

RWANDA / JUDGMENT

THE PROSECUTOR v. GASPARD KANYARUKIGA (TRIAL JUDGMENT)

ICTR-02-78-A

COURT

International Tribunal for Rwanda

DECIDED

8 May 2012

CASE / FILE NUMBER

ICTR-02-78-A

Source: amategeko.gov.rw · Research copy typeset by Esheria. Not court-issued or certified.

THE PROSECUTOR v. GASPARD KANYARUKIGA (TRIAL JUDGMENT)

- Source: Amategeko
- Section: Decisions (Judgements)
- Date: 2012-05-08
- Case/document no.: ICTR-02-78-A
- Collection: International Tribunal for Rwanda

Text

Page 1

OR: ENG

TRIAL CHAMBER II

Before: Judge Taghrid Hikmet, Presiding Judge Seon Ki Park

Judge Joseph Masanche

Registrar: Adama Dieng

Date: 1 November 2010

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor: Defence Counsel: Holo Makwaia David Jacobs Althea Alexis Windsor
Claver Sindayigaya Cheikh Tidiane Mara Marc Nerenberg Lansana Dumbuya Iain Edwards

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda
UNITED NATIONS

Page 2

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

i CONTENTS

CHAPTER I: INTRODUCTION	1
1. INTRODUCTION	1
2. SUMMARY OF PROCEDURAL HISTORY	1
3. OVERVIEW OF THE CASE	1
CHAPTER II: PRELIMINARY ISSUES	6
1. ISSUES RELATING TO THE INDICTMENT	6
1.1. Facts not Pleaded in the Indictment	6
1.2. Decision on the Defence Motion for Exclusion of Evidence	8
2. EVIDENTIARY MATTERS	9
3. DECISION ON DEFENCE MOTION FOR ACQUITTAL	12
4. JUDICIAL NOTICE	13
4.1. Facts of Common Knowledge	13
4.2. Adjudicated Facts	14
5. ALLEGED DISAPPEARANCE OF EXCULPATORY MATERIALS	14
6. NOTICE OF ALIBI	16
CHAPTER III: FACTUAL FINDINGS	17

1.	ALIBI, 12-16 APRIL 1994	17
1.1.	Introduction	17
1.2.	Evidence.....	17
1.3.	Deliberations	27
1.4.	Conclusion	32
2.	KILLINGS OF TUTSI CIVILIANS IN KIVUMU COMMUNE AFTER 6 APRIL 1994	33
	2.1. Introduction	33
	2.2. Evidence.....	33
	2.3. Deliberations	40
	2.4. Conclusion	46
3.	MEETINGS AT NYANGE PARISH, “ON OR ABOUT 10 APRIL 1994” AND “ON OR ABOUT 12 APRIL 1994”	47
	3.1. Introduction	47
	3.2. Evidence.....	47
	3.3. Deliberations	53
	3.4. Conclusion	62
4.	ARMED ATTACKERS SURROUND NYANGE CHURCH FROM 12 APRIL 1994	63
	4.1. Introduction	63
	4.2. Evidence.....	63
	4.3. Deliberations	71
	4.4. Conclusion	79
5.	ATTACKS AT NYANGE PARISH ON 15 APRIL 1994	81
	5.1. Introduction	81
	5.2. Evidence.....	81
	5.3. Deliberations	101
	5.4. Conclusion	121
6.	DESTRUCTION OF NYANGE PARISH CHURCH ON 16 APRIL 1994	123
	6.1. Introduction	123
	6.2. Evidence.....	123
	6.3. Deliberations	123
	6.4. Conclusion	135
		149

Page 3

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

ii	CHAPTER IV: LEGAL FINDINGS	151
----	----------------------------------	-----

1.	INTRODUCTION	151
2.	CRIMINAL RESPONSIBILITY	151
	2.1. Applicable Law	151
	2.2. Notice	154
3.	GENOCIDE	156
	3.1. Applicable Law	156
	3.2. Application.....	158
	3.3. Conclusion	162
4.	COMPLICITY IN GENOCIDE	162
5.	CRIMES AGAINST HUMANITY (EXTERMINATION).....	
	162 5.1. Applicable Law	
	162 5.2. Application.....	
	163 5.3. Conclusion	
	164 CHAPTER V: VERDICT	
	165 CHAPTER VI: SENTENCING	
	166	
1.	APPLICABLE LAW	166
2.	SUBMISSIONS	166
3.	DELIBERATIONS	167
	3.1. Gravity of the Offence	167
	3.2. Aggravating Circumstances	167
	3.3. Mitigating Circumstances	168
	3.4. Sentencing Practice	168
	3.5. Credit for Time Served	169
4.	CONCLUSION	170
	ANNEX A: PROCEDURAL HISTORY	171
1.	THE INDICTMENT	171
2.	MOTION FOR REFERRAL UNDER RULE 11 BIS	171
3.	PRE-TRIAL PHASE	172
4.	TRIAL PHASE	175
5.	FURTHER PROCEEDINGS	181
	ANNEX B: DEFINED TERMS AND JURISPRUDENCE	182

1.	LIST OF DEFINED TERMS, ACRONYMS AND ABBREVIATIONS	182
2.	JURISPRUDENCE	183
	2.1. ICTR	183
	2.2. ICTY	188
3.	OTHER MATERIAL	191
	ANNEX C: AMENDED INDICTMENT	192

Page 4

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

1

CHAPTER I: INTRODUCTION 1.

Introduction

1. The Accused in this case is Gaspard Kanyarukiga, who was born in Kivumu commune, Kibuye préfecture.¹ In 1994, Kanyarukiga was a businessman who owned a pharmacy in the Nyange Trading Centre, located in Nyange secteur, Kivumu commune, Kibuye préfecture.² He opened the pharmacy in the late 1980s.³ He also owned a business in Kigali.⁴ Kanyarukiga is alleged to be criminally responsible under Article 6(1) of the Statute and as part of a joint criminal enterprise. The Prosecution has charged Kanyarukiga with genocide, complicity in genocide (in the alternative) and extermination as a crime against humanity for acts allegedly committed in Kivumu commune between 6 and 30 April 1994. The Defence disputes all charges and raises a defence of alibi. Following is an overview of the main allegations.⁵
2. Summary of Procedural History 2. Gaspard Kanyarukiga was arrested in South Africa on 16 July 2004 and transferred to the International Criminal Tribunal for Rwanda (ICTR) on 19 July 2004. The Prosecution case commenced on 31 August 2009. After calling eleven witnesses over 14 trial days, the Prosecution closed its case on 17 September 2009. The Defence case opened on 18 January 2010 and closed on 11 February 2010. The Defence called twenty-three witnesses over fourteen trial days. The Chamber undertook a site visit in Rwanda between 19 and 21 April 2010. Closing arguments were heard on 24 May 2010. The Chamber pronounced its unanimous judgement on 1 November 2010 and the written judgement was filed on 9 November 2010 after the conclusion of the editorial process. The procedural history is set out in full in an Annex to this judgement.
3. Overview of the Case Attacks on Tutsi civilians in Kivumu commune 3. The Prosecution alleges in the Amended Indictment that, following the death of the Rwandan President on 6 April 1994, Tutsi civilians were attacked in their homes in Kivumu commune and some of them, including Grégoire Ndakubana, Martin Karekezi and Thomas Mwendezi, were killed. Based

on the undisputed testimony of eight Prosecution witnesses and two Defence witnesses, the Chamber has found beyond reasonable doubt that Tutsi civilians were attacked and killed in Kivumu commune after 6 April 1994. The Prosecution, however, has failed to establish that Grégoire Ndakubana, Martin Karekezi and Thomas Mwendezi were among the victims of these attacks.

1 Amended Indictment, filed on 14 November 2007, para 1; Defence Final Brief, filed 11 May 2010, para. 283; Prosecution Final Brief, filed 2010, para. 4. 2 Defence Final Brief, para. 284; Prosecution Final Brief, paras. 11-14. Witness CBR, T. 9 September 2009, p. 30; Witness CBT, T. 12 September 2009, pp. 42-43; Witness YAU, T. 15 September 2009, p. 30; Witness CNJ, T. 7 September 2009, pp. 12, 35; Witness CDL, 10 September 2009, p. 29; Witness CBS, T. 16 September 2009, p. 50; Witness Twagirashema, T. 3 February 2010, p. 4; Witness Tugirumukiza, T. 1 February 2010, p. 53; Witness Sibomana, T. 1 February 2010, p. 27. 3 According to the Defence opening statement, the Accused did not own the pharmacy prior to 1987. T. 18 January 2010, p. 15; Prosecution Final Brief para. 14. 4 Defence Final Brief, para. 293; Prosecution Final Brief, para. 6. Witness CBR, T. 9 September 2009, p. 30; Witness CBT, T. 14 September 2009, pp. 42-43; Witness CBS, T. 16 September 2009, p. 50; Witness Sibomana, T. 1 February 2010, p. 27. 5 With regard to some allegations, the Chamber has found that the Accused did not receive adequate notice. These allegations are not included in this overview of the case.

Page 5

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

2 Tutsi civilians seek refuge at Nyange Parish Church 4. The Amended Indictment alleges that, as a result of the attacks on Tutsi civilians in Kivumu commune, Tutsi civilians sought refuge in public buildings such as the communal office and the Nyange Parish Church.⁶ The Chamber has found, based on the consistent and corroborative testimony of seven Prosecution witnesses and three Defence witnesses, that Tutsi civilians sought refuge from these attacks at the Nyange Parish Church. The evidence, however, is insufficient to establish beyond reasonable doubt that Tutsi also sought refuge at the Kivumu commune office. Meeting on or about 10 April 1994 at Nyange Parish 5. The Amended Indictment alleges that, on or about 10 April 1994, Gaspard Kanyarukiga, Father Athanase Seromba, Fulgence Kayishema, Grégoire Ndahimana and others attended a meeting at the Nyange Parish Presbytery, at which the state of insecurity and killings were discussed and at which Father Seromba blamed the inkotanyi for killing President Habyarimana. One Prosecution witness provided evidence that, on 10 April 1994, Kanyarukiga arrived at the Nyange Parish with Fulgence Kayishema, Télesphore Ndungutse and Grégoire Ndahimana and attended a meeting with Father Seromba. The Prosecution witness did not give any evidence as to what was discussed at this meeting. The Chamber has doubts about the witness's account of this particular event and therefore has not relied on his evidence. Meeting on or about 12 April 1994 at Nyange Parish 6. The Prosecution alleges in the Amended Indictment that, "on or about 12 April 1994", Kanyarukiga, Kayishema, Ndahimana, Ndungutse and others

attended a meeting with Father Seromba on Seromba's balcony at the Nyange Parish. The evidence shows that the meeting described in the Amended Indictment occurred on 14 April 1994. Two Prosecution witnesses testified that at least Kanyarukiga, Kayishema, Ndahimana and Mbakirirehe met with Father Seromba at the Nyange Parish on 14 April 1994. The Defence presented one witness who testified that he was at the parish on 14 April 1994 and that no one met with Father Seromba on that day. The Chamber finds that the two Prosecution witnesses are generally credible and that the Defence evidence does not cast doubt on their testimony. The Chamber has therefore found it established beyond reasonable doubt that Kanyarukiga attended a meeting at the Nyange Parish on 14 April

