, para. 74, *citing Brđanin* Appeal Judgement, para. 277. *See also Muvunyi* Appeal Judgement of 29 August 2008, para. 80; *Orić* Appeal Judgement, para. 42; *Brđanin* Appeal Judgement, para. 273 ("the combination of a position of authority and physical presence at the crime scene allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement."); *Kayishema and Ruzindana* Appeal Judgement, paras. 201, 202.
[380] Trial Judgement, paras. 829, 831.
[381] Trial Judgement, para. 830.
[382] AT. 6 May 2013 p. 11, *referring to* Trial Judgement, para. 830, fn. 1503.
[383] *See* Witness CDL, T. 12 November 2010 pp. 17-21; Witness CBK, T. 3 November 2010 p. 19; Witness CNJ, T. 4 November 2010 pp. 58-61; Witness CNT, T. 10 November 2010 pp. 45-49.

149. With respect to Ndahimana's arguments regarding the number of perpetrators involved,[384] the Appeals Chamber notes that the Trial Chamber made no specific finding on the number of assailants on 16 April 1994, only concluding that "thousands of persons (assailants and refugees alike) were present" at Nyange Parish.[385] Regardless of the number of assailants, the Appeals Chamber considers that the Trial Chamber was not required to establish that Ndahimana's presence was noticed by or provided moral support to *all* perpetrators to find that he substantially contributed to the killings. As for Ndahimana's argument that his assistance was not necessary as the assailants were already fully determined to commit the crimes at Nyange Church, the Appeals Chamber recalls that proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required by law.[386]

150. Likewise, Ndahimana fails to demonstrate an error in the Trial Chamber's finding that "his attendance at meetings held at Nyange parish on the days prior to 16 April 1994, amidst the attacks and other circumstances prevailing at the parish and in his *commune* conveyed the impression of him as an 'approving spectator.'"[387] While the Trial Chamber does not point to any direct evidence in support of this finding, the Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude that it was the only reasonable inference that could be drawn from the evidence on Ndahimana's authority and influence, his repeated meetings with members of the JCE,[388] and his failure to publicly object to the killings. In this regard, the Appeals Chamber notes that the Trial Chamber accepted evidence that two of the participants in the 16 April attack[389] and another individual present during the attack[390] had witnessed Ndahimana's participation in meetings held with members of the JCE prior to the 16 April attack.[391]

151. Finally, the Appeals Chamber finds that Ndahimana's submission regarding an alleged failure of the Trial Chamber to provide a reasoned opinion lacks any merit. As discussed above,[392]

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[384] Ndahimana Appeal Brief, para. 254. *See also ibid.*, para. 255.
[385] Trial Judgement, para. 698. The Trial Chamber evaluated the number of victims to "hundreds and possibly thousands". *See ibid.*, paras. 837, 842. Only Witness CNJ estimated the number of perpetrators to be 10,000. *See* Witness CNJ, T. 5 November 2010 pp. 36, 37. However, the Appeals Chamber observes that the Trial Chamber found that it would only rely on Witness CNJ's evidence on the 16 April events where corroborated. *See* Trial Judgement, para. 641.
[386] *Blaškić* Appeal Judgement, para. 48.
[387] Trial Judgement, para. 831.
[388] The Appeals Chamber notes that, while repeatedly referring to the "members of the JCE" throughout the Trial Judgement, the Trial Chamber only identified Athanase Seromba, Fulgence Kayishema, and Gaspard Kanyarukiga as members of the JCE. *See* Trial Judgement, paras. 17, 295, 806.
[389] Trial Judgement, paras. 578 (Witness CDL), 590 (Witness CNJ).
[390] Trial Judgement, paras. 585, 680, 686 (Witness CBK).
[391] Trial Judgement, paras. 191, 282, 295, 297, 667, 674.
[392] *See supra*, para. 144.

the Trial Chamber provided clear and explicit reasons in support of its finding that Ndahimana substantially contributed to the killings perpetrated at Nyange Church on 16 April 1994.

152. In light of the foregoing, the Appeals Chamber finds that Ndahimana has failed to demonstrate any error in the Trial Chamber's conclusion that his conduct constituted the *actus reus* of aiding and abetting by tacit approval the killings at Nyange Church on 16 April 1994.

2. *Mens Rea*

153. The Trial Chamber found that Ndahimana "must have known that his presence during the attack would have a significant encouraging effect on the assailants" and "could not have ignored" that his failure to openly object to the killings "would likely be considered by the assailants as tacit approval of their perpetration of the attacks."[393] The Trial Chamber also held that Ndahimana knew that the destruction of the church would necessarily cause the death of the Tutsi refugees,[394] and that Ndahimana "could not have ignored, nor been ignorant of the fact that the main perpetrators intended to commit genocide."[395]

154. Ndahimana submits that the inference of his *mens rea* drawn by the Trial Chamber was not the only reasonable conclusion available from the evidence on the record.[396] He argues that the Trial Chamber failed to establish "unequivocally" that he knew that he was contributing significantly to the killings and, instead, speculated on his state of mind.[397] In his view, the Trial Chamber also erred in finding that he knew that the destruction of Nyange Church would cause the deaths of the refugees in the absence of any evidence.[398] Ndahimana further submits that the Trial Chamber erred in ignoring its own findings that his life was under threat and that his presence during the destruction of Nyange Church may have resulted from duress.[399] According to him, duress prevented him from possessing the *mens rea* for aiding and abetting.[400] In addition, Ndahimana contends that the Trial Chamber shifted the burden of proof by using expressions such as "Ndahimana must have known" and "Ndahimana could not ignore" or "be ignorant".[401]

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[393] Trial Judgement, para. 831.
[394] Trial Judgement, para. 831.
[395] Trial Judgement, para. 828.
[396] Ndahimana Notice of Appeal, paras. 57, 58; Ndahimana Appeal Brief, paras. 260-262, 265.
[397] Ndahimana Appeal Brief, paras. 264, 265, 268, 269. *See also* Ndahimana Notice of Appeal, paras. 57, 58, 60, 61.
[398] Ndahimana Notice of Appeal, para. 62.
[399] Ndahimana Notice of Appeal, paras. 59, 63, 64; Ndahimana Appeal Brief, paras. 266, 267, 273, 278, 279, 283, 284, 292-301; Ndahimana Reply Brief, paras. 97-99.
[400] Ndahimana Notice of Appeal, para. 64; Ndahimana Appeal Brief, paras. 283, 284, 292, 301; Ndahimana Reply Brief, paras. 97-99. *See also* AT. 6 May 2013 p. 10. Ndahimana argues that duress prevented him from committing the *actus reus* of the crimes willingly. *See* Ndahimana Reply Brief, para. 93.
[401] Ndahimana Appeal Brief, para. 262, *referring to* Trial Judgement, paras. 828, 831.

155. The Prosecution responds that the Trial Chamber's finding was not based on speculation but on reliable circumstantial evidence leading to the only reasonable conclusion that Ndahimana had the *mens rea* of an approving spectator for aiding and abetting genocide and extermination as a crime against humanity.[402] It also contends that there is no evidence that Ndahimana's conduct was the product of duress.[403] The Prosecution further submits that the Trial Chamber's impugned expressions did not shift the burden of proof but were "all just short hand references to say" that Ndahimana had the requisite knowledge.[404]

156. In light of its conclusion below that the Trial Chamber erred in finding that Ndahimana was under threat on 16 April 1994 and that his presence at Nyange Parish on 16 April 1994 might have resulted from duress,[405] the Appeals Chamber considers Ndahimana's submissions regarding duress as moot and will not consider them further.

157. The Appeals Chamber recalls that the requisite *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal perpetrator.[406] The aider and abettor need not share the *mens rea* of the principal perpetrator but must be aware of the essential elements of the crime ultimately committed by the principal, including his state of mind.[407] Specific intent crimes such as genocide require that the aider and abettor must know of the principal perpetrator's specific intent.[408]

158. Ndahimana correctly points out that the Trial Chamber inferred that he possessed the requisite *mens rea* for aiding and abetting.[409] The Trial Judgement reflects that this inference was based on circumstantial evidence. Specifically, the Trial Chamber took into account Ndahimana's position of authority as *bourgmestre* of Kivumu Commune, the fact that he was a person of influence, the moral authority he exerted over the population of his commune, and his presence prior to and during the 16 April attack.[410] Ndahimana fails to demonstrate that the Trial Chamber erred in inferring from this evidence that the only reasonable conclusion was that he knew that his presence during the 16 April attack would have a significant encouraging effect on the perpetrators and would likely be considered as tacit approval of the attack and killings.[411]

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[402] Prosecution Response Brief, paras. 186-190.
[403] Prosecution Response Brief, paras. 7, 197-202.
[404] Prosecution Response Brief, para. 194.
[405] *See infra*, paras. 185, 186.
[406] *See, e.g., Perišić* Appeal Judgement, para. 48; *Ntawukulilyayo* Appeal Judgement, para. 222; *Kalimanzira* Appeal Judgement, para. 86; *Rukundo* Appeal Judgement, para. 53.
[407] *See, e.g., Perišić* Appeal Judgement, para. 48, and authorities cited therein.
[408] *See, e.g., Ntawukulilyayo* Appeal Judgement, para. 222; *Blagojević and Jokić* Appeal Judgement, para. 127.
[409] *See* Ndahimana Appeal Brief, para. 261. *See also* Trial Judgement, paras. 828, 830.
[410] Trial Judgement, paras. 829-831.
[411] Trial Judgement, para. 831.

159. Likewise, Ndahimana fails to demonstrate that it was unreasonable for the Trial Chamber to conclude, despite the absence of direct evidence on the matter, that he knew that the physical destruction of the church using a bulldozer would cause the deaths of the Tutsis who had sought refuge in the church.[412] In the view of the Appeals Chamber, this conclusion was the only reasonable inference that could be drawn from the evidence that Ndahimana: (i) knew that the destruction of the church was decided for the purpose of killing the Tutsis who had locked themselves in; (ii) knew that a bulldozer would be used to that effect; (iii) knew that Tutsi refugees remained in the church; and (iv) was present during the destruction of the church and the killings of the refugees.[413]

160. Finally, the Appeals Chamber considers that while phrases such as "Ndahimana must have known"[414] and "Ndahimana could not ignore"[415], "could not have ignored"[416] or "been ignorant"[417] are not entirely clear,[418] they cannot be reasonably interpreted as denoting a shift in the burden of proof. Rather, the Trial Chamber's overall reasoning shows that it was convinced that the only reasonable conclusion to be drawn from the evidence was that Ndahimana knew that his presence would have an encouraging effect on the perpetrators of the killings at Nyange Church on 16 April 1994, and knew that the perpetrators intended to commit genocide and extermination as a crime against humanity.[419]

161. In light of the foregoing, the Appeals Chamber finds that Ndahimana has failed to demonstrate any error in the Trial Chamber's conclusion that the only reasonable inference available from the evidence was that he possessed the requisite *mens rea* to be held responsible for aiding and abetting by tacit approval the killings at Nyange Church on 16 April 1994.

3. Conclusion

162. For the above-mentioned reasons, the Appeals Chamber concludes that Ndahimana has failed to demonstrate that the Trial Chamber erred in holding him liable for aiding and abetting by tacit approval the killings at Nyange Church on 16 April 1994. Accordingly, the Appeals Chamber dismisses Ndahimana's Eighth and Ninth Grounds of Appeal in their entirety.

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[412] *See* Ndahimana Notice of Appeal, para. 62.
[413] *See* Trial Judgement, paras. 673-675, 686, 689, 753, 756, 806, 807, 828.
[414] Trial Judgement, para. 831.
[415] Trial Judgement, para. 828.
[416] Trial Judgement, paras. 828, 831.
[417] Trial Judgement, para. 828.
[418] *Cf. Krstić* Appeal Judgement, para. 81.
[419] Trial Judgement, paras. 828-832.

C. Alleged Errors Relating to Ndahimana's Responsibility for Participation in a Joint Criminal Enterprise (Prosecution Grounds 3 and 4)

163. As recalled above, the Trial Chamber found that, following the death of President Habyarimana, a joint criminal enterprise came into existence in Kivumu Commune, the purpose of which was to exterminate the Tutsis of the commune.[420] The Trial Chamber further found that Ndahimana: (i) attended meetings with members of the JCE at Nyange Presbytery on 13, 14, and 15 April 1994;[421] (ii) was present at the meeting held on the morning of 16 April 1994 near Nyange Presbytery when the decision was taken to kill the Tutsis who had sought refuge in Nyange Church by destroying the church;[422] (iii) was present during the destruction of the church and the killing of the Tutsi refugees that started after the 16 April morning meeting;[423] and (iv) shared drinks with members of the JCE after the destruction of the church.[424]

164. The Trial Chamber concluded that the Prosecution had failed to prove that the only reasonable inference to draw from the evidence was that Ndahimana shared the genocidal intent of the other members of the JCE.[425] Notably, the Trial Chamber considered that Ndahimana's presence at the meeting held on 16 April 1994 "might have been motivated by duress",[426] and that it was not established beyond reasonable doubt why he shared drinks with members of the JCE after the destruction of the church.[427] The Trial Chamber accordingly concluded that Ndahimana could not be held responsible pursuant to Article 6(1) of the Statute for committing genocide and extermination as a crime against humanity through participation in the JCE.[428] The Trial Chamber, nonetheless, found Ndahimana guilty of genocide and extermination as a crime against humanity for aiding and abetting by tacit approval the killings perpetrated at Nyange Parish on 16 April 1994.[429]

165. The Prosecution submits that the Trial Chamber erred in finding that Ndahimana did not possess the requisite intent to be convicted of committing genocide and extermination as a crime against humanity through participation in a joint criminal enterprise.[430] In particular, the

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[420] Trial Judgement, para. 5.
[421] Trial Judgement, paras. 13, 14, 17, 282, 297, 564, 813.
[422] Trial Judgement, paras. 756, 806. *See also ibid.*, paras. 22, 667, 673, 675.
[423] Trial Judgement, paras. 23, 24, 675, 686, 689, 807.
[424] Trial Judgement, paras. 24, 695.
[425] Trial Judgement, paras. 26, 812, 822.
[426] Trial Judgement, para. 676. *See also ibid.*, para. 675.
[427] Trial Judgement, para. 695.
[428] Trial Judgement, paras. 26, 822.
[429] Trial Judgement, paras. 28, 29, 832, 841-843.
[430] Prosecution Notice of Appeal, paras. 11-13, 19; Prosecution Appeal Brief, paras. 30-34, 46. In its Notice of Appeal, the Prosecution further alleged that the Trial Chamber erred in: (i) failing to find that Ndahimana's participation in the crimes also constituted planning; and (ii) finding that "specific intent" is required for joint criminal enterprise liability. *See* Prosecution Notice of Appeal, heading Ground 3 at p. 3, paras. 12-14. The Appeals Chamber observes that the

Prosecution contends that the Trial Chamber erred in finding that Ndahimana might have acted under duress and that he did not share the intent of the other members of the JCE.[431] It submits that the Appeals Chamber should find Ndahimana guilty under Article 6(1) of the Statute for committing genocide and extermination as a crime against humanity as a participant in the JCE.[432]

166. The Appeals Chamber will discuss the Prosecution's arguments related to duress before turning to its submissions on Ndahimana's responsibility for participation in a joint criminal enterprise.