1994. It has not been established however, that this meeting was held on the presbytery balcony. Armed attackers surround the Tutsi at Nyange Parish 7. The Prosecution alleges that from 12 April 1994, armed attackers, including interahamwe and gendarmes, surrounded the Nyange Church, where the Tutsi had taken refuge. The Chamber has considered the evidence of several events between 12 and 15 April 1994 in the context of this

6 The Trial Chamber notes that the Amended Indictment refers to Tutsi civilians who sought refuge in the Nyange Church as "refugees". Prosecution and Defence witnesses also used the term "refugee" to describe the Tutsi who took refuge at the church. The Chamber notes, however, that according to the Convention and Protocol Relating to the Status of Refugees, a "refugee" is someone who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (emphasis added). Convention Relating to the Status of Refugees, adopted 28 July 1951, Article 1(A)(2), 189 U.N.T.S. 150, 152; Protocol Relating to the Status of Refugees adopted 31 January 1967, Article 1(A)(2), 606 U.N.T.S. 267, 268. Given that the Tutsi in question were displaced within their country of nationality and had not crossed an international boundary, the term "refugee" does not accurately convey the status of these persons under international law in April 1994. Thus, within this Judgement, the Chamber has only used the term refugee to describe the Tutsi at the Nyange Church when quoting a witness or one of the Parties.

Page 6

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

3 paragraph. The Chamber has addressed the potential notice issues raised in relation to these events in its factual findings below. 8. Based on the evidence adduced at trial, the Chamber has found that the general allegation in this paragraph of the Amended Indictment is established beyond reasonable doubt. The Chamber has also found that, on 13 April 1994, Hutu assailants attacked the Tutsi civilians who had taken refuge at the Nyange Church. Sticks and machetes

were also confiscated from the Tutsi on that day. The Chamber finds it has been established that, on 14 April 1994, Hutu assailants surrounded and attacked the Tutsi at the Nyange Parish, but the Tutsi were able to repel the attacks. Finally, it has been established beyond reasonable doubt, that after 12 April 1994, gendarmes were posted at the Nyange Parish, and Father Seromba instructed them to shoot any Tutsi who tried to take bananas from the parish banana plantation. As explained below, the Prosecution failed to establish beyond reasonable doubt all other allegations of criminal or incriminating conduct prior to 15 April 1994. Attacks and killings on the morning of 15 April 1994 at Nyange Parish 9. The Amended Indictment alleges that on the morning of 15 April 1994, Kanyarukiga, Kayishema, Ndungutse and Ndahimana ordered and instigated the attacks on Tutsi civilians at the Nyange Parish. Allegedly these attacks included stones, traditional weapons and grenades which killed and wounded many Tutsi. 10. Three Prosecution witnesses provided convincing and largely corroborated accounts of Kanyarukiga's presence at the Nyange Parish and the Nyange Trading Centre, close to the parish, during the morning of 15 April 1994. The Chamber has found these accounts to be credible. A number of Defence witnesses did not see Kanyarukiga at the Nyange Parish or the Nyange Trading Centre on 15 April 1994. The Chamber however, has not found that these accounts cast doubt on the Prosecution evidence. Attacks, killings and attempted burning of Nyange Church later on 15 April 1994 11. According to the Amended Indictment, the attackers turned their focus to the Nyange Church later on 15 April 1994, with gunfire and dynamite. It is alleged that Kanyarukiga and others were present and that they ordered, instigated and supervised the attackers as well as aided and abetted the attackers by providing them with weapons and gasoline. 12. The Chamber has found the largely corroborated accounts of two Prosecution witnesses regarding Kanyarukiga's presence during the attacks and prior to the attempted burning of Nyange Church on 15 April 1994 to be credible. Two Prosecution witnesses provided accounts of Kanyarukiga's presence at the Nyange Parish after the attempted burning of the church and his participation in a discussion with Kayishema about the possible demolition of the church. The Chamber has found one of these witnesses credible and has therefore accepted the evidence of both witnesses on this point. The Chamber does not consider the Defence evidence to cast doubt on the testimony of these witnesses. Meeting at CODEKOKI on the morning of 16 April 1994 13. The Amended Indictment alleges that on the morning of 16 April 1994, Kanyarukiga and others held a meeting at the CODEKOKI building where the destruction of the Nyange Church and the killing of the Tutsi inside it were planned and agreed to. 14. The Prosecution led no evidence to support this allegation. Rather, the Prosecution has relied on one witness who provided evidence of a meeting, which Kanyarukiga allegedly attended outside his pharmacy on the morning of 16 April 1994. The Chamber has disregarded this evidence

Page 7

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

4 as the Prosecution has not given the Accused sufficient notice of this allegation. For these reasons the Prosecution has failed to establish the allegation in paragraph 16 of the Amended Indictment. Meeting at Nyange Parish on 16 April 1994 15. The Amended Indictment alleges that Kanyarukiga and others met with Athanase Seromba on 16 April 1994 to inform him of their decision to destroy the Nyange Church in order to kill the Tutsi inside. It further alleges that Kanyarukiga instigated the demolition of the church by suggesting that another would be built. 16. Four Prosecution witnesses provided evidence that Kanyarukiga and others met with Father Seromba at the Nyange Parish on the morning of 16 April 1994. The witnesses all testified about what was said or what they inferred was said during this meeting. The Chamber deems two of these witnesses to be generally credible and therefore relies on their testimony, having corroborated the other two Prosecution witnesses on this point. The Chamber also finds, based on the first-hand account of one of these witnesses, as corroborated by the circumstantial evidence of the other three, that the demolition of the church was discussed during this meeting. The Chamber has considered the evidence of one Defence witness who testified that he did not witness a meeting at the parish on 16 April 1994 and four Defence witnesses who testified that they did not see Kanyarukiga in Nyange on 16 April 1994 or hear that he was present. The Chamber does not consider this evidence to cast doubt on the consistent and corroborated evidence of the Prosecution witnesses. 17. Finally, one Prosecution witness gave evidence that Kanyarukiga told Bourgmestre Ndahimana, IPJ Kayishema, Judge Habiyaambere, Ndungutse and others that the Nyange Church had to be destroyed and that he would make it his responsibility to rebuild it. The Chamber has found the testimony of this witness to be compelling and reliable and therefore has no doubt that Kanyarukiga made this statement. Destruction of Nyange Church with bulldozers and the resulting deaths of 2000 Tutsi 18. According to the Amended Indictment, on 16 April 1994, Kanyarukiga and others were present and instigated the destruction of the Nyange Church with a bulldozer, which resulted in the killing of about 2000 Tutsi civilians. Based on the combined testimony of six Prosecution witnesses and eight Defence witnesses, the Chamber has found it established beyond reasonable doubt that at least one bulldozer was used to destroy the Nyange Church on 16 April 1994, killing approximately 2000 Tutsi civilians who had taken refuge inside. 19. The Prosecution relies on three witnesses to establish that Kanyarukiga was present during the destruction of the Nyange Church. The Chamber had not found this testimony to be credible. The Prosecution brought no evidence to support its allegations against Kanyarukiga regarding instigation. The Defence Case 20. The Defence has provided an alibi for the period of 12 April to 16 April 1994, which places Kanyarukiga in Gitarama and Ndera, just outside Kigali, during this time. The following factors, in combination, lead the Chamber to its conclusion with regard to the alibi. 21. Firstly, the Chamber finds that the delayed filing of the Accused's notice of alibi and the even later filing of a complete list of alibi witnesses suggest that the alibi has been constructed over a period of time to respond to the Prosecution evidence and meet the particular needs of the Accused.

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

5 22. Secondly, the Chamber does not find the Defence witnesses who provided evidence with regard to the alibi to be credible. 23. Finally, the Chamber has carefully considered the observations recorded during the Chamber's site visit. Comparisons between the observations during the site visit and the Defence witness evidence confirm to the Chamber that the evidence given by Defence witnesses is not credible and the route purportedly taken by Kanyarukiga on 16 April 1994 was long, precarious and would not have been taken at all at that time. 24. In combination, these factors lead the Chamber to find that the alibi is not reasonably possibly true. Verdict 25. The Chamber has found Gaspard Kanyarukiga responsible pursuant to Article 6(1) of the Statute for planning the destruction of the Nyange Church on 16 April 1994. Kanyarukiga is therefore guilty of genocide (Count 1) and extermination as a crime against humanity (Count 3). 26. Kanyarukiga is not guilty of complicity in genocide (Count 2). Sentencing 27. The Chamber has considered the gravity of each of the crimes for which he has been convicted, as well as aggravating and mitigating circumstances. The Chamber sentences Gaspard Kanyarukiga to a single sentence of 30 years imprisonment. He shall remain in the custody of the Tribunal pending transfer to the State where he will serve his sentence.

Page 9

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

6

CHAPTER II: PRELIMINARY ISSUES 1. Issues Relating to the Indictment 1.1. Facts not Pleaded in the Indictment 28. Article 20(4)(a) of the Statute guarantees an accused the fundamental right "[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her". The Appeals Chamber has interpreted this provision, in conjunction with Articles 17(4), 20(2), and 20(4)(b) of the Statute and Rule 47(C) of the Rules of Procedure and Evidence ("the Rules"), as requiring the Prosecution to state all material facts underpinning the charges in the indictment but not the evidence by which such facts are to be proven.⁷ 29. The Appeals Chamber has further noted that charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment to provide notice to the accused.⁸ The Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds.⁹ However, defects in an indictment may come to light during the proceedings because the evidence turns out differently than expected. In this situation, the Trial Chamber must consider whether a fair trial requires an amendment of the indictment, an adjournment of proceedings or the exclusion of evidence outside the scope of the indictment.¹⁰ 30. The Prosecution is required to plead in the indictment the specific mode or modes of liability under which the accused is charged.¹¹ The Appeals Chamber has routinely discouraged the Prosecution from merely restating the language of

Article 6(1) (or of Article 7(1) of the ICTY Statute) unless it intends to rely on all modes of liability contained therein.¹² Instead, the Prosecution is advised to plead only those modes of liability upon which it intends to rely.¹³ When the Prosecution does intend to rely on all modes of responsibility contained in Article 6(1) (or of Article 7(1) of the ICTY Statute), it must plead the material facts relevant to each mode of liability.¹⁴ Failure to do so will result in a defective indictment.¹⁵

7 Prosecutor v. Ntagerura et al., Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 21. See also Prosecutor

- v. Ntakirutimana and Ntakirutimana, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, para. 470 (this case refers to Articles 20(2), 20(4)(a) and 20(4)(b) of the Statute); Prosecutor v. Simić, Case No. IT-95-9-A, Judgement (AC), 28 November 2006, para. 20; Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-A, Judgement (AC), 3 May 2006, para. 23; Prosecutor v. Kupreškić et al., Case No. IT-95-16-A, Appeal Judgement (AC), 23 October 2001, para. 88. 8 Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Judgement (AC), 12 March 2008, paras. 27, 100; Simba v. Prosecutor, Case No. ICTR-01-76-A, Judgement (AC), 27 November 2007, para. 63; Muhimana v. Prosecutor, Case No. ICTR-95-1B-A, Judgement (AC), 21 May 2007, paras. 76, 167, 195; Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, para. 49. See also Ndindabahizi v. Prosecutor, Case No. ICTR-01-71-A, Judgement (AC), 16 January 2007, para. 16. 9 Ntagerura et al., Judgement (AC), para. 27; Niyitigeka v. Prosecutor, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 194. See also Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Judgement (AC), 28 February 2005, para. 30; Kupreškić et al., Judgement (AC), para. 92. 10 Ntagerura et al., Judgement (AC), para. 27. See also Kvočka et al., Judgement (AC), para. 31; Niyitigeka, Judgement (AC), para. 194; Kupreškić et al., Judgement (AC), para. 92. 11 Simić, Judgement (AC), para. 21; Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgement (AC), 20 May 2005, para. 357. 12 Simić, Judgement (AC), para. 21; Semanza, Judgement (AC), para. 357. See also Ntakirutimana and Ntakirutimana, Judgement (AC), para. 473. 13 Simić, Judgement (AC), para. 21; Kvočka et al., Judgement (AC), para. 41. 14 Simić, Judgement (AC), para. 21; Kvočka et al., Judgement (AC), para. 29. 15 Simić, Judgement (AC), para. 21; Kvočka et al., Judgement (AC), para. 29.

Page 10

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

7 31. Whether particular facts are “material” depends on the nature of the Prosecution case.¹⁶ The Prosecution’s characterisation of the alleged criminal conduct and the proximity of the accused to the underlying offence are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts in order to provide the accused with adequate notice.¹⁷ 32. The Appeals Chamber has held, for example, that criminal acts that were

physically committed by the accused must be set forth in the indictment specifically, including, where feasible, “the identity of the victim, the time and place of the events and the means by which the acts were committed.”¹⁸ In certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in matters such as the identity of the victims and the dates of the commission of the crimes.¹⁹ 33. Where it is alleged that the accused planned, instigated, ordered or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the “particular acts” or “particular course of conduct” on the part of the accused that forms the basis for the charges in question.²⁰ 34. If the Prosecution intends to rely on a theory of joint criminal enterprise, it must specifically plead this mode of liability in the indictment.²¹ Although joint criminal enterprise is understood as a means of “committing” under the Statute, it is insufficient for an indictment to make broad reference to Article 6(1).²² Rather, the Prosecution must indicate in the indictment whether it is alleging physical commission by the accused, participation in a joint criminal enterprise or both.²³ If the Prosecution relies on a theory of JCE, the purpose of the enterprise, the identity of its participants, the nature of the accused’s participation in the enterprise and the period of the enterprise must be pleaded in the indictment.²⁴ Additionally, the indictment should clearly indicate which form of JCE is specifically being alleged: basic, systemic, or extended.²⁵ 35. Finally, an indictment may also be defective when the material facts are pled without sufficient specificity, for example, when the times mentioned refer to broad date ranges, the places are only vaguely indicated and the victims are only generally identified.²⁶ 36. An indictment lacking the requisite precision is defective. However, the defect may be cured in exceptional circumstances if the Prosecution provides the accused with timely, clear and

16 *Karera v. Prosecutor*, Case No. ICTR-01-74-A, Judgement (AC), 2 February 2009, para. 292; *Ntagerura et al.*, Judgement (AC), para. 23; *Naletilić and Martinović*, Judgement (AC), para. 24. 17 *Ntagerura et al.*, Judgement (AC), para. 23. See also *Karera* Judgement (AC), para. 292. 18 *Muvunyi v. Prosecutor*, Case No. ICTR-2000-55A-A, Judgement (AC), 29 August 2008, para. 120; *Seromba*, Judgement (AC), para. 27; *Muhimana*, Judgement (AC), para. 76; *Ndindabahizi*, Judgement (AC), para. 16; *Gacumbitsi*, Judgement (AC), para. 49; *Ntakirutimana and Ntakirutimana*, Judgement (AC), para. 32, quoting *Kupreškić et al.*, Judgement (AC), para. 89. 19 *Muvunyi*, Judgement (AC), para. 94; *Muhimana*, Judgement (AC), para. 79; *Gacumbitsi*, Judgement (AC), para. 50; *Kupreškić et al.*, Judgement (AC), para. 89. 20 *Karera*, Judgement (AC), para. 292; *Seromba*, Judgement (AC), paras. 27, 100; *Ntagerura et al.*, Judgement (AC), para. 25. 21 *Ntagerura et al.*, Judgement (AC), para. 24; *Kvočka et al.*, Judgement (AC), para. 42. 22 *Ntagerura et al.*, Judgement (AC), para. 24; *Kvočka et al.*, Judgement (AC), para. 42. 23 *Simić*, Judgement (AC), para. 22. 24 *Simba*, Judgement (AC), para. 63; *Simić*, Judgement (AC), para. 22 (this case refers to “the nature and purpose”); *Ntagerura et al.*, Judgement (AC), para. 24; *Kvočka et al.*, Judgement (AC), para. 42. 25 *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Judgement (TC), 27 February 2009, para. 24; *Simba*, Judgement (AC), para. 63; *Simić*, Judgement (AC), para. 22; *Ntagerura et al.*, Judgement (AC), para. 24. See generally *Ntakirutimana and Ntakirutimana*, Judgement (AC), paras. 478-484. 26 *Ntagerura et al.*, Judgement (AC), para. 27; *Kvočka et al.*, Judgement (AC), para. 31 (this case adds “unless there are special circumstances”).

Page 11

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

8 consistent information detailing the factual basis underpinning the charge.²⁷ Such information may be provided through means such as a pre-trial brief and annexed witness summaries, the opening statement and motions to vary witness lists.²⁸ However, the principle that a defect in an indictment may be cured is not without limits. In this respect, the Appeals Chamber has emphasised: [T]he “new material facts” should not lead to a “radical transformation” of the Prosecution’s case against the accused. The Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused. Further, if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the indictment and the Trial Chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence.²⁹ 37. The Chamber also recalls that it is to be assumed that “an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges.”³⁰ Thus, the Appeals Chamber has held that mere service of witness statements pursuant to disclosure obligations does not suffice to inform the accused of the material facts that the Prosecution intends to prove at trial.³¹ 38. Also, as explained by the Appeals Chamber in *Karera*, a clear distinction must be drawn between vagueness in an indictment and an indictment omitting certain charges altogether.³² While it may be possible to cure a vagueness in the indictment, omitted charges can only be incorporated into the indictment by a formal amendment pursuant to Rule 50 of the Rules.³³ A Trial Chamber can convict an accused only of crimes that are charged in the indictment.³⁴ 39. The Chamber has considered whether sufficient notice was given for various pieces of Prosecution allegations and evidence. The Chamber discusses its findings with regard to notice in its factual and legal findings, prior to considering these allegations in its deliberations.³⁵ 1.2. Decision on the Defence Motion for Exclusion of Evidence 40. On 15 January 2010, the Trial Chamber issued its decision on the Defence request for a stay of the proceedings or the exclusion of several pieces of Prosecution evidence, which the Defence

²⁷ Muvunyi, Judgement (AC), para. 20; Seromba, Judgement (AC), para. 100; Simba, Judgement (AC), para. 64; Muhimana, Judgement (AC), paras. 76, 195, 217; Gacumbitsi, Judgement (AC), para. 49. See also *Ntagerura et al.*, Judgement (AC), paras. 28, 65. ²⁸ See, e.g., *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, para. 35; *Niyitegeka*, Judgement (AC), para. 197. See also Muhimana, Judgement (AC), para. 82. ²⁹ Muvunyi, Judgement (AC), para. 20, quoting *Bagosora et al.*, Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), para. 30 (internal citations omitted). ³⁰ Muvunyi, Judgement (AC), para. 100; *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-

AR73, Decision on the Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005, para. 22. 31 Ntakirutimana and Ntakirutimana, Judgement (AC), para. 27, quoting Prosecutor v. Brđanin and Talić, Case No. IT- 99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (TC), 26 June 2001, para. 62. See also Simić, Judgement (AC), para. 24; Naletilić and Martinović, Judgement (AC), para. 27. 32 Karera, Judgement (AC), para. 293. 33 Karera, Judgement (AC), para. 293. 34 Muvunyi, Judgement (AC), para. 18; Ntagerura et al., Judgement (AC), para. 28; Kvočka et al., Judgement (AC), para. 33. See also Nahimana et al. v. Prosecutor, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 326. 35 See paragraphs 197, 240, 241, 242, 322-323, 445, 446, 447, 448, 466, 573, 627-630, 631-632.