1. Duress

167. The Trial Chamber considered that Ndahimana's presence at the 16 April morning meeting did not necessarily mean that he shared the criminal intent of the members of the JCE, or that he planned or agreed to kill the Tutsi refugees,[433] given that his "presence […] at Nyange church on 16 April 1994 might have been motivated by duress as credible evidence showing that he was under threat was adduced during trial."[434] In its sentencing deliberations, the Trial Chamber further held that Ndahimana's "participation in the killings may have resulted from a sense of duress rather than from extremism or ethnic hatred."[435]

168. The Prosecution submits that the Trial Chamber erred in finding that Ndahimana's participation in the 16 April morning meeting might have been motivated by duress.[436] It argues that "duress was not a defence properly raised at trial, nor was it established – either as a formal legal defence or mere evidentiary issue – on the record presented."[437]

Prosecution failed to develop in its Appeal Brief the allegation pertaining to planning and therefore considers that the Prosecution has abandoned this allegation of error. The Appeals Chamber further notes that, in its Appeal Brief, the Prosecution indicated that it did not intend to pursue the allegation of error pertaining to the requirement of specific intent for joint criminal enterprise liability. *See* Prosecution Appeal Brief, fn. 72.

[431] Prosecution Notice of Appeal, paras. 13, 14, 17-19; Prosecution Appeal Brief, paras. 29-46.

[432] Prosecution Notice of Appeal, para. 15; Prosecution Appeal Brief, para. 46.

[433] Trial Judgement, paras. 22, 676.

[434] Trial Judgement, para. 676.

[435] Trial Judgement, para. 868. *See also ibid.*, para. 30 ("[…] it does suggest that his participation through aiding and abetting may have resulted from duress rather than from extremism or ethnic hatred.").

[436] Prosecution Notice of Appeal, paras. 16-18; Prosecution Appeal Brief, paras. 35-45. *See also* AT. 6 May 2013 pp. 18-21.

[437] Prosecution Appeal Brief, para. 35. *See also* Prosecution Notice of Appeal, paras. 17, 18; Prosecution Appeal Brief, paras. 36-45.

(a) Alleged Failure to Raise Duress as a Special Defence

169. The Prosecution contends that duress was not properly raised as a defence at trial as Ndahimana never provided notice of his intent to rely on duress as a special defence as required by Rule 67(A)(ii)(b) of the Rules.[438] The Prosecution argues that, although this failure to provide notice did not preclude Ndahimana from relying on this defence, it should have adversely impacted the Trial Chamber's assessment of its credibility.[439]

170. Ndahimana responds that, even if formal notice of his intent to rely on duress as a special defence as required by the Rules was not given, the Prosecution was given sufficient notice and had the opportunity to fully cross-examine all Defence witnesses who testified about threats against him.[440] He also submits that the Prosecution never raised any concerns about the lack of notice during trial and addressed the defence of duress in its Closing Brief.[441] While maintaining that he was not at Nyange Parish on 16 April 1994 but was in hiding due to threats, Ndahimana requests that, should the Appeals Chamber uphold the Trial Chamber's finding that he was present at Nyange Church on 16 April 1994, the Appeals Chamber treat duress as a complete defence and acquit him of aiding and abetting genocide.[442]

171. In reply, the Prosecution contends that it had no notice of Ndahimana's intention to rely on duress as a defence.[443] It submits that the evidence Ndahimana points to as showing that he was "a wanted man" does not equate to the special defence of duress, nor does it remedy the failure to provide the notice required by the Rules.[444]

172. A careful review of the record reveals that at no point in the trial proceedings did Ndahimana rely on duress as a special defence pursuant to Rule 67(A)(ii)(b) of the Rules. While Ndahimana argued at trial that he was hiding in the Convent as a result of threats, it is clear

[438] Prosecution Notice of Appeal, para. 17; Prosecution Appeal Brief, paras. 4, 35, 36.
[439] Prosecution Appeal Brief, paras. 36, 45, *referring to Kalimanzira* Appeal Judgement, para. 56.
[440] Ndahimana Response Brief, paras. 67, 68, 72-74, *referring to The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Grégoire Ndahimana's Pre-Defence Brief, 7 December 2010, as corrected by *The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Corrigendum to the Grégoire Ndahimana's Pre-Defence Brief, 12 January 2011 ("Ndahimana Pre-Defence Brief"), paras. 18, 116; Ndahimana Motion to Vary Witness List; Closing Arguments, T. 22 September 2011 p. 24.
[441] Ndahimana Response Brief, paras. 14, 68, *referring to The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Prosecutor's Final Trial Brief, 25 July 2011 ("Prosecution Closing Brief"), paras. 265, 266.
[442] Ndahimana Response Brief, paras. 69-71. Ndahimana submits that the Appeals Chamber should revisit the holding in the *Erdemović* Appeal Judgement that duress cannot amount to a complete defence. *See ibid.* para. 71, *referring to Erdemović* Appeal Judgement, para. 19. The Prosecution replies that Ndahimana provides no cogent reasons to depart from the *Erdemović* precedent. *See* Prosecution Reply Brief, paras. 19-21. The Appeals Chamber considers that the issue need not be considered in light of its conclusion on this aspect of the Prosecution's appeal.
[443] Prosecution Reply Brief, paras. 14, 15. The Prosecution submits that Ndahimana read the Prosecution Closing Brief out of context since in the two cited paragraphs, the Prosecution merely responded to the argument that Ndahimana's life was allegedly in danger. *See ibid.*, para. 15.
[444] Prosecution Reply Brief, para. 16.

that the claim that he was under threat was made in support of his alibi and was not raised as a separate defence.[445] The Appeals Chamber observes that the Defence's position at trial was not that Ndahimana participated in the meeting at Nyange Parish in the morning of 16 April 1994 and was present during the ensuing attack on the church because he was under threat or duress, but that Ndahimana *was not present* at Nyange Parish that day because he was hiding in the Convent as a result of threats.

173. The Appeals Chamber further notes that nothing in the Trial Judgement suggests that the Trial Chamber considered duress as a special defence. The Trial Judgement does not contain any discussion of the law applicable to duress as a special defence,[446] nor does it refer to duress as a special defence.

174. It also bears noting that the Trial Chamber did not make any determinative finding on duress but merely stated that Ndahimana "might", or "may", have been motivated by duress when discussing whether he shared the criminal intent of the members of the JCE[447] and whether his participation resulted from "extremism or ethnic hatred."[448] Read in context, the relevant parts of the Trial Judgement reveal that the Trial Chamber was not making findings on duress as a legal defence but simply considering an alternative reasonable inference from the circumstantial evidence on the record as to Ndahimana's *mens rea* when participating in the events of 16 April 1994 at Nyange Church.

175. The Appeals Chamber therefore finds no merit in the submissions raised by the Prosecution and Ndahimana regarding duress as a special defence and dismisses them.

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[445] *See* Notice of Alibi, item 16, p. 3; Ndahimana Pre-Defence Brief, paras. 116, 134, *and* Annex 1, Summary of Facts and Points in the Indictment on Which Witnesses Will Testify, Witnesses ND2 and KR4, items 12, 29 at pp. 29, 34; Ndahimana Motion to Vary Witness List, para. 23 *and* Annex 1, Summary of Facts and Points in the Indictment on Which Additional Witnesses Will Testify, Witnesses ND35, FM2, FB11, ND37, pp. 10, 12; Ndahimana Closing Brief, paras. 32, 389.
[446] *See, in contrast*, Trial Judgement, paras. 53-56, *discussing* the standard applicable to alibi.
[447] Trial Judgement, para. 676.
[448] Trial Judgement, para. 868. *See also ibid.*, para. 30.

(b) Assessment of the Evidence

176. The Trial Chamber inferred that Ndahimana's presence during the 16 April morning meeting and the destruction of the church might have been motivated by duress on the basis that "credible evidence showing that he was under threat was adduced during trial."[449] The Trial Chamber examined evidence that Ndahimana was under threat in a specific section of the Trial Judgement discussing the "Defence Case".[450] The Trial Chamber found that the evidence of Defence Witnesses ND17, BX3, and ND6 established that Ndungutse, one of the leaders of the attacks that took place at Nyange Church and a person of influence, "challenged [Ndahimana]'s authority and that some members of the population actually thought that [Ndahimana] was a targeted person."[451] On this basis, the Trial Chamber concluded that "Ndahimana was under threat during the period in question."[452]

177. The Prosecution submits that even if the Trial Chamber's "reference to 'duress' was not meant in a strictly legal sense but merely in a colloquial sense", the finding that Ndahimana might have acted under duress is not supported by the evidence on the record.[453] In particular, the Prosecution argues that: (i) the general allegations of Witnesses ND17, BX3, and ND6 do not establish any "immediate threat of severe irreparable harm to life or limb", and Ndahimana sharing drinks with other members of the JCE is "hardly behavior consonant with an individual who feared an immediate threat of serious harm";[454] (ii) there was no evidence suggesting that Ndahimana, as a *bourgmestre* with effective control over the communal police, could not have averted the evil that he participated in launching;[455] (iii) the attack on the Tutsi refugees in Nyange Church was grossly disproportionate to "the ambiguous and general threats allegedly made against [Ndahimana]";[456] and (iv) Ndahimana willingly and knowingly attended meetings before, during, and after the attacks on the Tutsi refugees, remained in office until July 1994, used his authority to protect Tutsis, and had a freedom of movement indicating that the alleged "vague threats" did not preclude him from exercising his authority as *bourgmestre* and from attending other meetings where the killings of Tutsi refugees were planned.[457] During the appeals hearing, the Prosecution added that, by crediting

[449] Trial Judgement, para. 676.
[450] *See* Trial Judgement, Sections III.6.3.7 *and* III.6.3.7.2.
[451] Trial Judgement, para. 706.
[452] Trial Judgement, para. 706.
[453] Prosecution Appeal Brief, para. 44. *See also* Prosecution Notice of Appeal, paras. 17, 18; Prosecution Appeal Brief, paras. 35, 45; AT. 6 May 2013 pp. 19, 44, 45. The Prosecution argues that, even "in ordinary usage", duress "requires a showing that a person's will or freedom of choice has been overborne by external threats or coercion." *See* Prosecution Appeal Brief, para. 44, fn. 99, *referring to* Concise Oxford Dictionary, 10th ed. Rev. (2001).
[454] Prosecution Appeal Brief, paras. 39, 40.
[455] Prosecution Appeal Brief, para. 41.
[456] Prosecution Appeal Brief, para. 42.
[457] Prosecution Appeal Brief, para. 43; AT. 6 May 2013 pp. 20, 45-47.

Witness ND6's testimony about Ndungutse's alleged search for Ndahimana, the Trial Chamber contradicted its own finding on Ndahimana's presence at the morning meeting on 16 April 1994.[458]

178. In response, Ndahimana submits that the Trial Chamber did not err in finding that he was under threat during the period in question and that his presence at the crime scene may have resulted from a sense of duress.[459] According to him, ample evidence that he was under threat was produced in court,[460] and the Prosecution fails to take into account that there was an imminent threat to his life.[461]

179. The question before the Appeals Chamber is whether the Trial Chamber erred in finding that credible evidence showed that Ndahimana was under threat during the period in question and, on this basis, in considering as a possible reasonable inference that his presence at the 16 April morning meeting and during the ensuing killings at Nyange Church might have been motivated by duress.

180. The Trial Chamber primarily relied on Witness ND6's testimony in support of its finding that Ndahimana was under threat during the period in question and had reason to be concerned for his safety.[462] In particular, the Trial Chamber relied on Witness ND6's testimony that Ndungutse believed that Ndahimana was an "accomplice of the *Inyenzis*" and that, around noon on 16 April 1994, he went to Ndahimana's house on Ndungutse's orders.[463] The Trial Chamber expressly referred to Witness ND6's testimony that Ndungutse stated that they "must go and look for *Inyenzis*" and "go and look for Ndahimana to show him that his efforts [to protect the refugees by positioning gendarmes at the church] have all failed."[464] The Trial Chamber further found that the testimonies of Witnesses ND17 and BX3 "corroborate[d] that the accused had reason to be concerned for his safety."[465] The Trial Chamber observed in particular that "Witness ND17 believed that Ndahimana was a 'targeted person […] because he was not involved in the business of killing people,' and because he had arrested suspected murderers",[466] and noted that Witness BX3

[458] AT. 6 May 2013 p. 45.
[459] Ndahimana Response Brief, paras. 12, 16, 63.
[460] Ndahimana Response Brief, para. 13, *referring to* the testimonies of Defence Witnesses ND2, ND6, ND11, ND14, ND17, ND35, BX3, Melane Nkiriyehe, and Clément Kayishema. The Prosecution responds that the Trial Chamber only relied on Witnesses ND17, BX3, and ND6 in support of the finding of threat, that Witnesses ND35, ND11, and Clément Kayishema did not testify about Ndahimana being under threat, and that Witnesses ND14 and ND2 testified about threats in Rubaya which are not relevant to Ndahimana's convictions. *See* Prosecution Reply Brief, para. 18.
[461] Ndahimana Response Brief, para. 75.
[462] Trial Judgement, paras. 702-706.
[463] Trial Judgement, para. 702, *referring to* Witness ND6, T. 27 January 2011 pp. 14, 15.
[464] Trial Judgement, paras. 702, 706, *referring to* Witness ND6, T. 27 January 2011 p. 27.
[465] Trial Judgement, para. 705.
[466] Trial Judgement, para. 706, *quoting* Witness ND17, T. 3 May 2011 p. 17.

explained that, after 12 April 1994, "Ndahimana was in hiding because people wanted to do harm to him".[467]

181. Witness ND6 testified to arriving at Nyange Parish around noon on 16 April 1994 and, because Ndungutse complained that Ndahimana was not at the parish, going to Ndahimana's house with Ndungutse and a group of people shortly afterwards.[468] The witness explained that Ndahimana was not present at his house and that he and his group went back to Nyange Church where he participated in the attack, which was starting.[469] Witness ND6 stated that the attack against the church was prepared while he and his group were looking for Ndahimana, and that Ndahimana was not present during the attack.[470] The Appeals Chamber notes, however, that Witness ND6's version of events contradicts the corroborated testimonial evidence the Trial Chamber relied on to find that the attack was prepared in the morning of 16 April 1994 during a meeting held near Nyange Presbytery at which both Ndahimana and Ndungutse were present and that Ndahimana remained at Nyange Church until after the attack.[471] The Appeals Chamber considers that a reasonable trier of fact could not accept as credible the uncorroborated testimony of Witness ND6 that Ndungutse was looking for Ndahimana on 16 April 1994 because Ndahimana was not at Nyange Church, while also accepting corroborated evidence that Ndahimana was present at Nyange Parish from the morning of 16 April 1994 and attended the morning meeting with Ndungutse.[472] Against this background, the Appeals Chamber considers that the Trial Chamber erred in finding that Witness ND6's evidence constituted credible evidence showing that Ndahimana was under threat.