Page 12

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

9 alleged were outside the scope of the Amended Indictment.³⁶ The Defence's motion for a stay of proceedings was dismissed because the Defence request was not based on delay or pre-trial misconduct, as required by the jurisprudence of the Tribunal.³⁷ 41. After considering the jurisprudence of the Tribunal regarding notice, the Trial Chamber excluded Witness CBN's testimony that the Accused was at a roadblock on 13 and 14 April 1994 and Witness CNJ's testimony that the Accused went to fetch a bulldozer with a member of the interahamwe.³⁸ The Chamber dismissed six additional Defence requests for exclusion of evidence on the basis that there was sufficient notice of the particular evidence adduced.³⁹ In an interlocutory appeal from the Trial Chamber decision, the ICTR Appeals Chamber upheld the Trial Chamber's finding that there was sufficient notice of Witness YAU's testimony that Kanyarukiga threw food intended for the Tutsi at the parish onto the ground.⁴⁰ 42. The Chamber reserved until the judgement its decision with regard to evidence provided by Prosecution witnesses that related to meetings the Accused was alleged to have attended.⁴¹ The Chamber has addressed whether the requisite notice has been given for this evidence in the relevant sections of its factual findings below.⁴² 2. Evidentiary Matters 43. Article 20(3) of the Statute guarantees the presumption of innocence of each accused person. The burden of proving the guilt of the accused beyond reasonable doubt rests solely on the Prosecution and never shifts to the Defence. The Chamber must be satisfied beyond reasonable doubt that the accused is guilty before a verdict may be entered against him or her.⁴³ 44. While the Defence does not have to adduce rebuttal evidence to the Prosecution case, the Prosecution will fail to discharge its burden of proof if the Defence presents evidence that raises a reasonable doubt regarding the Prosecution case.⁴⁴ An accused person must be acquitted if there is any reasonable explanation for the Prosecution evidence other than his or her guilt.⁴⁵ Refusal to believe or rely upon Defence evidence does not automatically amount to a guilty verdict.⁴⁶ The Chamber must still determine whether the evidence it does accept establishes the accused's guilt

36 Decision on Defence Motion for a Stay of Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010; Motion for a Stay of Proceedings, or Exclusion of Evidence Outside the Indictment, filed on 18 December 2009. 37 Decision on Defence Motion for a Stay of Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010, para. 9. 38 Decision on Defence Motion for a Stay of Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010, paras. 22, 30, Disposition. 39 Decision on Defence Motion for a Stay of Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010, paras. 19, 24, 26, 32, 36, 40. 40 Kanyarukiga v. Prosecutor, Case No. ICTR-02-78-AR73.2, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence (AC), 23 March 2010, para. 11. 41 Decision on Defence Motion for a Stay of Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010, paras. 17, 28, 37. 42 See paragraphs 243-249, 250, 251, 252, 450, 568-571. 43 See also Rule 87(A) of the Rules ("A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."). 44 Prosecutor v. Nchamihigo, Case No. ICTR-01-63-T, Judgement and Sentence (TC), 12 November 2008, para. 13. See also Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons) (AC), 1 June 2001, para. 117; Niyitigeka, Judgement (AC), paras. 60-61 (discussing alibi). 45 Prosecutor v. Delalić et al. ("Čelebići case"), Case No. IT-96-21-A, Judgement (AC), 20 February 2001, para. 458; Nchamihigo, Judgement (TC), para. 13. 46 Nchamihigo, Judgement (TC), para. 13.

Page 13

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

10 beyond reasonable doubt.⁴⁷ Where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.⁴⁸ When the alibi does prima facie account for the accused's activities at the relevant time of the commission of the crime, the Prosecution must "eliminate the reasonable possibility that the alibi is true".⁴⁹ 45. The general principle enshrined in Rule 90(A) of the Rules is that witnesses should be heard directly by the Trial Chamber.⁵⁰ However, there are well established exceptions to the Chamber's preference for direct, live, in-court testimony, including the taking of witness testimony by deposition,⁵¹ and the admission of written statements, in lieu of oral testimony, which do not go to proof of the alleged conduct of the accused as charged in the indictment.⁵² 46. While direct evidence is preferred, hearsay evidence is not per se inadmissible before the Trial Chamber.⁵³ The Trial Chamber has the discretion to treat such hearsay evidence with caution, depending on the circumstances of the case.⁵⁴ In certain circumstances, hearsay evidence may require other credible or reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt. "The source of information, the precise character of the information, and the fact that other evidence corroborates the hearsay evidence are relevant criteria in assessing the weight or probative value of hearsay evidence."⁵⁵ 47. In general, a Chamber can make a finding of fact based on the evidence of a single witness if it finds such

evidence to be relevant and credible.⁵⁶ Corroboration of a witness's testimony is not a requirement in the practice of the Tribunal.⁵⁷ Similarly, even if the Trial Chamber finds that a witness's testimony is inconsistent or otherwise problematic, it may still choose to accept the evidence because it is corroborated by other evidence.⁵⁸ 48. Two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way.⁵⁹ Corroboration may exist even when testimonies differ on some details, provided that no credible testimony described the facts in question in a way which is incompatible with the description given in another credible testimony.⁶⁰

47 Nchamihigo, Judgement (TC), para. 13. 48 Zigiranyirazo v. Prosecutor, Case No. ICTR-01-73-A, Judgement (AC), 16 November 2009, para. 18. 49 Zigiranyirazo, Judgement (AC), para. 18, quoting Kajelijeli v. Prosecutor, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 41; Kayishema and Ruzindana, Judgement (AC), para. 106. 50 Simba, Judgement (AC), para. 19. 51 Rule 71 of the Rules. 52 Rule 92 bis(A) of the Rules. 53 Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Judgement (TC), 12 September 2006, para. 12; Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 34. 54 Rutaganda, Judgement (AC), para. 34; Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence (AC), 16 February 1999, para. 15. See also Rule 89 of the Rules. 55 Karera, Judgement (AC), para. 39 (internal citations omitted). 56 Karera, Judgement (AC), para. 45; Musema v. Prosecutor, Case No. ICTR-96-13-A, Judgement (AC), 16 November 2001, paras. 37-38. 57 Karera, Judgement (AC), para. 45; Musema, Judgement (AC), para. 36; Ntakirutimana and Ntakirutimana, Judgement (AC), para. 132. 58 Ntakirutimana and Ntakirutimana, Judgement (AC), 13 December 2004, para. 132. 59 Bikindi v. Prosecutor, Case No. ICTR-01-72-A, Judgement (AC), 18 March 2010, para. 81, quoting Nahimana et al., Judgement (AC), para. 428; Karera, Judgement (AC), paras. 173, 192. 60 Bikindi, Judgement (AC), para. 81, quoting Nahimana et al., Judgement (AC), para. 428; Karera, Judgement (AC), para. 173, 192.

Page 14

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

11 49. The Trial Chamber may rely on evidence from accomplices or detained witnesses.⁶¹ An accomplice, within the jurisprudence of the Tribunal, is someone who is “an associate in guilt, a partner in crime”⁶² or, more specifically, someone who is charged with the same criminal acts as the accused.⁶³ As explained by the Appeals Chamber, evidence of accomplice witnesses is not *per se* unreliable, particularly where the accomplice has been thoroughly cross-examined.⁶⁴ However, the evidence of accomplice witnesses should be subject to “special caution.”⁶⁵ As the Appeals Chamber has noted: “considering accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal, a Chamber, when weighing the probative value of such evidence, is bound to carefully consider the totality of the circumstances in which it

was tendered.”⁶⁶ 50. In assessing the reliability of an accomplice witness, the principle consideration for the Trial Chamber is, therefore, whether or not the accomplice had an ulterior motive to so testify.⁶⁷ 51. Provided the appropriate caution is taken to guard against the exercise of an underlying motive on the part of the witness, the Chamber retains full discretion to rely on uncorroborated, but otherwise credible, witness testimony.⁶⁸ In assessing the evidence of accomplice witnesses, the Chamber may have particular regard for the extent to which discrepancies in the testimonies were explained;⁶⁹ whether the accomplice witness has made a plea agreement with the Prosecution;⁷⁰ whether the witness has already been tried and, if applicable, sentenced for his own crimes, or

61 Nchamihigo v. Prosecutor, Case No. ICTR-2001-63-A, Judgement (AC), 18 March 2010, para. 42; Niyitegeka, Judgement (AC), para. 98. 62 Niyitegeka, Judgement (AC), para. 98, citing Oxford English Dictionary (2nd ed. 1998); Ntagerura et al., Judgement (AC), para 203. See also Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998, para. 527 (defining an accomplice as “someone who associates himself in an offence committed by another” (internal citations omitted)). 63 Ntagerura et al., Judgement (AC), para. 234. The Appeals Chamber noted in Ntagerura that, “the reason for applying ‘caution’ to the testimony of accomplice evidence is that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal. Obviously, these motives or incentives are much stronger when the witness is charged with the same criminal acts as the accused [as opposed to crimes of a similar nature].” 64 Ntagerura et al., Judgement (AC), para. 204; Niyitegeka, Judgement (AC), para. 98. See also Muvunyi, Judgement (AC), para. 128. 65 Nchamihigo, Judgement (AC), para. 42; Niyitegeka, Judgement (AC), para. 105, citing Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgement (TC), 16 May 2003, para. 245; Ntagerura et al., Judgement (AC), paras. 204-205; Nahimana et al., Judgement (AC), para. 439. 66 Niyitegeka, Judgement (AC), para. 98; Ntagerura et al., Judgement (AC), para. 204. See also Nahimana et al., Judgement (AC), para. 439; Nchamihigo, Judgement (AC), para. 42. 67 Nchamihigo, Judgement (AC), para. 42, citing Ntagerura et al., Judgement (AC), para. 206 (“[T]he Trial Chamber must consider whether the particular witness has a specific motive to testify as it did and to lie.”); Prosecutor v. Brima et al., Case No. SCSL-2004-16-A, Judgement (SCSL AC), 22 February 2008, para. 128; Nahimana et al., Judgement (AC), para. 439. 68 Nchamihigo, Judgement (AC), para. 42 (“[A] Trial Chamber retains discretion to rely on uncorroborated, but otherwise credible, witness testimony because it is best placed to evaluate the probative value of evidence. Acceptance of and reliance upon uncorroborated evidence does not in itself constitute an error of law.”); Karera, Judgement (AC), para. 45; Muhimana, Judgement (AC), para. 101; Gacumbitsi, Judgement (AC), para. 72; Niyitegeka, Judgement (AC), para. 92. In Muvunyi, the Appeals Chamber only found that corroboration was necessary in the circumstances because the accomplice witness had a motive to enhance the accused’s role in the crimes and to diminish his own. Muvunyi, Judgement (AC), paras. 129-131. 69 Simba, Judgement (AC), para. 129 (The Appeals Chamber found that the Trial Chamber had not “exceeded its discretion when finding that the discrepancies between Witness YH’s testimony and his statement of 1 October 1997 could be explained by his attempt to distance himself from the crimes which he later acknowledged.”). 70 Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-T,

Judgement (TC), 17 January 2005, para. 24.

Page 15

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

12 whether he is still awaiting the completion of his trial;⁷¹ and whether the witness may have any other reason for holding a grudge against the accused.⁷² Further, the Chamber recalls that, whilst “the ability of the Chamber to rule on the basis of testimonies and other evidence is not bound by any rule of corroboration”,⁷³ corroboration is one of many potential factors relevant to the Chamber’s assessment of witness credibility.⁷⁴ 52. Where the Chamber accepts the evidence of an accomplice witness, who may have motives or incentives to implicate the accused, it must explain why it accepted the testimony.⁷⁵ As the Appeals Chamber has observed, “Trial Chambers cannot merely state they exercised caution when assessing the evidence of an accomplice witness, but must establish that they in fact did so.”⁷⁶ 53. The Trial Chamber also has broad discretion to determine the weight to be given to the discrepancies between a witness’s testimony and his prior statements.⁷⁷ It is for the Chamber to decide if an alleged inconsistency is sufficient to cast doubt on a witness’s evidence, and the Chamber may accept such evidence, notwithstanding the discrepancies.⁷⁸ However, a Trial Chamber is bound to take into account inconsistencies and any explanations offered in respect of them when weighing the probative value of the evidence.⁷⁹ 54. Finally, a Trial Chamber is entitled to accept certain parts of a witness’s testimony and reject others.⁸⁰ It may, for example, rely on a portion of a witness’s testimony, such as that which is based on the witness’s personal observations, while not relying on another part of the evidence, such as that which is based on hearsay.⁸¹ The Trial Chamber is not required to set out in detail why it accepted or rejected particular parts of a witness’s testimony.⁸² 3. Decision on Defence Motion for Acquittal 55. In its 9 October 2009 Decision on the Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis, the Trial Chamber denied the Defence request for a judgement of acquittal on the allegations contained within paragraphs 11 and 16 of the Amended Indictment.⁸³ In accordance with the well-established jurisprudence of the Tribunal, the Trial Chamber declined to examine the sufficiency of the evidence in support of these paragraphs in isolation from the remainder of the

⁷¹ Blagojević and Jokić, Judgement (TC), para. 24 (The Trial Chamber considered the testimony of two former co-accused, who appeared as witnesses for the Prosecution after being convicted following their guilty pleas, noting, “the Trial Chamber has assessed their evidence in light of the circumstances under which they gave their testimony and in particular, that they testified pursuant to a plea agreement; that they took the solemn declaration to speak the truth; that the charges dropped against them were dropped without prejudice; and that they had not yet been sentenced at the time of their testimony. Their testimony has been evaluated against the complete trial record.”). See also Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgement (AC), 17 March 2009, para. 147. ⁷² Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgement (TC), 1 December 2003, para. 151. ⁷³ Musema, Judgement (AC), para. 37, citing Prosecutor v. Musema,

Case No. ICTR-96-13-T, Judgement (TC), 27 January 2000, para. 45. See also Kajelijeli, Judgement (AC), para. 170, citing Niyitegeka, Judgement (AC), para. 92 (“The Appeals Chamber has consistently held that a Trial Chamber is in the best position to evaluate the probative value of evidence and that it may, depending on its assessment, rely on a single witness’s testimony for the proof of a material fact.”). See also Muhimana, Judgement (AC), para 49; Rutaganda, Judgement (AC), para. 29; Karera, Judgement (AC), para. 44. 74 Simba, Judgement (AC), para 24; Ntakirutimana and Ntakirutimana, Judgement (AC), para. 132. 75 Nchamihigo, Judgement (AC), para. 46; Krajišnik, Judgement (AC), paras. 146-147. 76 Nchamihigo, Judgement (AC), para. 46. 77 Gacumbitsi, Judgement (AC), para. 74; Kajelijeli, Judgement (AC), para. 96. 78 Kajelijeli, Judgement (AC), para. 96; Rutaganda, Judgement (AC), para. 443; Musema, Judgement (AC), para. 89. 79 Niyitegeka, Judgement (AC), para. 96, citing Kupreškić et al., Judgement (AC), para. 31. 80 Bikindi, Judgement (AC), para. 68; Karera, Judgement (AC), para. 88. 81 See Bikindi, Judgement (AC), para. 69. 82 Bikindi, Judgement (AC), para. 68; Karera, Judgement (AC), para. 90. 83 Decision on the Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis (TC), 9 October 2009.

Page 16

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

13 Amended Indictment.⁸⁴ Also, noting that defects in the indictment cannot be considered under Rule 98 bis, the Chamber declined to consider whether the disagreement between the date of the CODEKOKI meeting contained in paragraph 16 of the Amended Indictment and that mentioned in the evidence had rendered paragraph 16 inoperable.⁸⁵ 4. Judicial Notice 56. According to Rule 94 of the Rules, a Trial Chamber shall take judicial notice of facts of common knowledge and may take judicial notice of previously adjudicated facts. 4.1. Facts of Common Knowledge 57. Rule 94(A) provides that a “Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.” Facts of common knowledge are those that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature. Such facts are not only widely known but also beyond reasonable dispute.⁸⁶ 58. In accordance with the Appeals Chamber’s findings in Karemera and Semanza, the Pre-Trial Chamber took judicial notice of the following facts of common knowledge in its decision of 14 May 2009:⁸⁷ i. Between 6 April 1994 and 17 July 1994, genocide against the Tutsi ethnic group occurred in Rwanda. ii. Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified, according to the following ethnic classifications: Hutu, Tutsi, and Twa. iii. Between 6 April 1994 and 17 July 1994, there were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, a large number of deaths of persons of the Tutsi ethnic group occurred. iv. Between 6 April 1994 and 17 July 1994, there was in Rwanda, an armed conflict that was not of an international character. v. Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the Convention on the

Prevention and Punishment of the Crime of Genocide (1948), having acceded to it on 16 April 1975. vi. Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the Geneva Conventions of 12 August 1949 and their Additional Protocol II of 8 June 1977, having acceded to the Geneva Conventions of 12 August 1949 on 5 May 1964 and having acceded to Protocols Additional thereto of 1977 on 19 November 1984.

84 Decision on the Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis (TC), 9 October 2009, paras. 14- 15. 85 Decision on the Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis (TC), 9 October 2009, para. 17. 86 Semanza, Judgement (AC), para. 194, citing Prosecutor v. Slobodan Milošević, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (AC), 28 October 2003. 87 Decision on the Prosecution Motion for Judicial Notice (TC), 14 May 2009, paras. 12, 14. See also Prosecutor v. Karemera et al., Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006, paras. 25-38; Semanza, Judgement (AC), para. 192.

Page 17

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

14 59. The Chamber recalls that taking judicial notice of these facts does not relieve the Prosecution of its burden to lead evidence to prove beyond reasonable doubt that the Accused's conduct and mental state rendered him individually responsible for genocide or crimes against humanity as charged in the Amended Indictment.⁸⁸ 4.2. Adjudicated Facts 60. Rule 94(B) provides that a Trial Chamber may take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings. An adjudicated fact is one on which the Tribunal has deliberated and made a final determination.⁸⁹ Judicial notice, however, should not be taken of adjudicated facts relating to the acts, conduct and mental state of the accused.⁹⁰ Nor should judicial notice be taken of facts that concern core issues in the case.⁹¹ Finally, judicial notice pursuant to Rule 94(B) "is not designed for the importing of legal conclusions from past proceedings."⁹² 61. In its decision of 14 May 2009, the Pre-Trial Chamber denied the Prosecution request for judicial notice to be taken of two adjudicated facts: 1) that the Nyange Church was destroyed by a bulldozer on 16 April 1994; and 2) that Athanase Seromba was convicted of committing genocide with respect to approximately 1500 Tutsi "refugees" who had taken refuge at the Nyange Church.⁹³ The Chamber found that the first of the two proposed adjudicated facts concerned a core issue in the case and that taking judicial notice of this fact could have placed a significant burden on the Accused to produce rebuttal evidence.⁹⁴ The Chamber further found that the second proposed adjudicated fact contained findings or characterisations of an essentially legal nature, which were not subject to judicial notice.⁹⁵ 5. Alleged Disappearance of Exculpatory Materials 62. When Kanyarukiga was handed over to ICTR representatives in South Africa on 19 July 2004, the Office of the Prosecutor produced a preliminary inventory of items seized from the Accused.⁹⁶ A second, more detailed

inventory was prepared on 10 September 2004, after the Accused was transferred to Arusha.⁹⁷ Kanyarukiga signed this second inventory list on 10 September 2004 but made notations indicating that certain items, including two laissez-passers,

88 Semanza, Judgement (AC), para. 192; Karemera et al., Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), paras. 28, 30. 89 Decision on the Prosecution Motion for Judicial Notice (TC), 14 May 2009, para. 18. See also Prosecutor v. Ntakirutimana and Ntakirutimana, Case Nos. ICTR-96-10-T and ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts (TC), 22 November 2001, para. 26; Prosecutor v. Krajišnik, Case No. IT-00-39-PT, Decision on the Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis (TC), 28 February 2003, paras. 14-15. 90 Karemera et al., Case No. Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), para. 50. 91 Decision on the Prosecution Motion for Judicial Notice (TC), 14 May 2009, para. 19. 92 Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals against Trial Chamber's Decisions on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts (AC), 26 June 2007, para. 22, citing Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts with Dissenting Opinion of Judge Harhoff (TC), 10 April 2007, para. 33. 93 Decision on the Prosecution Motion for Judicial Notice (TC), 14 May 2009. 94 Decision on the Prosecution Motion for Judicial Notice (TC), 14 May 2009, para. 24. 95 Decision on the Prosecution Motion for Judicial Notice (TC), 14 May 2009, para. 25. 96 Office of the Prosecutor Inventory attached to Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009. 97 Inventory of Items Seized from KANYARUKIGA, Gaspard, dated 10 September 2004.

Page 18

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

15 were missing from the inventory.⁹⁸ On 7 August 2009, the Defence filed a motion pursuant to Rule 68(A) of the Rules requesting that the Prosecution disclose and return three Rwandan laissez-passers or feuille de routes, which it alleged were seized at the time of Kanyarukiga's arrest and delivered to the Prosecution of the ICTR.⁹⁹ 63. In its 30 October 2009 decision on the Defence motion for disclosure and return of exculpatory materials, the Trial Chamber denied the Defence request for the laissez-passers on the grounds that it had not been established that the laissez-passers were in the custody or control of the Prosecution.¹⁰⁰ 64. In its 19 February 2010 decision on the interlocutory appeal from the Trial Chamber's decision, the ICTR Appeals Chamber dismissed the Defence's first ground of appeal, finding that the Defence had failed to demonstrate that the Trial Chamber committed a discernible error in finding that there was no basis to order the disclosure of the laissez-passers.¹⁰¹ Like the Trial Chamber, the Appeals Chamber found that it had not been established that laissez-passers were among the items seized

from the Accused.¹⁰² 65. The Appeals Chamber also dismissed the Accused's second ground of appeal but found that the Trial Chamber had erred in its characterisation of the law on alibi when it stated that the laissez- passers "would not have been proof of the [Appellant's] location at any given time."¹⁰³ The Appeals Chamber also found that the "Trial Chamber's commentaries upon the evidentiary methods by which the Appellant may present his alibi defence and on any alleged prejudice were unnecessary and premature."¹⁰⁴ 66. Relying on these findings of error, the Defence requests in its closing brief that the Trial Chamber revisit the issue of the laissez-passers or feuille de routes in its final judgement.¹⁰⁵ The Defence argues that it presented compelling evidence of the existence of the laissez-passers or feuille de routes and that the "loss of these important documents in the hands of the Prosecution has seriously detrimentally affected the ability of the Accused to present his complete Defence".¹⁰⁶ The Defence contends that the Prosecution's negligence entitles the Accused to a remedy.¹⁰⁷ 67. The Trial Chamber recalls that the issue at hand has already been resolved by the Appeals Chamber. Additionally, even if believed, the evidence presented by Defence witnesses at trial can only establish that the documents were issued to the Accused in 1994. It cannot prove that these documents were among the items seized from the Accused when he was arrested in South Africa in

98 Inventory of Items Seized from KANYARUKIGA, Gaspard, dated 10 September 2004, p. 3. 99 Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009, paras. 1-2, 4-6. 100 Decision on Defence Motion for Disclosure and Return of Exculpatory Documents Seized from the Accused (TC), 30 October 2009, para. 19. 101 Kanyarukiga v. Prosecutor, Case No. ICTR-02-78-AR73, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents (AC), 19 February 2010, para. 20. 102 Kanyarukiga, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents (AC), para. 18. 103 Kanyarukiga, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents (AC), paras. 24, 26, quoting Decision on Defence Motion for Disclosure and Return of Exculpatory Documents Seized from the Accused (TC), 30 October 2009, para. 20. The Appeals Chamber explained that the Accused is not required to prove his location at any given time but rather, may present evidence which is likely to raise a reasonable doubt in the Prosecution case. 104 Kanyarukiga, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents (AC), para. 25. 105 Defence Final Brief, filed on 11 May 2010, para. 463. 106 Defence Final Brief, para. 460. 107 Defence Final Brief, para. 467.