182. Turning to Witnesses ND17 and BX3, who were found to corroborate that Ndahimana had reason to be concerned for his safety, the Appeals Chamber observes that, in an earlier part of the Trial Judgement, the Trial Chamber expressed doubts about the reliability of Witness BX3's vague hearsay evidence and the credibility of Witness ND17's testimony, which it found presented a risk of recent fabrication of evidence.[473] The Trial Chamber concluded that their evidence that Ndahimana was hiding in the Convent on 16 April 1994 was not reasonably possibly true.[474]

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[467] Trial Judgement, para. 706, *quoting* Witness BX3, T. 23 February 2011 pp. 34-36.
[468] Witness ND6, T. 27 January 2011 pp. 14-16, 26, 27. *See also* Trial Judgement, paras. 616, 702, 704.
[469] Witness ND6, T. 27 January 2011 pp. 15, 26, 27. *See also* Trial Judgement, paras. 616, 655, 702.
[470] Witness ND6, T. 27 January 2011 pp. 15, 16, 29.
[471] *See* Witness CBR, T. 1 November 2010 pp. 23-25; Witness CBK, T. 3 November 2010 p. 17; Witness CNJ, T. 4 November 2010 pp. 57-60. *See also* Trial Judgement, paras. 571, 586, 591, 667-673.
[472] Additionally, the Appeals Chamber observes that, even if ignoring this significant discrepancy between Witness ND6's evidence and the corroborated evidence relied upon by the Trial Chamber to find that Ndahimana was present at the 16 April morning meeting and during the attack on Nyange Church, Witness ND6 was clear that he and Ndungutse did not see Ndahimana at his house or at Nyange Church. *See* Witness ND6, T. 27 January 2011 pp. 15, 16, 27-29; Trial Judgement, paras. 616, 702, 704. The Appeals Chamber therefore fails to see how Ndungutse's instructions to Witness ND6 may have in any way influenced Ndahimana's attendance at the morning meeting and destruction of the church.
[473] Trial Judgement, paras. 651-657.
[474] Trial Judgement, para. 657.

Nonetheless, when discussing the evidence of Witnesses ND17 and BX3 on the issue of whether Ndahimana was targeted, the Trial Chamber stated: "[t]hat the alibi was not found reasonably possibly true does not mean that the entire testimonies of the alibi witnesses must be disregarded."[475]

183. The Appeals Chamber agrees that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[476] In the present instance, however, the Appeals Chamber notes that Witness ND17's evidence on the existence of threats serves as an explanation for Ndahimana's hiding at the Convent.[477] The evidence of Witness ND17 regarding Ndahimana being targeted is therefore inextricably linked to his evidence explaining why Ndahimana was in hiding on 16 April 1994, an aspect of his testimony which was not found to be "reasonably possibly true".[478] It was therefore not reasonable for the Trial Chamber to distinguish these two parts of his testimony and accept the former part as credible, while rejecting the latter part as not "reasonably possibly true".

184. Similarly, Witness BX3 testified that Ndahimana went into hiding because he was targeted.[479] The witness's evidence that Ndahimana was in hiding after 12 April 1994[480] was nonetheless rejected by the Trial Chamber, which, based on corroborated evidence (including Ndahimana's in part), concluded as proven beyond reasonable doubt that: Ndahimana attended meetings at Nyange Parish on 13 April 1994, 14 April 1994, 15 April 1994, and 16 April 1994;[481] participated in a public funeral in Rufungo on 15 April 1994;[482] was present during the destruction of Nyange Church on 16 April 1994 and shared drinks afterwards;[483] and continued to exercise his functions as *bourgmestre* in April 1994, notably in issuing orders to communal policemen which were obeyed.[484] In light of this, the Appeals Chamber considers that it was unreasonable for the Trial Chamber to accept as credible the evidence of Witnesses ND17 and BX3 that Ndahimana was under threat during the period in question.

185. Based on the foregoing, the Appeals Chamber concludes that it was unreasonable for the Trial Chamber to find that Witnesses ND6, ND17, and BX3 provided credible evidence that Ndahimana was under threat during the period in question. Ndahimana also fails to substantiate his

[475] Trial Judgement, para. 706, fn. 1330.
[476] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[477] *See* Witness ND17, T. 3 May 2011 p. 4 (closed session).
[478] *See* Trial Judgement, para. 657.
[479] Witness BX3, T. 23 February 2011 pp. 14, 15 (closed session), p. 36.
[480] Witness BX3, T. 23 February 2011 p. 36.
[481] Trial Judgement, paras. 11, 13, 14, 17, 282, 297, 563, 564, 673, 710, 753, 754, 756, 806, 813.
[482] Trial Judgement, paras. 17, 526.
[483] Trial Judgement, paras. 23, 24, 686, 689, 695, 754, 764, 798.

assertion on appeal that there was ample evidence to that effect on the record.[485] In the absence of credible evidence that Ndahimana was under threat, the Appeals Chamber finds that the Trial Chamber erred in concluding that Ndahimana's presence at Nyange Church on 16 April 1994 might have been motivated by duress, in particular where Ndahimana himself did not suggest at trial that this was the case.[486]

186. Accordingly, the Appeals Chamber grants this part of the Prosecution's Fourth Ground of Appeal and sets aside the Trial Chamber's finding that Ndahimana's presence at Nyange Church on 16 April 1994 might have been motivated by duress. The Appeals Chamber will discuss the impact of its finding on Ndahimana's responsibility, if any, in the following section.

2. Responsibility for Participation in a Joint Criminal Enterprise

187. The Trial Chamber expressly examined whether, by his presence on 16 April 1994, Ndahimana committed the crime of genocide through a basic form of joint criminal enterprise.[487] The Trial Chamber concluded that it was not convinced beyond reasonable doubt that Ndahimana "shared the requisite specific intent of the other members of the JCE", as "[s]pecifically, the Prosecution failed to prove beyond reasonable doubt that [Ndahimana] shared the intent to destroy the Tutsi population in whole or in part."[488]

188. In respect of its finding, the Trial Chamber: (i) stated that it could not "rely on previous positive actions of the accused";[489] (ii) recalled that Ndahimana did not "play a central role in planning the killings at Nyange church[,] [t]hat is, he did not issue orders or express instructions to kill Tutsis";[490] (iii) held that, contrary to the Prosecution's submissions, it was "plausible that Ndahimana's presence at Nyange parish on the days preceding the destruction of Nyange church could have been motivated by an attempt to protect the refugees rather than to harm them";[491] and (iv) recalled that the reasons for him and members of the JCE sharing drinks after the destruction of the church were not established beyond reasonable doubt.[492] The Trial Chamber had also

[484] *See* Trial Judgement, paras. 743-747, 762.
[485] *See* Ndahimana Response Brief, paras. 13, 73.
[486] The Appeals Chamber recalls that Ndahimana's position at trial was that he was not present at Nyange Church on 16 April 1994, not that he attended the relevant meeting and was present during the killings because he was under threat or duress. *See* Ndahimana Pre-Defence Brief, paras. 112, 113, 116, 134. *See also* Ndahimana Closing Brief, paras. 29-32, 389.
[487] Trial Judgement, paras. 701, 809-823.
[488] Trial Judgement, para. 812. *See also ibid.*, para. 822.
[489] Trial Judgement, paras. 813, 814, *referring to* the findings regarding the meetings held on 13 and 14 April 1994 and to the conclusion that no inference could be drawn from Ndahimana's visit to Nyange Parish on the evening of 15 April 1994.
[490] Trial Judgement, para. 815.
[491] Trial Judgement, para. 820.
[492] Trial Judgement, para. 695.

considered in its factual findings that Ndahimana's presence at the 16 April morning meeting "d[id] not necessarily mean that he shared the criminal intent of the members of the JCE" as his presence "might have been motivated by duress".[493]

189. The Prosecution submits that the Trial Chamber erred in finding that Ndahimana did not possess the requisite intent to be convicted of genocide and extermination as a crime against humanity for participation in a joint criminal enterprise. The Prosecution specifically argues that the only reasonable inference that could be drawn from the evidence is that Ndahimana shared with the other members of the JCE the common purpose of killing the Tutsis in Kivumu Commune, as well as the requisite intent for genocide and extermination as a crime against humanity.[494]

190. In support of its contention, the Prosecution submits that Ndahimana met regularly with members of the JCE before, during, and immediately after the killings, and that he did not express any disagreement with the decision to kill the refugees by destroying the church, nor used his authority and power as *bourgmestre* to stop the attacks or punish the perpetrators.[495] It also argues that, given the timing and circumstances, the only plausible explanation for Ndahimana and members of the JCE sharing drinks after the destruction of the church was "to toast the ultimate success of their joint plan to kill the Tutsi refugees."[496] In the Prosecution's view, the fact that Ndahimana held a meeting on 20 April 1994 to discuss the division of the property of "dead Tutsis" during which no mention was made about punishing those responsible for the killings,[497] and the fact that Ndahimana promoted two key perpetrators of the 15 and 16 April killings to senior positions within the communal police only two weeks after the killings, further support the inference that he shared the common purpose of the JCE.[498] The Prosecution further relies on the fact that Ndahimana: (i) knew that a large number of armed assailants had gathered outside Nyange Church;[499] (ii) was present while Seromba and other members of the JCE communicated with the attackers on 15 and 16 April 1994;[500] (iii) knew that, as a direct result of the attacks, thousands of

[493] Trial Judgement, para. 676. *See also ibid.*, para. 675.
[494] Prosecution Notice of Appeal, paras. 12, 13; Prosecution Appeal Brief, paras. 30, 34. *See also* AT. 6 May 2013 p. 7.
[495] Prosecution Notice of Appeal, paras. 12, 13; Prosecution Appeal Brief, paras. 30, 31, *referring to* Trial Judgement, paras. 11, 13, 14, 17, 22, 24, 544, 659, 740, 767.
[496] Prosecution Appeal Brief, para. 32. *See also* AT. 6 May 2013 pp. 47, 60.
[497] Prosecution Appeal Brief, para. 33, *referring to* Witness KR3, T. 25 January 2011 p. 29 (closed session).
[498] Prosecution Appeal Brief, para. 33, *referring to* Trial Judgement, paras. 745, 749.
[499] Prosecution Appeal Brief, para. 31, *referring to* Witness CBK, T. 3 November 2010 p. 12; Witness YAU, T. 15 September 2010 p. 49.
[500] Prosecution Appeal Brief, para. 31, *referring to* Trial Judgement, paras. 673, 686; Witness CBK, T. 3 November 2010 p. 58; Witness YAU, T. 15 September 2010 p. 49.

Tutsi refugees would be killed or seriously injured;[501] and (iv) was present during a part of the ensuing attacks, including the destruction of the church.[502]

191. Ndahimana responds that the Prosecution fails to demonstrate that the Trial Chamber erred in finding that he did not share the genocidal intent of the JCE members and of the main perpetrators.[503] He submits that the Prosecution's submission regarding the sharing of drinks after the destruction of Nyange Church is immaterial as the Trial Chamber concluded that the paragraph of the Indictment containing this allegation did not allege any criminal conduct, and as the Prosecution failed to prove beyond reasonable doubt the reasons for the sharing of drinks.[504] Ndahimana also contends that the Prosecution's arguments based on an alleged meeting held on 20 April 1994 and on his promotion of communal policemen are without merit.[505]

192. The Appeals Chamber observes that the existence of the JCE was not disputed at trial.[506] The Appeals Chamber also recalls that the purpose of the JCE was to exterminate the Tutsis of Kivumu Commune with the specific intent to destroy them as a group.[507] Accordingly, in the circumstances of the instant case, the intent required for liability under the first category of joint criminal enterprise, namely the intent to further the common purpose of the JCE,[508] and the intent required for liability for committing the crimes of genocide and extermination as a crime against humanity are the same. The Appeals Chamber will therefore consider whether, as alleged by the Prosecution, the Trial Chamber erred in finding that Ndahimana did not share the intent of the other members of the JCE.

193. The Appeals Chamber finds no merit in the Prosecution's argument regarding the alleged meeting held on 20 April 1994 by Ndahimana to discuss the division of the property of Tutsis.

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[501] Prosecution Appeal Brief, para. 31, *referring to* Trial Judgement, para. 831.
[502] Prosecution Notice of Appeal, para. 12; Prosecution Appeal Brief, para. 31. The Prosecution submits that, as the highest administrative authority in "Nyange *commune*", Ndahimana's participation at the meetings where the attacks were planned and his presence when the church was destroyed "carried heavy symbolic weight" and "undoubtedly emboldened other members of the JCE, as well as the attackers." *See* Prosecution Appeal Brief, para. 31, *referring to* Trial Judgement, para. 831.
[503] Ndahimana Response Brief, paras. 41, 48, 55, 61.
[504] Ndahimana Response Brief, para. 56. In reply, the Prosecution argues that the evidence on the sharing of drinks and the 20 April 1994 meeting was offered to prove Ndahimana's intent to participate in the JCE and that he was not under threat at the time in question, and, as such, did not need to be pleaded in the Indictment. *See* Prosecution Reply Brief, paras. 23, 24.
[505] Ndahimana Response Brief, paras. 57-60. With respect to the alleged 20 April meeting, Ndahimana argues that: (i) there is no mention of this allegation in the Indictment; (ii) it was not raised at trial; (iii) the issue of the meeting was solely raised during the cross-examination of Defence Witness KR3; (iv) the Prosecution distorts the testimony of Witness KR3; and (v) the Trial Chamber held that it would rely on hearsay evidence only when corroborated by first-hand evidence. *See ibid.*, paras. 57-59. With respect to the promotion of policemen, he submits that the promotion of a policeman was at the time decided by the Communal Council upon recommendation of the *bourgmestre* and would become effective only after being approved by the prefect. *See ibid.*, para. 60, *referring to* Exhibits P47 and P51.
[506] Trial Judgement, para. 5.
[507] Trial Judgement, para. 5.