Page 19

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

2004. Thus, because the Defence has not adduced any evidence since the Appeals Chamber decision to support a finding that the alleged travel documents were ever in the custody or control of the Prosecution, the Trial Chamber shall not revisit this issue. 6. Notice of Alibi 68. The Defence filed a “Provisional Formal Notice of Alibi” on 30 September 2009, after the presentation of the Prosecution case from 31 August to 17 September 2009.¹⁰⁸ The Chamber recalls 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. Rule 67(A)(ii)(a) indicates that this notification shall be provided “as early as reasonably practicable” and prior to the commencement of the trial. However, Rule 67(B) goes on to say that failure to file any notice under Rule 67(A)(ii), in this case a notice of alibi, does not prevent the accused from relying on this defence at trial. Given this procedural requirement under the rules to allow the Accused in this case to raise an alibi whether or not the notice of alibi was filed before the Prosecution case, the Chamber accepts that the Accused can rely on the defence of alibi and accepts, procedurally, the filing of the notice of alibi.¹⁰⁹ 69. The Chamber will assess what effect, if any, the late filing of the notice of alibi has on the alibi as presented in this case, in its section dealing with alibi.¹¹⁰

¹⁰⁸ Provisional Formal Notice of Alibi, filed on 30 September 2009. ¹⁰⁹ The Chamber notes that the Prosecution, in its final brief, alludes to the Defence not filing a formal notice of alibi prior to the commencement of the trial in this case. Prosecutor’s Final Trial Brief, filed on 11 May 2010, paras. 265- 268. ¹¹⁰ See paragraphs 123-125. See also *Kalimanzira v. Prosecutor*, Case No. ICTR-05-88-A, Judgement (AC), 20 October 2010, paras. 54, 56; *Nchamihigo*, Judgement (AC), para. 99.

Page 20

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

17

CHAPTER III: FACTUAL FINDINGS 1. Alibi, 12-16 April 1994 1.1.

Introduction

70. As outlined in the Indictment, the Prosecution alleges that Kanyarukiga was present at, or in the vicinity of, the Nyange Parish from 12 to 16 April 1994.¹¹¹ Further, the Prosecution alleges that Kanyarukiga undertook activities during this period, which are deemed to be criminal under the Statute.¹¹² 71. The Defence “categorically denies” Kanyarukiga’s alleged presence and participation as outlined in the Prosecution evidence.¹¹³ The Defence claims that Kanyarukiga left Nyange on 12 April 1994 and stayed in Gitarama from 12 April 1994 to 14 April 1994, whilst he endeavoured to organise travel documents, among other things, in order to travel to Ndera, just outside Kigali, to retrieve his family.¹¹⁴ The Defence further claims that Kanyarukiga left Gitarama early on the morning of 15 April 1994, passed by

Gitarama Military Camp to pick up a soldier-escort and then proceeded to Ndera, stopping at Witness KG55's house, Witness Hitimana's shop in Kigali and at a roadblock in Ndera.¹¹⁵ The Defence further claims that on 16 April 1994, the day that the Nyange Church was destroyed, Kanyarukiga travelled from Ndera to Nyange with his family, via an alternate and longer route than that taken on 15 April 1994.¹¹⁶ The Defence presented a number of Defence witnesses who claim they saw Kanyarukiga on at least one of these days.⁷² The Prosecution submits that the evidence presented by the Defence in support of the Accused's alibi is "weak, inconsistent and unconvincing" and asserts that there are a number of issues of credibility with the alibi witnesses brought by the Defence. The Prosecution disputes that Kanyarukiga was absent from Nyange during this period.¹¹⁷ ⁷³ The Chamber notes that it has considered Accused's alibi in conjunction with the Prosecution evidence during its deliberations. 1.2. Evidence Defence Witness KG59 ⁷⁴. Witness KG59 has known Kanyarukiga since the witness was young.¹¹⁸ Witness KG59 testified that he was on good terms with Kanyarukiga, they met often and that the witness thought Kanyarukiga trusted him.¹¹⁹ ⁷⁵ Witness KG59 recalled that around 8.00 a.m. on 12 April 1994, Kanyarukiga left the witness the keys to his home in Giko cellule.¹²⁰ Witness KG59 said it was usual practice for

¹¹¹ Amended Indictment, filed on 14 November 2007, paras. 12-18. ¹¹² Amended Indictment, paras. 6-8, 18, 19. ¹¹³ Defence Final Brief, para. 8. ¹¹⁴ Provisional Formal Notice of Alibi, paras. 2-3; Defence Final Brief, paras. 17-46. ¹¹⁵ Defence Final Brief, paras. 47-66. ¹¹⁶ Provisional Formal Notice of Alibi, paras. 6-9; Defence Final Brief, paras. 67-102. ¹¹⁷ Prosecutor's Final Trial Brief, paras. 249, 250, 265-424. ¹¹⁸ T. 25 January 2010, pp. 8, 9 (CS); T. 25 January 2010, p. 12. ¹¹⁹ T. 25 January 2010, pp. 9, 20 (CS). ¹²⁰ T. 25 January 2010, p. 10 (CS). This witness testified also that Kanyarukiga was in "Gaseke" between 6 and 12 April 1994.

Page 21

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

¹⁸ Kanyarukiga to leave his house keys with the witness or the witness's wife when he was not at his house in Kivumu commune.¹²¹ Kanyarukiga told the witness that he was going to see his family.¹²² Witness KG59 remembered that Kanyarukiga left Nyange on 12 April 1994 because that was the first day that people were killed in his area.¹²³ ⁷⁶ Witness KG59 testified that he saw Kanyarukiga again in the late evening of 16 April 1994 when the witness returned Kanyarukiga's house keys to him.¹²⁴ Witness KG59 said that Kanyarukiga told him that he had brought his family members to Nyange.¹²⁵ Kanyarukiga came to the witness's house on a Saturday night, the same day that the church was destroyed.¹²⁶ Witness KG59 testified that he did not see Kanyarukiga's family members when the Accused visited his house on 16 April 1994.¹²⁷ Defence Witness KG45 ⁷⁷. Witness KG45 was 21 years old and a student in 1994.¹²⁸ Witness KG45 assisted with Kanyarukiga's businesses and had an extended family relationship with Kanyarukiga.¹²⁹ Witness KG45 recalled that Kanyarukiga arrived in Nyange on 6 April 1994 and left Nyange on 12

April 1994.¹³⁰ Witness KG45 recalled that early (around 7.30 a.m.) on the morning of 12 April 1994, Kanyarukiga told the witness that he was leaving Nyange to evacuate his family from Kigali and bring them back to Nyange because “the war was intensifying.”¹³¹ 78. Witness KG45 recalled that Kanyarukiga’s pharmacy was closed on 14 April 1994 between 12.00 and 1.00 p.m. and remained closed until 21 April 1994 because of the insecurity in the Nyange area.¹³² The witness noted that during this time Kanyarukiga was not in Nyange. 133 Defence Witness Juvénal Nshogozabahizi 79. Witness Juvénal Nshogozabahizi is Kanyarukiga’s son and was approximately 25 years old in 1994.¹³⁴ The witness left his father’s house in Gaseke for Gitarama between 9.00 and 10.00 a.m. on 12 April 1994 in three vehicles with Kanyarukiga, Théodomir Rwamakuba (also known as Mateco) and Rwamakuba’s family.¹³⁵ According to Witness Nshogozabahizi, Kanyarukiga decided to go to Gitarama on 12 April 1994 because Kanyarukiga had not received any news about family

121 T. 25 January 2010, pp. 10, 11 (CS); T. 25 January 2010, pp. i, ii (extract). 122 T. 25 January 2010, p. 10 (CS). 123 T. 25 January 2010, pp. 25, 26. 124 T. 25 January 2010, p. 11 (CS). 125 T. 25 January 2010, p. 11 (CS). 126 T. 25 January 2010, p. 11 (CS); T. 25 January 2010, p. i (extract). 127 T. 25 January 2010, p. v (extract). 128 T. 21 January 2010, p. 58. 129 T. 21 January 2010, pp. 59, 62, 66, 67 (CS). 130 T. 21 January 2010, p. 70 (CS). 131 T. 21 January 2010, pp. 60, 61, 70, 77 (CS). The witness referred to “two days before” the pharmacy was closed on 14 April 1994 as the date that the Accused informed her that he was leaving for Kigali. 132 T. 21 January 2010, pp. 59-60, 61, 62, 71 (CS). 133 T. 21 January 2010, p. 61 (CS). 134 T. 3 February 2010, p. 22. The witness testified that he is currently 41 years old. The witness later agreed that he was “26 years or so” in 1994. T. 3 February 2010, p. 43. 135 T. 3 February 2010, pp. 27, 28, 32, 42, 51. The witness testified that they travelled in Kanyarukiga’s red Nissan saloon car and Théodomir’s Mazda 303 and a red Mitsubishi Pajero. T. 3 February 2010, p. 28.