The Appeals Chamber observes that the evidence relied upon by the Prosecution with respect to this meeting is particularly vague.[509] More importantly, the Appeals Chamber does not consider that the holding of a meeting with *conseillers* of the commune to discuss various issues, such as the security in the sectors of the commune, the tour to be undertaken by the *bourgmestre* in the sectors, and the use of the property of Tutsis, during which there was no discussion about the massacres, is necessarily indicative of Ndahimana's alleged genocidal intent.[510]

194. A review of the Trial Judgement also disproves the Prosecution's claim that Ndahimana never used his authority as *bourgmestre* to stop the attacks on Tutsis or punish the perpetrators. Ndahimana was indeed found to have taken measures to arrest suspects in the murders of Martin Karekezi and Thomas Mwendezi perpetrated on or about 9 April 1994 and to disarm Ndungutse after he threatened Defence Witness KR3 for refusing to participate in an attack against Tutsis on 8 April 1994.[511] The Trial Chamber further relied on letters sent by Ndahimana on 10 and 11 April 1994, the authenticity of which was not challenged by the Prosecution, in which Ndahimana asked several Kivumu political party chairmen to request their members "not to attack anyone due to their political or ethnic leanings" and notify their members that anyone caught in the commission of such acts of aggression "shall be punished",[512] and urged a local leader of the *Mouvement Démocratique Républicain* ("MDR") to recommend to the MDR members "not to commit violence against anybody on ethnic basis".[513] The Appeals Chamber further notes that the Trial Chamber found it plausible that Ndahimana's presence at Nyange Parish on the days preceding the destruction of the church could have been motivated by an attempt to protect the refugees and accepted that Ndahimana assisted Tutsis during the genocide.[514] The Prosecution does not challenge those findings.

195. The Appeals Chamber, however, emphasises that although evidence of an accused's good character and assistance to Tutsis may be relevant to the assessment of his *mens rea*, it does not

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[508] The Appeals Chamber notes that the Prosecution alleges this form of joint criminal enterprise. *See* Prosecution Appeal Brief, para. 28.
[509] *See* Prosecution Appeal Brief, para. 33, *referring to* Witness KR3, T. 25 January 2011 p. 29 (closed session). It is, for instance, particularly unclear from Witness KR3's testimony whether the discussion on the use of the property of Tutsis concerned the property of Tutsi survivors or those who had been killed. *See* Witness KR3, T. 25 January 2011 pp. 29, 30 (closed session). As regards Ndahimana's argument that the allegation was not pleaded in the Indictment, the Appeals Chamber clarifies that the Prosecution is not required to plead the evidence by which it seeks to prove the material allegations in the indictment. *See*, *e.g.*, *Nahimana et al.* Appeal Judgement, para. 322; *Ntagerura et al.* Appeal Judgement, para. 21; *Kupreškić et al.* Appeal Judgement, para. 88.
[510] *See* Witness KR3, T. 25 January 2011 pp. 29, 30 (closed session).
[511] Trial Judgement, paras. 66, 70, 97, 866, fn. 1551.
[512] Trial Judgement, para. 143, *citing* Exhibit D124.
[513] Trial Judgement, para. 144, *citing* Exhibit D110C.
[514] Trial Judgement, paras. 66, 70, 96, 97, 820, 864, 868. The Appeals Chamber does not rely on the Trial Chamber's findings that Ndahimana used the meeting of 11 April 1994 to discuss the security situation in Kivumu and requested the prefect to send gendarmes to the parish as the reliance on these findings directly contradicts the Trial Chamber's

preclude a finding that the accused acted with genocidal intent.[515] In this regard, the Appeals Chamber finds merit in the Prosecution's submission concerning the reasons for Ndahimana and members of the JCE sharing drinks after the destruction of Nyange Church on 16 April 1994. While it accords deference to the Trial Chamber's reluctance to rely on the "interpretation" of Witnesses CBK, CBY, and CDJ that the group sharing drinks was celebrating the destruction of the church,[516] taking all circumstances into account, the Appeals Chamber fails to see any other reasonable inference that could be drawn from the evidence in the present case. In particular, the Appeals Chamber notes the corroborated evidence of Witnesses CBK, CBY, and CDJ that the drinks followed the destruction of the church and were shared next to the crime scene, that members of the JCE were present, and that the group was happy and in a rather joyous mood.[517] Against this background, the Appeals Chamber finds that the Trial Chamber erred in failing to conclude that the only reasonable inference to be drawn from the evidence was that the drinks were shared to toast the ultimate success of the plan to kill the Tutsi refugees. In the Appeals Chamber's view, Ndahimana's participation in this event supports the inference that he shared the intent of the other JCE members.[518]

196. A number of other facts established by the Trial Chamber, when considered together, further support the inference that Ndahimana shared the intent to further the common criminal purpose to exterminate the Tutsis of Kivumu Commune to destroy them as a group, specifically: (i) Ndahimana's repeated meetings with members of the JCE on 11, 13, 14, 15, and 16 April 1994; (ii) his attendance at the 16 April meeting where the decision to destroy the church was made; (iii) the fact that he must have known that he would be perceived as an approving spectator; (iv) his presence during the killings while having reason to know that it would encourage the assailants; (v) his failure to object to the killings on 16 April 1994; (vi) his failure to punish his subordinates from the communal police for their participation in the 15 April killings; and (vii) his promotion of Niyitegeka to the post of deputy brigadier on 29 April 1994 while knowing that he participated in the 15 April killings.[519]

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prior finding that the evidence in this regard "does not indicate whether the intent behind these decisions was to protect the refugees or to harm them." *See ibid.*, para. 788. *See also ibid.*, paras. 145, 866.

[515] *See, e.g.*, *Ntawukulilyayo* Appeal Judgement, para. 227; *Munyakazi* Appeal Judgement, paras. 142, 175.

[516] Trial Judgement, para. 695.

[517] *See* Witness CBK, T. 3 November 2010 pp. 7, 8, 20; Witness CBY, T. 9 November 2010 p. 55; Witness CDJ, T. 11 November 2010 pp. 31, 39, 40; Trial Judgement, paras. 691-695. The Appeals Chamber notes that, while expressing concerns about the credibility of this aspect of the testimonies of Witnesses CBK, CBY, and CDJ, the Trial Chamber nonetheless relied on their testimonies to find proven beyond reasonable doubt that Ndahimana shared drinks with members of the JCE after the killings on 16 April 1994, finding only that the evidence had not established beyond reasonable doubt "the reasons for their sharing drinks." *See* Trial Judgement, para. 695.

[518] Trial Judgement, para. 695.

[519] Trial Judgement, paras. 9, 11, 13, 14, 17, 18, 104, 136, 282, 293, 297, 673, 710, 746, 750, 753, 754, 788, 806, 813, 824-832, fn. 1402. *See supra*, Section IV.A. The Appeals Chamber recalls that the Trial Chamber found that the

197. The Appeals Chamber has found above that it was not reasonable for the Trial Chamber to find that Ndahimana's presence at Nyange Church on 16 April 1994 might have been motivated by duress.[520] This was the only alternative reasonable inference expressly identified by the Trial Chamber to rule out the inference that Ndahimana had genocidal intent. In light of the evidence discussed in the two preceding paragraphs, the Appeals Chamber fails to see any conclusion that could reasonably be reached from the totality of the evidence, other than that Ndahimana shared the requisite specific intent of the other JCE members. Based on the evidence on the record, the Appeals Chamber considers that Ndahimana did not merely act with the knowledge that his acts would assist in the killings of the Tutsi refugees, but also with the intent to exterminate the Tutsis of Kivumu Commune to destroy them as a group. Accordingly, the Appeals Chamber sets aside the Trial Chamber's finding that Ndahimana did not share the intent to further the JCE common purpose to exterminate the Tutsis of Kivumu Commune with the specific intent to destroy them as a group and finds that he possessed such intent.

198. As a result of its finding on Ndahimana's *mens rea*, the Trial Chamber did not consider whether his conduct amounted to the *actus reus* of participation in a joint criminal enterprise. In this respect, the Appeals Chamber recalls that, in addition to a plurality of persons and the existence of a common purpose which amounts to or involves the commission of a crime encompassed by the Statute, the *actus reus* of joint criminal enterprise requires the participation of the accused in this common purpose.[521] The participation in the common purpose need not involve the commission of a crime, but may take the form of assistance in, or contribution to, the execution of the common purpose.[522] The contribution need not be necessary or substantial, but it should at least be a significant contribution to the crimes for which the accused is found responsible.[523]

199. In the present case, the Trial Chamber unambiguously found that, by providing moral support to the assailants, Ndahimana substantially contributed to the killings of Tutsis perpetrated with genocidal intent on 16 April 1994.[524] This finding remains undisturbed on appeal.[525] On the

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participation of communal policemen in the 16 April killings was not established. *See* Trial Judgement, para. 759. *See also infra*, Section V.D. The Appeals Chamber also notes that the Prosecution fails to establish that Abayisenga, whom Ndahimana promoted to brigadier on 29 April 1994, participated in the 15 April killings. The Appeals Chamber notes that the Trial Chamber only refers to Witness CNJ as alleging that Abayisenga was involved in these killings. *See* Trial Judgement, fn. 1402. The Trial Chamber specified that it may rely on Witness CNJ's evidence on these events only where corroborated. *See ibid.*, para. 458.

[520] *See supra*, paras. 184, 185.

[521] *See Munyakazi* Appeal Judgement, para. 160; *Brdanin* Appeal Judgement, para. 364; *Tadić* Appeal Judgement, para. 227.

[522] *See*, *e.g.*, *Krajišnik* Appeal Judgement, para. 215; *Ntakirutimana* Appeal Judgement, para. 466; *Tadić* Appeal Judgement, para. 227.

[523] *See Krajišnik* Appeal Judgement, para. 215; *Brdanin* Appeal Judgement, para. 430.

[524] *See* Trial Judgement, paras. 828-832.

[525] *See supra*, Section V.B.

basis of this finding, the Appeals Chamber finds that Ndahimana's conduct significantly contributed to the killings perpetrated at Nyange Church on 16 April 1994.[526]

200. Accordingly, the Appeals Chamber concludes that the Prosecution has demonstrated that the Trial Chamber erred in finding that Ndahimana did not possess the requisite *mens rea* to be held responsible for participation in a basic form of joint criminal enterprise and, in light of its findings on Ndahimana's conduct on 16 April 1994, in failing to hold him responsible pursuant to Article 6(1) of the Statute for committing the killings of 16 April 1994 at Nyange Church through his participation in the JCE.

3. Conclusion

201. Based on the foregoing, the Appeals Chamber concludes that the Prosecution showed that all reasonable doubt of Ndahimana's guilt for his participation in the JCE has been eliminated and, accordingly, grants the Prosecution's Third and Fourth Grounds of Appeal and finds Ndahimana responsible pursuant to Article 6(1) of the Statute for committing genocide and extermination as a crime against humanity through participation in a joint criminal enterprise based on his conduct on 16 April 1994. Noting that Ndahimana was convicted for aiding and abetting genocide and extermination as a crime against humanity based on the same conduct, the Appeals Chamber holds that committing through participation in a joint criminal enterprise most appropriately reflects the full scope of Ndahimana's criminal conduct.[527] The impact of this finding, if any, on sentencing will be considered in the relevant section below.

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[526] The Appeals Chamber recalls that "the threshold for finding a 'significant contribution' to a [joint criminal enterprise] is lower than the 'substantial contribution' required to enter a conviction for aiding and abetting." *See Gotovina and Markač* Appeal Judgement, para. 149. The Appeals Chamber also emphasises that, contrary to the Trial Chamber's suggestion, Ndahimana's contribution to the 16 April killings in the form of providing moral support by tacit approval is not to be characterised as an omission. *See* Trial Judgement, heading Section 4.3.2 *and* paras. 810, 811. *See also Brdanin* Appeal Judgement, para. 273; *Ntagerura et al.* Appeal Judgement, para. 338.

[527] *See* Statute, Art. 24(2) ("The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers."). The Appeals Chamber notes that it has in the past entered convictions on the basis of alternate modes of liability. *See*, *e.g.*, *Rukundo* Appeal Judgement, paras. 37, 39-115, 169-218, 269, 270. *See also Milošević* Appeal Judgement, paras. 275-282, p. 128; *Simić* Appeal Judgement, paras. 75-191, 301.

D. Alleged Errors relating to Ndahimana's Superior Responsibility (Prosecution Ground 5)

202. The Trial Chamber found that communal policemen, including Adrien Niyitegeka, were present during the killing of Tutsis at Nyange Church on 16 April 1994, but that the "exact role of the policemen remains unclear" and that their participation in the 16 April killings was not established.[528] The Trial Chamber stated that "[p]roof of the mere presence of communal policemen cannot be sufficient for the purpose of supporting findings under Article 6(3)", and accordingly concluded that Ndahimana could not be held responsible under Article 6(3) of the Statute in connection with the killings at Nyange Church on 16 April 1994.[529]

203. The Prosecution submits that the Trial Chamber erred in not finding Ndahimana guilty pursuant to Article 6(3) of the Statute for failing to punish Niyitegeka, his subordinate from the communal police, for aiding and abetting the killings at Nyange Parish on 16 April 1994.[530] It requests that the Appeals Chamber set aside Ndahimana's acquittal pursuant to Article 6(3) of the Statute in relation to the killings perpetrated on 16 April 1994, find him guilty on appeal on this basis, and take this finding of guilt into account as an aggravating factor in the determination of the sentence.[531]

204. Ndahimana responds that the Trial Chamber considered the most appropriate mode of liability applicable to his conduct on 16 April 1994 and committed no error in not convicting him pursuant to Article 6(3) of the Statute for the crimes allegedly committed by Niyitegeka.[532] He submits that the legal elements of superior responsibility and the relevant material facts, such as the name of Niyitegeka or the specific conduct of Niyitegeka, were not pleaded in the Indictment.[533] Ndahimana also contends that there is no evidence that Niyitegeka or any other communal policemen committed any crime on 16 April 1994 or that he had the requisite knowledge.[534]

205. In reply, the Prosecution acknowledges that "a dual conviction under both Article 6(1) and Article 6(3) could not be entered", but argues that the Trial Chamber "should still have made findings supporting all of the modes of liability established at trial" so as to establish the "full

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[528] Trial Judgement, paras. 27, 745, 757, 759.
[529] Trial Judgement, para. 759.
[530] Prosecution Notice of Appeal, paras. 20, 21; Prosecution Appeal Brief, paras. 48, 51. *See also* Prosecution Appeal Brief, paras. 49, 50; AT. 6 May 2013 pp. 47, 48, 60.
[531] Prosecution Notice of Appeal, paras. 21, 22; Prosecution Appeal Brief, para. 62(c). *See also* Prosecution Reply Brief, para. 53.
[532] Ndahimana Response Brief, paras. 19, 21, 78.
[533] Ndahimana Response Brief, paras. 79-82. *See also* AT. 6 May 2013 pp. 16, 35.
[534] Ndahimana Response Brief, paras. 83-93.

gravity of Ndahimana's criminal conduct".[535] The Prosecution further submits that the material facts of Ndahimana's superior responsibility for 16 April 1994 were sufficiently pleaded in the Indictment and that Ndahimana fails to show that he lacked notice in this regard.[536]

206. The Appeals Chamber recalls that when an accused is charged with superior responsibility pursuant to Article 6(3) of the Statute, the indictment must plead that the accused is the superior of sufficiently identified subordinates, as well as the criminal conduct of the subordinates for whom the accused is alleged to be responsible.[537] A review of the Indictment reveals that it clearly pleaded that Ndahimana had *de jure* and *de facto* authority over the communal policemen of Kivumu Commune and the communal policemen's participation in the killings perpetrated at Nyange Parish.[538] The Appeals Chamber finds that the Indictment sufficiently identified Ndahimana's subordinates for whose acts he was alleged to be responsible[539] and their criminal conduct,[540] and finds no merit in Ndahimana's argument that the Indictment failed to plead the name and specific conduct of Niyitegeka. As Ndahimana fails to provide any other argument supporting his contention that the Indictment was defective, the Appeals Chamber turns to consider the Prosecution's allegation of error. Before doing so, the Appeals Chamber emphasises that its consideration of Niyitegeka's alleged criminal responsibility for aiding and abetting the killings of 16 April 1994 is only relevant to the extent that it relates to Ndahimana's alleged superior responsibility for failing to prevent or punish Niyitegeka's criminal conduct.

207. With respect to the alleged contradiction in the Trial Chamber's findings regarding Niyitegeka's involvement in the 15 and 16 April attacks, the Appeals Chamber notes that the Trial Chamber expressly referred to its summaries of witnesses' testimonies in support of its finding that "Niyitegeka's involvement in the attacks on Nyange church on 15 and 16 April 1994 [was] not disputed".[541] Several of these summaries refer to Niyitegeka's active participation in the 15 April attack[542] and one mentions that Niyitegeka was present during the 16 April attack.[543]

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[535] Prosecution Reply Brief, para. 26. *See also ibid.*, para. 27.
[536] Prosecution Reply Brief, paras. 29-39, *referring to* Indictment, paras. 12, 21, 37. *See also* AT. 6 May 2013 pp. 24, 59, 60.
[537] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 100; *Bagosora and Nsengiyumva* Appeal Judgement, para. 191; *Muvunyi* Appeal Judgement of 29 August 2008, para. 19.
[538] *See* Indictment, paras. 12, 21, 37. *See also* Trial Judgement, para. 733.
[539] *Cf. Bagosora and Nsengiyumva* Appeal Judgement, paras. 197-199.
[540] The Appeals Chamber recalls that "the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior [...] will usually be stated with less precision because the detail[s] of those acts are often unknown, and because the acts themselves are often not very much in issue". *Muvunyi* Appeal Judgement of 29 August 2008, para. 58, *citing Ntagerura et al.* Appeal Judgement, para. 26, fn. 82, *quoting Blaškić* Appeal Judgement, para. 218.
[541] Trial Judgement, para. 745, *referring to* Sections III.5.2.1 and III.6.2.17 of the Trial Judgement.
[542] Trial Judgement, paras. 330 (Witness CBT), 334 (Witness CDK, *referring to* Niyitegeka's alias "Maharamu"), 345 (Witness CDL), 368 (Witness CBY, *referring to* "Maharamu"), 384 (Witness CBI), fn. 616 (Witness CNJ), fn. 656 (Witness CBK, *referring to* "Maharamu"). The Trial Chamber found established beyond reasonable doubt that Niyitegeka was one of the attackers on 15 April 1994 based on the evidence of Witnesses CBT, CDK, CBY, CDL, CBI,

The Appeals Chamber considers that the Trial Chamber's use of the word "involvement" accurately describes that Niyitegeka *participated in* the 15 April attack and *was present* during the attack that took place the following day. The Appeals Chamber, therefore, rejects the Prosecution's argument that the Trial Chamber's finding of Niyitegeka's "involvement" in the killings cannot be reconciled with its finding that the *participation* of communal policemen in the 16 April attack was not established.

208. Turning to the Prosecution's specific arguments regarding Ndahimana's superior responsibility for Niyitegeka's aiding and abetting the killings of 16 April 1994, the Appeals Chamber notes that Defence Witness KR3, whose testimony the Trial Chamber accepted in this respect,[544] testified that he saw Niyitegeka in the crowd of people gathered at Nyange Church that day but did not see him participate in the killings.[545]

209. The Trial Chamber accepted evidence that Niyitegeka was, at the relevant time, one of the five communal policemen of Kivumu.[546] The Appeals Chamber considers that it is reasonable to consider, as the Prosecution argues, that given his position as a communal policeman and the limited number of communal policemen in Kivumu,[547] Niyitegeka must have been well-known in the commune.[548] However, the Appeals Chamber finds that, in the absence of any evidence of Niyitegeka's words or deeds that day, the extent of his authority, or that the attackers were aware of his presence,[549] a reasonable trier of fact could have accepted the possibility that Niyitegeka's

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CBK, and CNJ. *See ibid.*, paras. 749, 750, 754, fn. 1402. Given the Trial Chamber's reliance on Witnesses CBT, CDK, CBY, CDL, CBI, CBK, and CNJ, the Appeals Chamber considers that the Trial Chamber must have been referring to Section III.5.2 of the Trial Judgement, and not only sub-Section III.5.2.1, which exclusively concerns Witness CBT's testimony.

[543] Trial Judgement, para. 627, *summarising* Defence Witness KR3's testimony. The Appeals Chamber notes that, in paragraph 758 of the Trial Judgement, the Trial Chamber mistakenly referred to Witness ND7's evidence of Niyitegeka's presence at the church on 16 April 1994. Witness ND7 did not testify to that effect and the references provided by the Trial Chamber relate to Witness KR3's testimony. *See* Witness ND7, T. 24 January 2011; Trial Judgement, fn. 1412. Likewise, a review of the testimonial evidence in the record reveals that the Trial Chamber erred in stating in paragraph 754 of the Trial Judgement that "both Defence and Prosecution witnesses reported the presence of the policeman Niyitegeka not only on 15 April 1994, but also on 16 April 1994" since Defence Witness KR3 is the only witness who reported the presence of Niyitegeka on 16 April 1994.

[544] *See* Trial Judgement, paras. 627, 745, 758.

[545] Witness KR3, T. 25 January 2011 pp. 20-22; Trial Judgement, para. 758.

[546] Trial Judgement, paras. 741, 744-746, 749.

[547] *See* Trial Judgement, para. 755 ("[…] considering the relatively small number of policemen in Kivumu *commune*").

[548] In this regard, the Appeals Chamber considers it noteworthy that a number of witnesses were able to identify Niyitegeka by name or alias in the course of their testimonies. *See* Witness CBS, T. 6 September 2010 pp. 22, 23; Witness CBT, T. 7 September 2010 p. 41; Witness CBI, T. 14 September 2010 pp. 39, 40; Witness CBR, T. 1 November 2010 pp. 20-22; Witness CBK, T. 3 November 2010 pp. 13, 14; Witness CNJ, T. 4 November 2010 pp. 50, 51; Witness CDK, T. 8 November 2010 p. 35; Witness CBY, T. 9 November 2010 pp. 53, 54; Witness CDL, T. 12 November 2010 p. 9; Witness KR3, T. 24 January 2011 p. 69; Witness ND5, T. 26 January 2011 p. 51; Witness ND6, T. 27 January 2011 p. 13; Witness ND3, T. 17 February 2011 pp. 4, 5; Witness ND22, T. 20 April 2011 pp. 26, 27.

[549] *See Brđanin* Appeal Judgement, para. 277 ("[…] encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of it."). Significantly, the Appeals Chamber notes that only one witness reported the presence of Niyitegeka that day. It also notes the presence of higher ranking officials

presence during the attack may have remained unnoticed by the attackers or, if noticed, may have had no effect on them. Consequently, a reasonable trial chamber could have concluded that the record did not demonstrate beyond reasonable doubt that Niyitegeka's presence at Nyange Church on 16 April 1994 substantially contributed to the killings that took place there on that day.

210. In the absence of evidence relating to Niyitegeka's role in the crimes committed, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber erred in not finding Ndahimana responsible pursuant to Article 6(3) of the Statute in connection with the killings at Nyange Church on 16 April 1994. Accordingly, the Appeals Chamber dismisses the Prosecution's Fifth Ground of Appeal in its entirety.

during the attack. *See supra*, para. 208; Witness KR3, T. 25 January 2011 pp. 20-22; Trial Judgement, paras. 686, 757, 770, 807.

VI. ALLEGED ERRORS RELATING TO THE CRIME OF EXTERMINATION (NDAHIMANA GROUND 10 IN PART)

211. The Trial Chamber held that the large-scale killings perpetrated at Nyange Parish on 15 and 16 April 1994 "amount[ed] to extermination"[550] and, by majority, found that Ndahimana was guilty of extermination as a crime against humanity "by aiding and abetting as well as by virtue of his command responsibility over the communal police".[551]

212. Under his Tenth Ground of Appeal, Ndahimana reiterates a number of arguments pertaining to his criminal responsibility under Articles 6(1) and 6(3) of the Statute,[552] as well as to the assessment of his alibi and the credibility of witnesses.[553] Since these arguments have already been addressed and rejected in prior sections of this Judgement,[554] the Appeals Chamber will not consider them further.

213. However, Ndahimana also raises a distinct contention not previously addressed that, having found that he "did not play any role in the attack on Nyange church" on 15 and 16 April 1994, the Trial Chamber could not hold him guilty of extermination as a crime against humanity.[555] In his view, the large number of victims of the attacks on Nyange Church "does not prove beyond reasonable doubt that [he] falls under the requisite elements of extermination."[556] In particular, he submits that the Trial Chamber erred in convicting him of extermination in the absence of proof of the requisite *mens rea*.[557]

214. The Prosecution responds that the Trial Chamber correctly found that Ndahimana was liable for extermination as a crime against humanity.[558]

215. The Appeals Chamber emphasises that, contrary to Ndahimana's submission, Ndahimana was found to have played a role in the killings perpetrated at Nyange Parish on 15 and 16 April 1994 for failing to punish the crimes committed by his subordinates from the communal

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[550] Trial Judgement, para. 842.
[551] Trial Judgement, para. 843. Judge Arrey dissented on the appropriate mode of liability.
[552] Ndahimana Appeal Brief, paras. 304, 309.
[553] Ndahimana Notice of Appeal, para. 68; Ndahimana Appeal Brief, paras. 317-324.
[554] *See supra*, Sections IV.A, V.A *and* B.
[555] Ndahimana Appeal Brief, para. 306. *See also* Ndahimana Notice of Appeal, para. 67.
[556] Ndahimana Appeal Brief, para. 316.
[557] Ndahimana Appeal Brief, paras. 307-316. Ndahimana generally argues that the Prosecution "did not prove the legal elements" of the crime of extermination beyond reasonable doubt. *See* Ndahimana Notice of Appeal, para. 65; Ndahimana Appeal Brief, para. 303. However, Ndahimana only develops arguments regarding the mental element of extermination, but does not challenge the *actus reus* of extermination or the chapeau requirements for a crime against humanity. *See* Ndahimana Notice of Appeal, para. 65; Ndahimana Appeal Brief, paras. 307-316; Ndahimana Reply Brief, paras. 100, 101.
[558] Prosecution Response Brief, paras. 205, 207-218.

police on 15 April 1994 on the basis of his superior responsibility and by aiding and abetting the killings on 16 April 1994.[559] Further, the Appeals Chamber recalls that, in a prior section of this Judgement, it has concluded that Ndahimana did possess the intent to exterminate the Tutsis of Kivumu Commune and that his responsibility for the killings of 16 April 1994 was more appropriately characterized as committing through participation in a joint criminal enterprise.[560]

216. Accordingly, the Appeals Chamber dismisses this remaining part of Ndahimana's Tenth Ground of Appeal.

[559] Trial Judgement, paras. 27-29, 767, 800, 832, 841. *See also ibid.*, paras. 30 ("Such evidence in no way exonerates Ndahimana for his role in the massacre at Nyange church"), 868 ("The Majority […] emphasises that such evidence in no way exonerates Ndahimana for the role he played in the events at Nyange parish.").
[560] *See supra*, para. 201.

VII. ALLEGED ERRORS RELATING TO SENTENCING

217. The Trial Chamber, by majority, sentenced Ndahimana to a single sentence of 15 years' imprisonment.[561]

218. Ndahimana and the Prosecution have both appealed this sentence.[562] In addressing their appeals, the Appeals Chamber bears in mind that trial chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise penalties to fit the circumstances of the convicted person and the gravity of the crime.[563] As a rule, the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber unless the appealing party demonstrates that the Trial Chamber committed a discernible error in exercising its discretion, or failed to follow the applicable law.[564]

A. Ndahimana's Sentencing Appeal (Ground 11)

219. Under his Eleventh Ground of Appeal, Ndahimana submits that the Trial Chamber erred in the assessment of: (i) certain mitigating circumstances; (ii) the aggravating factors; and (iii) the degree of his participation in the crimes.[565] He contends that, as a result of these errors, the Trial Chamber imposed an "unreasonably harsh" sentence.[566] Ndahimana also reiterates a number of arguments against the Trial Chamber's findings on his criminal responsibility.[567] Since these arguments have already been addressed and rejected in prior sections of this Judgement,[568] and because they do not specifically relate to sentencing, the Appeals Chamber will not consider them further.