Page 22

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

19 members who were in Ndera.¹³⁶ In addition, Witness Nshogozabahizi testified that Rwamakuba and his family had to leave Nyange because their safety was threatened.¹³⁷ 80. The witness testified that he and Kanyarukiga spent the nights of 12 and 13 April 1994 at a house in Gitarama.¹³⁸ Witness Nshogozabahizi recalled that, during the days of 13 and 14 April 1994, Kanyarukiga stayed inside the compound of the house where they were staying.¹³⁹ From 12 April 1994 until 15 April 1994, the witness said that Kanyarukiga did not use his vehicle because there was a fuel shortage, and every time Kanyarukiga wanted to go somewhere, he would go on foot or in another vehicle.¹⁴⁰ 81. According to Witness Nshogozabahizi, Kanyarukiga then left the house in Gitarama around 9.00 a.m. on 15 April 1994 in the red Mitsubishi Pajero.¹⁴¹ The witness believed that Kanyarukiga was going to Ndera to evacuate his family.¹⁴² 82. On 16 April 1994 and in the company of other family members, Kanyarukiga arrived at the house in Gitarama, where the witness was staying.¹⁴³ He testified that they arrived after 8.00 p.m., probably around 9.00 or

10.00 p.m.¹⁴⁴ Everyone came out of the house to welcome those who had arrived with Kanyarukiga.¹⁴⁵ The witness recalled that he was happy because he saw his mother, who had arrived with Kanyarukiga.¹⁴⁶ He testified that between nine and ten persons came to the house when the vehicle arrived.¹⁴⁷ 83. Kanyarukiga and those with him spent about 30 minutes to one hour at the house in Gitarama.¹⁴⁸ There was no room for the group to stay overnight at the house, so the party proceeded to Nyange.¹⁴⁹ Witness Nshogozabahizi stayed at the Gitarama house and did not go with his father to Kivumu commune.¹⁵⁰ Defence Witness KG18 84. Defence Witness KG18, a Hutu, was 18 years old and a student in 1994 and has known Kanyarukiga since the witness was a child.¹⁵¹ The witness said that he has been to Kanyarukiga's house in Kigali on certain occasions with the witness's father.¹⁵² 85. According to Witness KG18, Kanyarukiga, his son Juvénal and Théodomir Rwamakuba, and his family came from Kigali and arrived at the house in which the witness was staying on

136 T. 3 February 2010, pp. 28, 43. Witness Nshogozabahizi said that, when the Accused left Nyange, he had sworn that he would do everything possible to go and evacuate those family members who were in Ndera. 137 T. 3 February 2010, p. 28. 138 T. 3 February 2010, pp. 28-29. 139 T. 3 February 2010, p. 29. The witness noted that he was not really following Kanyarukiga during this time. 140 T. 3 February 2010, p. 29. 141 T. 3 February 2010, p. 29. 142 T. 3 February 2010, p. 29. 143 T. 3 February 2010, pp. 30, 31, 41. 144 T. 3 February 2010, pp. 30, 31, 41. 145 T. 3 February 2010, p. 30. 146 T. 3 February 2010, p. 30. 147 T. 3 February 2010, pp. 30, 31, 41. 148 T. 3 February 2010, p. 31. 149 T. 3 February 2010, pp. 30, 41. 150 T. 3 February 2010, p. 30. 151 T. 10 February 2010, pp. 8, 12, 20, 26 (CS); Defence Exhibit D62 (Personal Identification Sheet of Witness KG18). 152 T. 10 February 2010, p. 8 (CS).

Page 23

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

20 12 April 1994.¹⁵³ Witness KG18 also testified that on 12 April 1994, Kanyarukiga and the others were coming from Kibuye, and they were fleeing.¹⁵⁴ 86. The witness recalled that on 12 April 1994, the day Kanyarukiga arrived, Kanyarukiga did not go out.¹⁵⁵ On the following day, 13 April 1994, Kanyarukiga went out once and on the third day (14 April 1994) Kanyarukiga went out with a friend, came back to the house for a meal and then went out again with Théodomir Rwamakuba.¹⁵⁶ During the period between 12 and 14 April 1994, the witness testified that, when Kanyarukiga went out, he would tell "them" where he was going so that if anyone wanted to contact him, they would know where he was.¹⁵⁷ 87. The witness stated that, on 15 April 1994, the Accused left the Gitarama house alone between 7.00 and 8.00 a.m. in the red Pajero.¹⁵⁸ Kanyarukiga did not spend the night of 15 April 1994 in the house in Gitarama.¹⁵⁹ Kanyarukiga's son told the witness that he was going to find Kanyarukiga's children and that someone was accompanying Kanyarukiga to his destination.¹⁶⁰ 88. On 16 April 1994, around 9.00 p.m., Kanyarukiga came back to Gitarama with about nine or ten people.¹⁶¹ The witness said that there were three girls who were Agnès, Spéciose and Aimée, a boy who was eight or nine, four

other girls, Kanyarukiga's wife and Kanyarukiga's mother.¹⁶² The witness recalled that Kanyarukiga and his family stayed about two hours at the house in Gitarama and then left for Nyange as there was no space to remain at the house.¹⁶³ Defence Witness Philippe Rukabyatorero 89. Witness Rukabyatorero was the interim commander at Gitarama Military Camp from August 1993 until approximately 14 April 1994.¹⁶⁴ He has known Kanyarukiga since 1986, when the witness was at ESM (École Supérieure Militaire).¹⁶⁵ The witness saw Kanyarukiga in Gitarama twice on 14 April 1994.¹⁶⁶ 90. The first occasion that the witness met Kanyarukiga was by accident, at 10.00 a.m. on 14 April 1994 at Hotel Tourisme in Gitarama for about 30 minutes.¹⁶⁷ Kanyarukiga told the witness that Kanyarukiga's family was "blocked" at his residence in Ndera and that he was trying to find a

153 T. 10 February 2010, pp. 7, 8, 9, 10, 11, 31, 34 (CS). The witness testified that they arrived in three cars: a Mazda pick-up, a Pajero and a saloon car. 154 T. 10 February 2010, p. 11 (CS). 155 T. 10 February 2010, pp. 24-25 (CS). 156 T. 10 February 2010, pp. 22, 25 (CS). 157 T. 10 February 2010, pp. 13, 22 (CS). The witness initially stated that Kanyarukiga went out once or twice a day during those three days. T. 10 February 2010, p. 22 (CS). He later said that he only saw Kanyarukiga going out two times during the three days. T. 10 February 2010, p. 25 (CS). Finally, he clarified that Kanyarukiga went out once on 13 April 1994 and twice on 14 April 1994. T. 10 February 2010, p. 25 (CS). Witness KG18 recalled that he did not see Kanyarukiga go out in any vehicle from the house in Gitarama. T. 10 February 2010, p. 13 (CS). 158 T. 10 February 2010, pp. 13, 15, 16, 25 (CS). 159 T. 10 February 2010, p. 16 (CS). Witness KG18 remembers this date 15 April 1994 because he was preparing his birthday, and he had invited many other children. 160 T. 10 February 2010, pp. 11, 16 (CS). 161 T. 10 February 2010, pp. 16, 17, 18 (CS). 162 T. 10 February 2010, pp. 17, 18 (CS). 163 T. 10 February 2010, pp. 18, 19 (CS). 164 T. 2 February 2010, pp. 25, 26. 165 T. 2 February 2010, p. 26. 166 T. 2 February 2010, pp. 27, 28. 167 T. 2 February 2010, pp. 27, 28, 52.

Page 24

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

21 way to get to his Ndera residence to retrieve them.¹⁶⁸ Kanyarukiga asked the witness to help him evacuate his family.¹⁶⁹ The witness told Kanyarukiga to come to his office at Gitarama Military Camp that afternoon in order to find a solution.¹⁷⁰ 91. At approximately 4.00 p.m. on 14 April 1994, the witness met Kanyarukiga for the second time when Kanyarukiga arrived at the witness's office at Gitarama Military Camp.¹⁷¹ After some discussion, the witness arranged for a feuille de route to be prepared, signed and issued to Kanyarukiga.¹⁷² The witness recalled that the objective of the feuille de route was to enable Kanyarukiga to leave Gitarama, pass through roadblocks in order to arrive in Ndera.¹⁷³ Kanyarukiga remained in the witness's office for approximately 30 to 45 minutes.¹⁷⁴ 92. The witness asked a platoon leader to provide him with a soldier to escort Kanyarukiga to Ndera, and the witness introduced this soldier to Kanyarukiga.¹⁷⁵ The witness could not recall the name of the soldier but remembered that the soldier's rank was private first class.¹⁷⁶ The witness asked Kanyarukiga to return the following

day to Gitarama Military Camp to pick up the assigned soldier Kanyarukiga so that they could leave for Ndera early that same morning.¹⁷⁷ The soldier returned approximately two days later, around 17 April 1994, and reported to the witness that the soldier and Kanyarukiga had been able to evacuate Kanyarukiga's family.¹⁷⁸ The soldier also reported that the group had problems on their return journey and did not use the Kigali-Gitarama highway.¹⁷⁹ Instead, they passed through Bugasera because there was a lot of fighting in Kanombe and Kicukiro-Remera area.¹⁸⁰ Defence Witness Thicien Ndaberetse 93. Witness Thicien Ndaberetse was a private first class in the Rwandan Army and was based at Gitarama Military Camp in April 1994. He testified that he was assigned by the commander of Gitarama Military Camp, Rukabyatorero, to travel with Kanyarukiga from Gitarama to Ndera and back to pick up members of Kanyarukiga's family about a week after the president died.¹⁸¹ 94. Commander Rukabyatorero called the witness to his office, and when the witness arrived, Kanyarukiga was with the commander.¹⁸² The witness did not provide dates that he travelled with Kanyarukiga from Gitarama to Ndera and back, but testified that on the day after they were introduced, Kanyarukiga and Witness Ndaberetse left Gitarama Military Camp around 9.00 a.m. and arrived in Ndera between 2.00 and 3.00 p.m.¹⁸³ On their way to Ndera, Kanyarukiga and the witness stopped at a woman's house.¹⁸⁴ Witness Ndaberetse estimated they spent between 40 and 60 minutes at this location before leaving.¹⁸⁵ After passing through Kigali, Kanyarukiga and the

168 T. 2 February 2010, p. 28. 169 T. 2 February 2010, p. 28. 170 T. 2 February 2010, p. 28. 171 T. 2 February 2010, p. 28. 172 T. 2 February 2010, pp. 28, 29, 33-34, 37-38, 52. 173 T. 2 February 2010, p. 37. 174 T. 2 February 2010, p. 29. 175 T. 2 February 2010, pp. 29, 54. 176 T. 2 February 2010, p. 29. 177 T. 2 February 2010, p. 29. 178 T. 2 February 2010, p. 29. 179 T. 2 February 2010, p. 29. 180 T. 2 February 2010, p. 29. 181 T. 21 January 2010, pp. 7-8, 9, 11. 182 T. 21 January 2010, pp. 8, 9, 10. 183 T. 21 January 2010, p. 14. 184 T. 21 January 2010, p. 11. 185 T. 21 January 2010, p. 11.