[561] Trial Judgement, paras. 32, 872.
[562] Ndahimana Notice of Appeal, paras. 70-76; Prosecution Notice of Appeal, paras. 23-30.
[563] *See, e.g., Ntabakuze* Appeal Judgement, para. 264; *Bagosora and Nsengiyumva* Appeal Judgement, para. 419; *Ntawukulilyayo* Appeal Judgement, para. 232.
[564] *See, e.g., Ntabakuze* Appeal Judgement, para. 264; *Bagosora and Nsengiyumva* Appeal Judgement, para. 419; *Setako* Appeal Judgement, para. 277.
[565] Ndahimana Notice of Appeal, paras. 70, 73-76; Ndahimana Appeal Brief, paras. 331-340, 344-347.
[566] Ndahimana Appeal Brief, para. 346. *See also* Ndahimana Notice of Appeal, para. 70.
[567] Ndahimana Notice of Appeal, paras. 71, 72, 75; Ndahimana Appeal Brief, paras. 330, 341-343, 348. *See also* Ndahimana Reply Brief, para. 113.
[568] *See supra*, Sections IV.A, V.A *and* V.B.

1. Alleged Errors in the Assessment of Mitigating Factors

220. Ndahimana submits that the Trial Chamber erred in concluding that his assistance to Tutsis was "relatively selective", by addressing this factor in a cursory manner, and by not according it due weight.[569] He argues that there was "no selectivity" in the assistance he provided as it "was not based on friendship or family ties" and as "he did not turn people away."[570] He adds that he risked great danger by saving Tutsis and "acted with heroism and courage", given the hostility against him.[571] Ndahimana also contends that the Trial Chamber erred in failing to take into account as a mitigating factor the constraints on the exercise of his authority during the events.[572]

221. The Prosecution responds that the Trial Chamber considered the relevant factors and that Ndahimana does not demonstrate that it erred in weighing them.[573]

222. Ndahimana replies that, had the Trial Chamber undertaken a proper assessment of the assistance he provided to Tutsis, he would have received "a far lesser sentence."[574]

223. The Appeals Chamber recalls that while a Trial Chamber has the obligation to consider any mitigating circumstances when determining the appropriate sentence, it enjoys a considerable degree of discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to that factor.[575]

224. The Appeals Chamber notes that, in its "Summary of the Case", the Trial Chamber stated that it did not hold the "selective assistance [to Tutsis] to constitute *a* mitigating factor."[576] However, when discussing the mitigating circumstances in the Sentencing section of the Trial Judgement, the Trial Chamber expressly acknowledged this factor, took account of the supporting evidence, and determined that it did not view it as "a *substantial* mitigating factor."[577] The Trial Chamber reasoned that the "disproportionate result" of the comparison of the number of Tutsis that

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[569] Ndahimana Notice of Appeal, para. 70; Ndahimana Appeal Brief, paras. 334-336.
[570] Ndahimana Appeal Brief, para. 338.
[571] Ndahimana Appeal Brief, para. 337.
[572] Ndahimana Notice of Appeal, para. 76; Ndahimana Appeal Brief, para. 340. In his Notice of Appeal, Ndahimana further argued that the Trial Chamber erred in not taking into account the elements of duress and threat when considering the mitigating factors. *See* Ndahimana Notice of Appeal, para. 75. As Ndahimana has failed to reiterate and elaborate upon this contention in his Appeal Brief, the Appeals Chamber considers that he has abandoned it and the Appeals Chamber will therefore not examine it.
[573] Prosecution Response Brief, paras. 226-229.
[574] Ndahimana Reply Brief, para. 108. *See also ibid.*, para. 107.
[575] *See, e.g.*, *Ntabakuze* Appeal Judgement, para. 280; *Bagosora and Nsengiyumva* Appeal Judgement, para. 424; *Bikindi* Appeal Judgement, para. 158.
[576] Trial Judgement, para. 31 (emphasis added).
[577] Trial Judgement, para. 864 (emphasis added).

Ndahimana assisted with the number of victims of the attack on Nyange Church led it "to view Ndahimana's assistance to Tutsis as relatively selective".[578]

225. Contrary to Ndahimana's submission, the Appeals Chamber does not consider that the Trial Chamber's characterisation of Ndahimana's assistance as "relatively selective" implies that it was discriminatory, but rather that it was limited when compared to the number of victims of the attacks at Nyange Church.[579] Ndahimana has failed to demonstrate that the Trial Chamber erred in this regard. Likewise, Ndahimana has failed to demonstrate that the Trial Chamber committed a discernible error in according only limited weight to his assistance to Tutsis in mitigation of the sentence.

226. With respect to the Trial Chamber's alleged error in failing to appropriately consider the limitations on and impediments to the exercise of Ndahimana's authority, the Appeals Chamber observes that Ndahimana contends that the Trial Chamber erroneously disregarded these factors without advancing any supporting arguments. The Appeals Chamber concludes that Ndahimana has therefore failed to demonstrate that the Trial Chamber erred in not considering the extent of his power as a mitigating factor.

2. Alleged Errors in the Assessment of Aggravating Factors

227. Ndahimana submits that the Trial Chamber erroneously relied on the number of victims of the attack on Nyange Church as an aggravating factor.[580] He argues that, since the number of the victims is an element of the offence of the crime of genocide and is reflected in its scale, it could not be taken into consideration as an aggravating factor.[581] In addition, Ndahimana contends that the Trial Chamber erred in finding aggravating factors that were not based on proof beyond reasonable doubt, "without giving weight to the reasonable doubts raised by the Defence evidence" and not taking into account its earlier finding that no Prosecution witness would be relied on unless corroborated.[582]

228. The Prosecution responds that the Trial Chamber did not engage in impermissible double-counting as, in accordance with the jurisprudence of the Tribunal, a large number of victims can be considered as an aggravating factor in sentencing for convictions for genocide and

[578] Trial Judgement, para. 864.
[579] *See* Trial Judgement, para. 864.
[580] Ndahimana Notice of Appeal, para. 74; Ndahimana Appeal Brief, para. 331, *referring to* Trial Judgement, paras. 860, 864.
[581] Ndahimana Appeal Brief, para. 331.
[582] Ndahimana Notice of Appeal, para. 73; Ndahimana Appeal Brief, para. 332.

extermination as a crime against humanity.[583] It also submits that the aggravating factors taken into account by the Trial Chamber were established beyond reasonable doubt.[584]

229. In reply, Ndahimana submits, in contrast with his prior submissions, that the Trial Chamber "refused to accept the number of Tutsis killed as an aggravating factor" because it considered it to be an element of the crime[585] and "used this factor only for comparison purpose in relation to the number of Tutsis assisted by [Ndahimana]."[586] Ndahimana now argues that the Trial Chamber erred in comparing the number of victims to the number of Tutsis he assisted to deny him the benefit of a mitigating factor.[587]

230. The Appeals Chamber notes that Ndahimana's argument in reply that the Trial Chamber did not take the number of Tutsis killed into consideration as an aggravating factor contradicts the allegation of error and arguments that Ndahimana advanced in his Notice of Appeal and Appeal Brief. Recalling that contradictory submissions need not be considered on appeal,[588] the Appeals Chamber declines to consider Ndahimana's submission on this point made in his Reply Brief.[589]

231. It is well-established that a large number of victims is not an element of the crime of genocide.[590] The Appeals Chamber also recalls that, with respect to extermination as a crime against humanity, "a particularly large number of victims can be an aggravating circumstance in relation to the sentence for this crime if the extent of the killings exceeds that required for extermination."[591] The Appeals Chamber further recalls that extermination is the act of killing on a "large scale",[592] and that "large scale" does not suggest a strict numerical approach with a minimum number of victims.[593] While extermination as a crime against humanity has been found in relation to the killing of thousands of persons, it has also been found in relation to fewer killings, such as the

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[583] Prosecution Response Brief, paras. 222, 223. *See also ibid.*, para. 225.
[584] Prosecution Response Brief, para. 224. *See also ibid.*, para. 225.
[585] Ndahimana Reply Brief, para. 109. *See also ibid.*, paras. 111, 112.
[586] Ndahimana Reply Brief, para. 112.
[587] Ndahimana Reply Brief, para. 111. *See also ibid.*, paras. 109-112.
[588] *See supra*, para. 12.
[589] The Appeals Chamber observes that Ndahimana's argument in reply is based on the erroneous premise that the Trial Chamber did not consider the number of victims as an aggravating factor. As expressly stated in the Trial Judgement, the Trial Chamber found that "the number of victims of the attack on Nyange church, for which Ndahimana is individually responsible, is an aggravating factor." *See* Trial Judgement, para. 860. Moreover, by raising such argument in reply, Ndahimana exceeded the scope of his Notice of Appeal and prevented the Prosecution from making written submissions in response.
[590] *See, e.g., Ndindabahizi* Appeal Judgement, para. 135.
[591] *Ndindabahizi* Appeal Judgement, para. 135.
[592] *See, e.g., Lukić and Lukić* Appeal Judgement, para. 536; *Bagosora and Nsengiyumva* Appeal Judgement, para. 394; *Rukundo* Appeal Judgement, para. 185.
[593] *Lukić and Lukić* Appeal Judgement, para. 537, *referring to Stakić* Appeal Judgement, para. 260 *and Ntakirutimana* Appeal Judgement, para. 516.

killings of approximately 60 individuals and less.[594] In the present case, the Trial Chamber found that the attacks on Nyange Church resulted "in the death of approximately 2,000 Tutsi men, women and children."[595] The Appeals Chamber considers that the extent of the killings at Nyange Church on 15 and 16 April 1994 exceeded that required for extermination, and that the number of victims could therefore be taken into consideration as an aggravating circumstance in the determination of the sentence. The Appeals Chamber accordingly rejects Ndahimana's contention that the Trial Chamber engaged in impermissible double-counting in considering the number of victims of the attacks on Nyange Church as an aggravating factor.

232. The Appeals Chamber finds that Ndahimana has failed to substantiate his allegations regarding other aggravating factors. The Appeals Chamber notes that, in addition to the number of victims, the Trial Chamber only considered the fact that the crimes were committed at a place of sanctuary as an aggravating factor.[596] Ndahimana does not challenge the Trial Chamber's consideration of this factor and instead merely asserts that aggravating factors were not proven beyond reasonable doubt, without specifying which factors he impugns and without advancing any arguments in support of this assertion. The Appeals Chamber dismisses Ndahimana's general contention without further examination.

3. Alleged Error in the Assessment of the Degree of Participation in the Crimes

233. Ndahimana submits that the sentence imposed by the Trial Chamber was disproportionate to the degree of his participation in the crimes as he was convicted as an aider and abettor and as a superior for failing to punish his subordinates.[597] Citing the Trial Chamber's findings that he "did not play a leading role in the attacks", did not plan, instigate, or personally participate in them and that his responsibility did not "result from a premeditated plan, but rather from his belated

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[594] *See Lukić and Lukić* Appeal Judgement, paras. 537, 544, fns. 1564-1567, and references contained therein. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 398.
[595] Trial Judgement, para. 854.
[596] Trial Judgement, para. 860. The Appeals Chamber notes that, in its "Summary of the Case", the Trial Chamber also stated that it found "Ndahimana's position as the leading political authority in Kivumu *commune* to be an aggravating factor." *See ibid.*, para. 30. However, the Appeals Chamber also notes that when discussing the aggravating circumstances in the Sentencing section of the Trial Judgement, the Trial Chamber unambiguously stated that since "Ndahimana's *abuse* of his role as an influential authority is an element of the crime for which he was convicted under Article 6(1) and Article 6(3) of the Statute […] it cannot be considered as an aggravating factor." *See ibid.*, para. 859 (emphasis added). The Trial Chamber did not make any other mention of Ndahimana's authority when making its findings on the aggravating factors. In these circumstances, the Appeals Chamber considers that the Trial Chamber's reference to Ndahimana's leadership position as an aggravating factor is not supported by the Trial Chamber's own legal findings and, though unfortunate, was a mere oversight. Parenthetically, the Appeals Chamber wishes to recall that it is well-established that it is the abuse of the position of authority rather than the influential position in and of itself that may constitute an aggravating factor. *See, e.g., Martić* Appeal Judgement, para. 350; *Simba* Appeal Judgement, para. 284; *Stakić* Appeal Judgement, para. 411.
[597] Ndahimana Appeal Brief, paras. 344-347. The Appeals Chamber notes that Ndahimana failed to raise these allegations of error in his Notice of Appeal. However, the Appeals Chamber notes that the Prosecution did not object to the allegations on this basis and responded to them. In these circumstances, the Appeals Chamber will consider them.

association to the crimes through his presence at Nyange church on 16 April 1994", Ndahimana contends that his conduct amounted to "zero culpability" and that the sentence imposed by the Trial Chamber is "manifestly excessive."[598]

234. The Prosecution responds that Ndahimana's sentence is in fact too lenient in light of the particular circumstances of the case.[599]

235. The Appeals Chamber recalls that Ndahimana's failure to punish his subordinates for their criminal acts and his aiding and abetting by tacit approval the killings perpetrated at Nyange Church constituted his culpable conduct as found by the Trial Chamber.[600] The fact that he was not found responsible for playing a leading role, planning, instigating, or physically committing the crimes, or that his criminal conduct was not premeditated does not reduce that culpability.[601] In light of the gravity of the crimes, as emphasised by the Trial Chamber,[602] the Appeals Chamber is not persuaded that the Trial Chamber imposed a sentence disproportionate to the degree of his participation in the crimes as found by the Trial Chamber.

B. Prosecution's Sentencing Appeal (Ground 6)

236. Under its Sixth Ground of Appeal, the Prosecution submits that the Trial Chamber erred in its assessment of the mitigating factors and abused its discretion by imposing a sentence that was manifestly inadequate.[603] It requests that the Appeals Chamber impose a sentence of life imprisonment or, in the alternative, a substantially longer term of imprisonment.[604]

1. Alleged Errors in the Assessment of Mitigating Factors

237. The Prosecution submits that the Trial Chamber erred in considering as mitigating factors: (i) the speculative finding that Ndahimana was acting under duress;[605] (ii) the fact that Ndahimana did not have genocidal intent to kill Tutsis;[606] (iii) Ndahimana's membership in an alleged moderate political party, the MDR;[607] and (iv) the fact that "*several* persons of influence in Kivumu *commune*

[598] Ndahimana Appeal Brief, para. 347, *referring to* Trial Judgement, para. 865. *See also* Ndahimana Reply Brief, para. 105.
[599] Prosecution Response Brief, paras. 219, 220.
[600] *See* Trial Judgement, paras. 767, 832, 848.
[601] *Cf. Ntabakuze* Appeal Judgement, para. 282; *Ntawukulilyayo* Appeal Judgement, para. 236.
[602] *See* Trial Judgement, para. 854.
[603] Prosecution Notice of Appeal, paras. 23-29; Prosecution Appeal Brief, paras. 6, 52-61.
[604] Prosecution Appeal Brief, paras. 7, 61, 62(d). *See also* Prosecution Notice of Appeal, para. 30.
[605] Prosecution Notice of Appeal, para. 27; Prosecution Appeal Brief, paras. 6, 59.
[606] Prosecution Appeal Brief, para. 57.
[607] Prosecution Notice of Appeal, para. 27; Prosecution Appeal Brief, para. 58. *See also* Prosecution Reply Brief, para. 60.

had an interest and were involved in the massacres at Nyange parish".[608] In support of its contentions, the Prosecution argues that Ndahimana failed to establish any credible basis for duress and offered no evidence of political leanings of the MDR.[609] In its view, it is also difficult to understand how Ndahimana's alleged membership in the same party as the then Prime Minister, Jean Kambanda, could have "negatively influenced the way he was perceived by the Hutu society in Kivumu *commune*."[610] The Prosecution further contends that the Trial Chamber's finding on the influence of other authorities "was premised entirely on rank speculation and unfounded assumptions"[611] and that the motivation of other alleged persons of influence has nothing to do with Ndahimana's individual circumstances or criminal culpability.[612]

238. In addition, the Prosecution submits that the Trial Chamber's statement that Ndahimana was only criminally responsible for "his tacit approval combined with his presence at the crime scene" is a "gross minimization" of Ndahimana's abuse of his role as an influential leader in the community and should not have been considered in mitigation.[613] According to the Prosecution, Ndahimana's position of authority combined with his approving presence at the scene of the crime "lent an aura of official sanction, encouraging the attackers to proceed with impunity."[614]

239. Ndahimana responds that the Trial Chamber properly weighed all the relevant factors challenged by the Prosecution[615] and that the Trial Chamber's findings on the mitigating circumstances were supported by the evidence.[616] He also submits that the comparison made by the Prosecution between him and Prime Minister Kambanda is misplaced.[617]

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[608] Prosecution Notice of Appeal, para. 27, *referring to* Trial Judgement, para. 868 (emphasis in the original); Prosecution Appeal Brief, para. 59. *See also* Prosecution Reply Brief, para. 57.
[609] Prosecution Appeal Brief, paras. 58, 59. *See also* AT. 6 May 2013 pp. 48-50.
[610] Prosecution Appeal Brief, para. 58, *referring to* Trial Judgement, para. 867.
[611] Prosecution Appeal Brief, para. 58.
[612] Prosecution Appeal Brief, para. 60.
[613] Prosecution Appeal Brief, para. 56. *See also ibid.*, para. 55. While the Prosecution refers to the Trial Chamber's consideration of the fact that Ndahimana did not possess genocidal intent as a mitigating factor, it is unclear whether the Prosecution alleges that the Trial Chamber erred in taking such a factor into consideration as a matter of law. The Prosecution rather seems to argue that the Trial Chamber erred in finding that Ndahimana did not possess genocidal intent as a matter of fact. *See ibid.*, paras. 55-57. Likewise, considering the Prosecution's submissions as a whole, the Appeals Chamber understands the Prosecution's reference to the Trial Chamber's treatment of Ndahimana's good character and family situation to support its contention that the sentence imposed was too lenient, and not as a separate allegation of error. *See ibid.*, para. 54; Prosecution Reply Brief, paras. 56-58.
[614] Prosecution Appeal Brief, para. 56.
[615] Ndahimana Response Brief, paras. 99, 109, 112.
[616] Ndahimana Response Brief, paras. 96(e), (f). Ndahimana refers in particular to Prosecution Witness CDL's evidence on the political leanings of the party in question. *See ibid.*, para. 96(f), *referring to* Trial Judgement, para. 867, *referring to* Exhibit D77, p. 14.
[617] Ndahimana Response Brief, para. 96(g).

240. The Prosecution replies that it invoked the Prime Minister's membership in the same party as Ndahimana to counter the contention that Ndahimana's own membership would have been negatively perceived.[618]

241. The Appeals Chamber notes that the Trial Chamber found that "the influence of other authorities of Kivumu *commune*" was "relevant [to] its determination of Ndahimana's sentence."[619] In reaching this conclusion, it relied, in part, on "the strong impression that *several* persons of influence in Kivumu *commune* had an interest and were involved in the massacres",[620] as well as its finding that Ndahimana's "participation in the killings may have resulted from a sense of duress rather than from extremism or ethnic hatred."[621] The Trial Chamber also took "into account evidence relating to the fact that [Ndahimana] was affiliated with a moderate political party", the MDR, and "acknowledg[ed]" that his membership in such a party "could have negatively influenced the way he was perceived by the Hutu society in Kivumu *commune*."[622] The Trial Chamber also found that "the fact that Ndahimana did not possess the genocidal intent to kill the Tutsis" carried "significant weight" as a mitigating factor in sentencing.[623]

242. The Appeals Chamber recalls its prior conclusions that the Trial Chamber erred in finding that Ndahimana did not possess genocidal intent and that his presence at Nyange Church on 16 April 1994 might have been motivated by duress.[624] Accordingly, these factors cannot be considered in mitigation of Ndahimana's sentence.

243. Turning to Ndahimana's affiliation with a moderate political party, the Appeals Chamber observes that, in support of the impugned finding, the Trial Chamber relied on the evidence of Defence Witnesses ND13 and KR3, and Prosecution Witness CDL.[625] The Appeals Chamber notes, however, that Witnesses ND13 and KR3 did not provide evidence on the MDR's political leanings.[626] Witness CDL, an excerpt from whose confession was cited by the Trial Chamber, was the only witness to testify about the MDR's ideology and his evidence on this point was at best equivocal since the witness explained that the MDR had both a moderate and an extremist wing.[627] The Appeals Chamber considers that as the political leanings of the MDR party were not

[618] Prosecution Reply Brief, paras. 59, 60. *See also ibid.*, para. 55.
[619] Trial Judgement, para. 869.
[620] Trial Judgement, para. 868. *See also ibid.*, para. 30.
[621] Trial Judgement, para. 868. *See also ibid.*, para. 30.
[622] Trial Judgement, para. 867.
[623] Trial Judgement, para. 869.
[624] *See supra*, paras. 185, 186, 201.
[625] Trial Judgement, para. 867, fns. 1552, 1553, and references contained therein.
[626] Witnesses ND13 and KR3 merely testified about the MDR being *a minority* political party. *See* Witness ND13, T. 17 January 2011 pp. 20, 35; Witness KR3, T. 24 January 2011 pp. 73-75 (closed session).
[627] *See* Witness CDL, T. 18 November 2010 pp. 21-28 (closed session). *See also* Trial Judgement, para. 867, *referring to* Exhibit D77, p. 14.

established in accordance with the requisite standard of the balance of probabilities,[628] the Trial Chamber committed a discernible error in taking into account Ndahimana's affiliation with a "moderate political party" for mitigation purposes.

244. The Appeals Chamber is also of the view that, given the Trial Chamber's overarching obligation to tailor the penalties to fit the individual circumstances of the convicted person,[629] the external perception of Ndahimana's political views, moderate or otherwise, and the alleged "influence of other authorities of Kivumu *commune*"[630] were immaterial to the determination of the appropriate punishment for Ndahimana's own criminal acts. Accordingly, the Appeals Chamber finds that the Trial Chamber also erred in taking these factors into consideration in mitigation.

245. As for the Trial Chamber's characterisation of Ndahimana's criminal conduct as being "derived from his tacit approval combined with his presence at the crime scene",[631] the Appeals Chamber notes that this language accords with the Trial Chamber's prior legal and factual findings in relation to Ndahimana's responsibility pursuant to Article 6(1) of the Statute.[632] The Appeals Chamber considers that such a characterisation merely constituted a restatement of Ndahimana's criminal responsibility under Article 6(1) of the Statute as found by the Trial Chamber and did not amount to the minimisation alleged by the Prosecution.

246. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in taking into account in mitigation the findings that Ndahimana was acting under duress and did not have genocidal intent, his membership in a moderate political party, and the influence of other authorities of Kivumu Commune. The Appeals Chamber will consider the impact, if any, of these findings on sentencing below. The Appeals Chamber rejects the Prosecution's remaining arguments.

2. Alleged Inadequacy of the Sentence

247. The Prosecution submits that the Trial Chamber committed a discernible error by imposing a sentence manifestly inadequate to the gravity of the crimes, the degree of Ndahimana's criminal responsibility, and the aggravating factors found by the Trial Chamber.[633] The Prosecution requests that the Appeals Chamber increase Ndahimana's sentence to life imprisonment or, alternatively, to

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[628] *See Nahimana et al.* Appeal Judgement, para. 1038(3); *Kajelijeli* Appeal Judgement, para. 294. *See also Muhimana* Appeal Judgement, para. 231.
[629] *See supra*, para. 218.
[630] Trial Judgement, para. 869. *See also ibid.*, para. 868 ("However, the evidence gives the strong impression that *several* persons of influence in Kivumu *commune* had an interest and were involved in the massacres.").
[631] Trial Judgement, para. 865.
[632] *See* Trial Judgement, paras. 824-832.
[633] Prosecution Notice of Appeal, paras. 25, 26, 28; Prosecution Appeal Brief, paras. 52-53, 61. *See also* AT. 6 May 2013 p. 61.

a substantially longer term of imprisonment to better reflect the true gravity of Ndahimana's crimes and individual circumstances.[634]

248. Ndahimana responds that the Prosecution's arguments about the propriety of the sentence are unfounded.[635] He submits, *inter alia*, that although "deterrence alone cannot indicate what a just punishment is",[636] his conviction in and of itself is stigmatising and has a considerable deterrent effect.[637] Citing the Trial Chamber's statement that the "general practice of this tribunal has been to limit imposing life sentences except for the most senior leaders who planned and ordered that atrocities be committed",[638] Ndahimana also emphasises that he was not convicted for direct participation but as a superior and an aider and abettor, and that he was acquitted of several charges.[639]

249. In its Reply Brief, the Prosecution argues that despite several acquittals entered by the Trial Chamber, Ndahimana is no less deserving of the most serious penalty.[640] It also submits that such penalty is consistent with its position at trial and is commensurate to the gravity of Ndahimana's criminal conduct, the aggravating circumstances, and the fundamental sentencing principles of retribution and deterrence.[641]

250. The Appeals Chamber is of the opinion that its findings of errors relating to the mitigating factors together with its re-characterisation of Ndahimana's criminal responsibility for the killings of 16 April 1994 as that of a participant in a joint criminal enterprise call for a reconsideration of the sentence imposed on Ndahimana by the Trial Chamber. This part of the Prosecution's sentencing appeal has therefore become moot. The Appeals Chamber will nonetheless consider the parties' submissions on the adequacy of the sentence when reaching its conclusions on the impact of its findings on sentencing in the following section.

[634] Prosecution Notice of Appeal, paras. 29, 30; Prosecution Appeal Brief, paras. 61, 62(d).
[635] Ndahimana Response Brief, paras. 95(ii), 102, 116.
[636] Ndahimana Response Brief, para. 96(i).
[637] Ndahimana Response Brief, para. 96(h).
[638] Ndahimana Response Brief, para. 107, *referring to* Trial Judgement, para. 855.
[639] Ndahimana Response Brief, paras. 106, 108, 109, 113.
[640] Prosecution Reply Brief, para. 70.
[641] Prosecution Reply Brief, paras. 65-71.

C. Impact of the Appeals Chamber's Findings on the Sentence

251. The Appeals Chamber has affirmed Ndahimana's convictions pursuant to Article 6(3) of the Statute for genocide and extermination as a crime against humanity for failing to punish his subordinates from the communal police for the killings perpetrated on 15 April 1994 at Nyange Church. The Appeals Chamber has also concluded that Ndahimana's responsibility in relation to the killings perpetrated on 16 April 1994 was more appropriately described as that of a participant in a joint criminal enterprise rather than as that of an aider and abettor. Accordingly, the Appeals Chamber has found Ndahimana responsible pursuant to Article 6(1) of the Statute for committing genocide and extermination as a crime against humanity through participation in a joint criminal enterprise based on his conduct on 16 April 1994. In addition, the Appeals Chamber has found that the Trial Chamber erred in taking into account in mitigation of Ndahimana's sentence the findings that he may have acted under duress and did not have genocidal intent, his membership in a moderate political party, and the influence of other authorities of Kivumu Commune.

252. The Appeals Chamber considers that, in the circumstances of this case, the elevation of Ndahimana's responsibility from that of an aider and abettor to that of a participant in a joint criminal enterprise results in an increase of his overall culpability which calls for a higher sentence.[642]

253. The Appeals Chamber recalls that thousands of Tutsis had gone to Nyange Church to take refuge where they were subsequently attacked by crowds of assailants whose specific intent was to destroy them as a group. These attacks resulted in the death of most of the refugees. Ndahimana not only failed to punish his subordinates for participating in the killings, but also significantly contributed to the killings by his acts and deeds, sharing the perpetrators' genocidal intent. Having considered the extraordinary gravity of the crimes for which Ndahimana is being convicted, the form and degree of his participation in these crimes,[643] as well as the appropriate mitigating and aggravating circumstances, the Appeals Chamber sets aside Ndahimana's sentence of 15 years of imprisonment and sentences him to a term of 25 years of imprisonment.

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[642] The Appeals Chamber recalls that participation in a joint criminal enterprise is a form of "commission" of the crime. *See, e.g., Nahimana et al.* Appeal Judgement, para. 478; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, para. 20; *Tadić* Appeal Judgement, para. 188. The Appeals Chamber further notes that aiding and abetting is a mode of responsibility which has generally warranted lower sentences than forms of direct participation such as committing. *See Ntawukulilyayo* Appeal Judgement, para. 244, fn. 582 and references contained therein.

[643] *Cf. Brđanin* Appeal Judgement, para. 432 ("The Appeals Chamber recognizes that, in practice, this approach may lead to some disparities, in that it offers no formal distinction between JCE members who make overwhelmingly large contributions and JCE members whose contributions, though significant, are not as great. However, the Appeals Chamber recalls that any such disparity is adequately dealt with at the sentencing stage.").

VIII. DISPOSITION

254. For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT to Article 24 of the Statute and Rule 118 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the appeals hearing on 6 May 2013;

SITTING in open session;

DISMISSES Ndahimana's appeal in all respects;

GRANTS the Prosecution's Third and Fourth Grounds of Appeal, **SETS ASIDE** the finding that Ndahimana is responsible under Article 6(1) of the Statute for aiding and abetting genocide and extermination as a crime against humanity for his role in the killings of Tutsi refugees at Nyange Church on 16 April 1994, and **FINDS** him responsible under Article 6(1) of the Statute in relation to these killings for committing genocide and extermination as a crime against humanity through participation in a joint criminal enterprise;

GRANTS, in part, the Prosecution's Sixth Ground of Appeal and **FINDS** that the Trial Chamber erred in taking into account in mitigation of Ndahimana's sentence that Ndahimana may have been acting under duress and did not have genocidal intent, his membership in a moderate political party, and the influence of other authorities of Kivumu Commune;

DISMISSES the Prosecution's appeal in all other respects;

AFFIRMS Ndahimana's convictions for genocide and extermination as a crime against humanity pursuant to Article 6(3) of the Statute in relation to the killings of Tutsi refugees perpetrated at Nyange Church on 15 April 1994;

SETS ASIDE the sentence of 15 years imposed on Ndahimana by the Trial Chamber, and **IMPOSES** a sentence of 25 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 11 August 2009;

RULES that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules; and

ORDERS that, in accordance with Rules 103(B) and 107 of the Rules, Ndahimana is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served.

Done in English and French, the English text being authoritative.

Judge Theodor Meron, Presiding	Judge William H. Sekule	Judge Arlette Ramaroson

Judge Carmel Agius	Judge Khalida Rachid Khan

Done this sixteenth day of December 2013 at Arusha, Tanzania.

[Seal of the Tribunal]

IX. ANNEX A: PROCEDURAL HISTORY

1. The main aspects of the appeal proceedings are summarised below.

A. Notices of Appeal and Briefs

2. Trial Chamber II of the Tribunal rendered the judgement in this case on 17 November 2011 and issued its written Trial Judgement in English on 18 January 2012.

3. On 17 February 2012, Ndahimana and the Prosecution filed their respective notices of appeal.[644]

4. On 28 February 2012, the Appeals Chamber granted Ndahimana leave to file his appeal brief no later than 30 days from the date on which he was served with the French translation of the Trial Judgement, and file his response brief no later than 15 days from the date on which he was served with the French translation of the Trial Judgement and the Prosecution's appeal brief, whichever was later.[645]

5. The Prosecution filed its appeal brief on 2 May 2012.[646] Ndahimana filed his response brief on 24 December 2012,[647] to which the Prosecution replied on 8 January 2013.[648]

6. Ndahimana filed his appeal brief on 12 December 2012.[649] On 21 January 2013, the Prosecution filed its response brief.[650] Ndahimana filed his brief in reply on 5 February 2013.[651]

[644] Notice of Appeal of Grégoire Ndahimana, 17 February 2012; Prosecutor's Notice of Appeal, 17 February 2012, *as corrected by* Corrigendum to Prosecutor's Notice of Appeal, 21 February 2012.
[645] Decision on Grégoire Ndahimana's Motion for Extension of Time to File his Appellant's and Respondent's Briefs, 28 February 2012.
[646] Prosecutor's Appellant's Brief, 2 May 2012.
[647] Respondent's Brief Pursuant to Rule 112 (A) of the Rules of Procedure and Evidence, 24 December 2012.
[648] Prosecutor's Brief in Reply to Grégoire Ndahimana's Response Brief, 8 January 2013.
[649] Appellant's Brief, 12 December 2012.
[650] Prosecutor's Brief in Response to Grégoire Ndahimana's Appeal, 21 January 2013.
[651] Appellant's Brief in Reply, 5 February 2013.

B. Assignment of Judges

7. On 22 February 2012, the Presiding Judge of the Appeals Chamber assigned the following Judges to the appeal: Judge Theodor Meron (Presiding), Judge Arlette Ramaroson, Judge Andrésia Vaz, Judge Carmel Agius, and Judge Patrick Robinson.[652] On 23 February 2012, the Presiding Judge designated himself as the Pre-Appeal Judge.[653]

8. On 27 March 2012, the Presiding Judge replaced Judge Patrick Robinson with Judge Khalida Rachid Khan.[654]

9. On 19 March 2013, the Presiding Judge replaced Judge Andrésia Vaz with Judge William H. Sekule.[655]

C. Appeals Hearing

10. On 6 May 2013, the parties presented their oral arguments at a hearing held in Arusha, Tanzania, in accordance with the Scheduling Order of 9 April 2013.

D. Motion for Additional Evidence

11. On 2 May 2013, the Appeals Chamber dismissed Ndahimana's motion under Rule 115 of the Rules for the admission of additional evidence.[656]

[652] Order Assigning Judges to a Case Before the Appeals Chamber, 22 February 2012.
[653] Order Assigning a Pre-Appeal Judge, 23 February 2012.
[654] Order Replacing a Judge in a Case Before the Appeals Chamber, 27 March 2012.
[655] Order Replacing a Judge in a Case Before the Appeals Chamber, 19 March 2013.
[656] Decision on Grégoire Ndahimana's Motion for Admission of Additional Evidence on Appeal, 2 May 2013.

X. ANNEX B: CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Tribunal

BAGILISHEMA Ignace

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement, 3 July 2002 ("*Bagilishema* Appeal Judgement").

BAGOSORA Théoneste and NSENGIYUMVA Anatole

Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor, Case No. ICTR-98-41-A, Judgement, 14 December 2011 ("*Bagosora and Nsengiyumva* Appeal Judgement").

BIKINDI Simon

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

GACUMBITSI Sylvestre

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement").

GATETE Jean-Baptiste

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-00-61-A, Judgement, 9 October 2012 ("*Gatete* Appeal Judgement").

HATEGEKIMANA Ildephonse

Ildephonse Hategekimana v. The Prosecutor, Case No. ICTR-00-55B-A, Judgement, 8 May 2012 ("*Hategekimana* Appeal Judgement").

KAJELIJELI Juvénal

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement").

KALIMANZIRA Callixte

Callixte Kalimanzira v. The Prosecutor, Case No. ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement").

KANYARUKIGA Gaspard

Gaspard Kanyarukiga v. The Prosecutor, Case No. ICTR-02-78-A, Judgement, 8 May 2012 ("*Kanyarukiga* Appeal Judgement").

KARERA François

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement").

KAYISHEMA Clément and RUZINDANA Obed

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement, 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement").

MUGENZI Justin and MUGIRANEZA Prosper

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Judgement, 4 February 2013 ("*Mugenzi and Mugiraneza* Appeal Judgement").

MUHIMANA Mikaeli

Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement, 21 May 2007 ("*Muhimana* Appeal Judgement").

MUNYAKAZI Yussuf

The Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36A-A, Judgement, 28 September 2011 ("*Munyakazi* Appeal Judgement").

MUSEMA Alfred

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement").

MUVUNYI Tharcisse

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 1 April 2011 ("*Muvunyi* Appeal Judgement of 1 April 2011").

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 29 August 2008 ("*Muvunyi* Appeal Judgement of 29 August 2008").

NAHIMANA *et al.*

Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement").

NCHAMIHIGO Siméon

Siméon Nchamihigo v. The Prosecutor, Case No. ICTR-01-63-A, Judgement, 18 March 2010 ("*Nchamihigo* Appeal Judgement").

NDAHIMANA Grégoire

The Prosecutor v. Grégoire Ndahimana, Case No. ICTR-01-68-T, Judgement and Sentence, delivered in public on 17 November 2011, signed on 30 December 2011, filed in writing on 18 January 2012 ("Trial Judgement").

The Prosecutor v. Grégoire Ndahimana, Case No. ICTR-01-68-T, Decision on Defence Motion to Hear the Testimony of Witnesses BX7 and FB1 via Video Link, 25 February 2011 ("Video Link Decision").

The Prosecutor v. Grégoire Ndahimana, Case No. ICTR-01-68-T, Decision on Defence Motion to Vary its Witness List and Request for Protective Measures for New Witnesses, confidential, 31 March 2011 ("Witness List Decision").

The Prosecutor v. Grégoire Ndahimana, Case No. ICTR-01-68-T, Decision on Defence's Motion for the Admission of Witness Testimony Pursuant to Rule 92*bis*, confidential, 3 May 2011 ("Rule 92*bis* Decision").

NDINDABAHIZI Emmanuel

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

NSHOGOZA Léonidas

Léonidas Nshogoza v. The Prosecutor, Case No. ICTR-07-91-A, Judgement, 15 March 2010 ("*Nshogoza* Appeal Judgement").

NTABAKUZE Aloys

Aloys Ntabakuze v. The Prosecutor, Case No. ICTR-98-41A-A, Judgement, 8 May 2012 ("*Ntabakuze* Appeal Judgement").

NTAGERURA *et al.*

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement").

NTAKIRUTIMANA Elizaphan and Gérard

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Cases Nos. ICTR-96-10-A & ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement").

NTAWUKULILYAYO Dominique

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

RENZAHO Tharcisse

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

RUKUNDO Emmanuel

Emmanuel Rukundo v. The Prosecutor, Case No. ICTR-01-70-A, Judgement, 20 October 2010 ("*Rukundo* Appeal Judgement").

RUTAGANDA Georges Anderson Nderubumwe

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement").

SEROMBA Athanase

The Prosecutor v. Athanase Seromba, Case No. ICTR-01-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement").

SETAKO Ephrem

Ephrem Setako v. The Prosecutor, Case No. ICTR-04-81-A, Judgement, 28 September 2011 ("*Setako* Appeal Judgement").

SIMBA Aloys

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

ZIGIRANYIRAZO Protais

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

2. International Criminal Tribunal for the Former Yugoslavia (ICTY)

BLAGOJEVIĆ Vidoje and JOKIĆ Dragan

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement").

BLAŠKIĆ Tihomir

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement").

BRDANIN Radoslav

Prosecutor v. Radoslav Brdanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brdanin* Appeal Judgement").

"ČELEBIĆI"

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić, and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

ERDEMOVIĆ Dražen

Prosecutor v. Dražen Erdemović, Case No. IT-96-22-A, Judgement, 7 October 1997 ("*Erdemović* Appeal Judgement").

GOTOVINA Ante and MARKAČ Mladen

Prosecutor v. Ante Gotovina and Mladen Markač, Case No. IT-06-90-A, Judgement, 16 November 2012 ("*Gotovina and Markač* Appeal Judgement").

HADŽIHASANOVIĆ Enver and KUBURA Amir

Prosecutor v. Enver Hadžihasanovič and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanovič and Kubura* Appeal Judgement").

HALILOVIĆ Sefer

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgement").

HARAQIJA Astrit and MORINA Bajrush

Prosecutor v. Astrit Haraqija and Bajrush Morina, Case No. IT-04-84-R77.4-A, Judgement, 23 July 2009 ("*Haraqija and Morina* Appeal Judgement").

KRAJIŠNIK Momčilo

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement").

KRSTIĆ Radislav

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement").

KUPREŠKIĆ *et al.*

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement").

LUKIĆ Milan and Sredoje

Prosecutor v. Milan Lukić and Sredoje Lukić, Case No. IT-98-32/1-A, Judgement, 4 December 2012 ("*Lukić and Lukić* Appeal Judgement").

MARTIĆ Milan

Prosecutor v. Milan Martić, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement").

MILOŠEVIĆ Dragomir

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgement, 12 November 2009 ("*Milošević* Appeal Judgement").

MRKŠIĆ Mile and ŠLJIVANČANIN Veselin

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement").

ORIĆ Naser

Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement, 3 July 2008 ("*Orić* Appeal Judgement").

PERIŠIĆ Momčilo

Prosecutor v. Momčilo Perišić, Case No. IT-04-81-A, Judgement, 28 February 2013 ("*Perišić* Appeal Judgement").

SIMIĆ Blagoje

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement").

STAKIĆ Milomir

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement").

STRUGAR Pavle

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement").

TADIĆ Duško

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement").

B. Defined Terms and Abbreviations

AT.	Transcript from hearings on appeal in the present case. All references are to the official English transcript, unless otherwise indicated
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. Grégoire Ndahimana*, Case No. ICTR-01-68-I, Amended Indictment, 18 August 2010
MDR	*Mouvement Démocratique Républicain*
Ndahimana Appeal Brief	*Grégoire Ndahimana v. The Prosecutor*, Case No. ICTR-01-68-A, Appellant's Brief, 12 December 2012
Ndahimana Closing Brief	*The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Defence Final Brief, confidential, 25 July 2011
Ndahimana Notice of Alibi	*The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Notice of Alibi From the Defence of Ndahimana Grégoire, confidential, 3 September 2010
Ndahimana Notice of Appeal	*Grégoire Ndahimana v. The Prosecutor*, Case No. ICTR-01-68-A, Notice of Appeal of Grégoire Ndahimana, 17 February 2011

Ndahimana Pre-Defence Brief	*The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Gregoire Ndahimana's Pre-Defence Brief, 7 December 2010 *as corrected by* Corrigendum to the Grégoire Ndahimana's Pre-Defence Brief (Pursuant to Rule 73 *ter* of the Rules of Procedure and Evidence), 12 January 2011
Ndahimana Reply Brief	*Grégoire Ndahimana v. The Prosecutor*, Case No. ICTR-01-68-A, Appellant's Brief in Reply, 5 February 2013
Ndahimana Response Brief	*Grégoire Ndahimana v. The Prosecutor*, Case No. ICTR-01-68-A, Respondents Brief, 24 December 2012
Ndahimana Supplement to Notice of Alibi	*The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Supplement to the Notice of Alibi Filed on 3rd September 2010, confidential, 22 September 2010
Prosecution	Office of the Prosecutor
Prosecution Appeal Brief	*Grégoire Ndahimana v. The Prosecutor*, Case No. ICTR-01-68-A, Prosecutor's Appellant's Brief, 2 May 2012
Prosecution Closing Brief	*The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Prosecutor's Final Trial Brief, 25 July 2011
Prosecution Notice of Appeal	*Grégoire Ndahimana v. The Prosecutor*, Case No. ICTR-01-68-A, Prosecutor's Notice of Appeal, 17 February 2012, *as corrected by* Corrigendum to Prosecutor's Notice of Appeal, 21 February 2012
Prosecution Reply Brief	*Grégoire Ndahimana v. The Prosecutor*, Case No. ICTR-01-68-A, Prosecutor's Brief in Reply to Gregoire Ndahimana's Response Brief, 8 January 2013
Prosecution Response Brief	*Grégoire Ndahimana v. The Prosecutor*, Case No. ICTR-01-68-A, Prosecutor's Brief in Response to Gregoire Ndahimana's Appeal, 21 January 2013
RPF	Rwandan (or Rwandese) Patriotic Front
Rules	Rules of Procedure and Evidence of the Tribunal

Statute	Statute of the Tribunal established by Security Council Resolution 955 (1994)
T.	Transcript from hearings at trial in the present case. All references are to the official English transcript, unless otherwise indicated
Trial Chamber	Trial Chamber II of the Tribunal
Tribunal *or* ICTR	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