Page 25

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

22 witness arrived at Kanyarukiga's house in Ndera and spent the night there.¹⁸⁶ Witness Ndaberetse testified that he and Kanyarukiga came across many roadblocks between Gitarama and Ndera.¹⁸⁷ 95. The witness recalled that in the afternoon of that same day, he and Kanyarukiga went to the bourgmestre's office in Ndera.¹⁸⁸ According to the witness, Kanyarukiga was obliged to see the bourgmestre to obtain another feuille de route, which included the names of his family, because the one they were using did not.¹⁸⁹ Witness Ndaberetse testified that he did not see all the names on the feuille de route obtained from the bourgmestre but testified that the names were typed and that his name and Kanyarukiga's appeared first.¹⁹⁰ 96. The following day, the witness, Kanyarukiga and Kanyarukiga's family left Ndera between 8.00 a.m. and 9.00 a.m.¹⁹¹ Witness Ndaberetse recalled there were between five and eight people in the car, including children and adults, and the vehicle was full.¹⁹² 97. According to the witness, the vehicle crossed various roadblocks and was stopped at a roadblock referred to as "kilomètre

19".¹⁹³ Witness Ndaberetse recalled that they presented their *feuille de route*, but the people at the roadblock did not acknowledge its authenticity and said that it had been issued by an *inyenzi*.¹⁹⁴ At the roadblock, the vehicle and the people in the vehicle were checked, and the witness believed the situation to be very dangerous.¹⁹⁵ The "confrontation" lasted between 40 and 60 minutes.¹⁹⁶ 98. The witness recalled that Kanyarukiga went to see the commander of Kanombe Military Camp, and the commander issued another *feuille de route* to Kanyarukiga.¹⁹⁷ The *feuille de route* had the names of the witness, Kanyarukiga and members of Kanyarukiga's family.¹⁹⁸ 99. After Kanyarukiga obtained the *feuille de route*, the party went back to the highway and successfully passed through the kilomètre 19 roadblock.¹⁹⁹ Witness Ndaberetse could not recall what time of day they returned to the roadblock at "kilomètre 19" because "it happened a long time ago."²⁰⁰

186 T. 21 January 2010, pp. 11, 12, 13. 187 T. 21 January 2010, pp. 14, 37-38, 39. 188 T. 21 January 2010, pp. 13, 14, 26-28, 31. 189 T. 21 January 2010, pp. 13, 26. 190 T. 21 January 2010, pp. 27-28. 191 T. 21 January 2010, pp. 14, 15. 192 T. 21 January 2010, pp. 14, 26. 193 T. 21 January 2010, p. 15. 194 T. 21 January 2010, pp. 15-17. It is not entirely clear whether the *feuille de route* they presented was that issued by Commander Rukabyatorero or the *bourgmestre*, but Witness Ndaberetse implied that it was that issued by the *bourgmestre*. T. 21 January 2010, p. 17. 195 T. 21 January 2010, p. 16. 196 T. 21 January 2010, p. 16. 197 T. 21 January 2010, pp. 17-18. Witness Ndaberetse recalled that the Accused parked the vehicle outside the camp, and the "two of us entered into the camp on foot in order to go and request the *feuille de route*." T. 21 January 2010, p.

30. When first questioned, the witness stated that only the Accused entered the military camp. T. 21 January 2010, p.

18. See also T. 21 January 2010, p. 37. Later, Witness Ndaberetse testified that he let Kanyarukiga enter the camp alone, and he remained next to members of the family in the car. T. 21 January 2010, p. 42. The witness also stated that he did not remember whether they entered the camp together "because it was a long time ago," but he remembered they went to the camp. T. 21 January 2010, p. 31. 198 T. 21 January 2010, p. 17. 199 T. 21 January 2010, p. 18. 200 T. 21 January 2010, p. 18.

Page 26

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

23 100. Witness Ndaberetse advised Kanyarukiga, who was driving, to take another route back to Gitarama because they had encountered many roadblocks during their journey to Ndera.²⁰¹ They took the road going through Bugesera and stopped at a commercial centre known as Ruhuha for one hour.²⁰² After having their meal, they discovered that the vehicle had a flat tyre.²⁰³ From Ruhuha, they crossed the Rwabusoro Bridge.²⁰⁴ Witness Ndaberetse testified that it was "a rainy period", and there was a lot of mud on the road.²⁰⁵ He recalled that they were obliged to show the *feuille de route* at several roadblocks including roadblocks at the Rwabusoro

bridge, another following that bridge and at Ruhango and Gahogo before Gitarama Military Camp.²⁰⁶ Witness Ndaberetse testified that a *feuille de route* was supposed to be shown at all checkpoints, and he also had to show his military identity card at times.²⁰⁷ The party arrived in Gitarama at nightfall, and Kanyarukiga dropped the witness off at Gitarama Military Camp.²⁰⁸ Defence Witness KG55 101. Witness KG55 is related to Kanyarukiga.²⁰⁹ Witness KG55 testified that she saw Kanyarukiga on 15 April 1994 at her home.²¹⁰ Kanyarukiga talked to the witness inside her home for about 30 minutes between 10.00 and 11.00 a.m.²¹¹ The witness recalled that Kanyarukiga told her that he had come from Gitarama and was going to Ndera to evacuate his wife and his family living there.²¹² She testified that she remembered the date because it was the day she was separated from her children.²¹³ 102. The witness was concerned for her safety and in comforting her and her children Kanyarukiga said, "[d]on't worry everything will be fine" and gave her 5,000 Rwandan francs. 214 Defence Witness Célestin Hitimana 103. Witness Hitimana, a Hutu, has been friends with Kanyarukiga since primary school.²¹⁵ Witness Hitimana recalled that the President died on 6 April 1994 and that he saw Kanyarukiga approximately a week later at the witness's shop in Kigali.²¹⁶ The witness stated that this occurred between 10.00 a.m. and 12.00 p.m. and lasted for no more than five minutes.²¹⁷ When Kanyarukiga

201 T. 21 January 2010, p. 14. 202 T. 21 January 2010, p. 18. 203 T. 21 January 2010, p. 19. 204 T. 21 January 2010, p. 18. 205 T. 21 January 2010, p. 18. 206 T. 21 January 2010, p. 30. 207 T. 21 January 2010, p. 28. The Chamber notes that Witness Ndaberetse gave this answer in reference to questions about the *feuille de route* issued by the *bourgmestre*, but it appears to be equally applicable to the other two *feuille de routes*. 208 T. 21 January 2010, p. 19. 209 T. 19 January 2010, p. 37 (CS); Defence Exhibit D55 (Personal Identification Sheet of Witness KG55). 210 T. 19 January 2010, pp. 37-38, 39 (CS). Witness KG55 thought that she remembered that she saw the Accused about one week after "the trouble or the unrest" started. T. 19 January 2010, p. 39 (CS). 211 T. 19 January 2010, pp. 39, 42, 43 (CS). While still on direct examination by Defence Counsel, Witness KG55 contradicted her previous testimony when the witness testified that she remembered Kanyarukiga visited her house "in the afternoon." T. 19 January 2010, p. 40 (CS). 212 T. 19 January 2010, pp. 40, 42 (CS). 213 T. 19 January 2010, p. 40 (CS). 214 T. 19 January 2010, p. 39 (CS). 215 T. 1 February 2010, pp. 3, 5, 6, 8. 216 T. 1 February 2010, pp. 6, 7. The witness said he reopened his shop more than a week after the death of the president and that "the second day after I opened my shop[.]" Kanyarukiga came to see him. 217 T. 1 February 2010, pp. 7, 8, 21.

Page 27

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

24 came to the witness's shop, Kanyarukiga told the witness that he had come from Gitarama and was going to Ndera to see his family.²¹⁸ Defence Witness KG44 104. Witness KG44 manned a roadblock in Ndera in April 1994 and knew Kanyarukiga from that region.²¹⁹ The witness alluded to taking part in "activities, which can be linked to the genocide" at this roadblock.²²⁰ 105. Kanyarukiga passed through the roadblock that the witness manned on 15 April 1994, however

the witness did not talk to him.²²¹ The witness saw Kanyarukiga during the day, but it was impossible to give a precise time.²²² The Accused was driving a red Pajero and another person was in the car.²²³ The vehicle had come from “kilomètre 15” and was going towards Kanyarukiga’s house.²²⁴ 106. Witness KG44 also saw Kanyarukiga at the same roadblock on the morning of 16 April 1994 coming from the direction of Kanyarukiga’s house with a soldier and many people in the car.²²⁵ He could not remember what time he saw Kanyarukiga on 16 April 1994, only that it was during the day.²²⁶ When Kanyarukiga was at the roadblock on 16 April 1994, the witness noted that there were some problems with those manning the roadblock and their view of Kanyarukiga. ²²⁷ Defence Witness KG46 107. Witness KG46 manned a roadblock near Kanyarukiga’s house in April 1994.²²⁸ He knew Kanyarukiga in April 1994 and lived close to him in Ndera.²²⁹ While manning the roadblock on 15 April 1994, the witness saw Kanyarukiga at approximately 3.00 p.m., when Kanyarukiga passed through the roadblock after coming from kilomètre 15.²³⁰ 108. Witness KG46 saw Kanyarukiga again before midday on 16 April 1994, as he passed through the roadblock the witness was manning.²³¹ Kanyarukiga was in a vehicle coming from the direction of Ndera.²³² There were many people in the vehicle, but the witness did not know their names.²³³

218 T. 1 February 2010, pp. 7, 20, 21. 219 T. 26 January 2010, pp. 3-4, 5 (CS); Defence Exhibit D58 (Personal Identification Sheet of Witness KG44). 220 T. 26 January 2010, p. 5 (CS). 221 T. 26 January 2010, pp. 4, 5 (CS). 222 T. 26 January 2010, pp. 5, 27 (CS). 223 T. 26 January 2010, p. 5 (CS). The witness identified this car as one he had seen Théodore Rwamakuba, Kanyarukiga’s nephew, driving. 224 T. 26 January 2010, p. 6 (CS). 225 T. 26 January 2010, pp. 6-7, 17 (CS). The witness testified that the car was full. T. 26 January 2010, p. 18 (CS). Witness KG44 testified that when he had testified the vehicle was full, that meant that the number of passengers was more than the number of people the vehicle was allowed to transport and that the people were sitting close together. T. 26 January 2010, p. 25 (CS). 226 T. 26 January 2010, p. 7 (CS). Later, Witness KG44 testified that on 16 April 1994, “when Kanyarukiga left his residence, it was in the morning.” T. 26 January 2010, p. 27 (CS). 227 T. 26 January 2010, p. 7 (CS). 228 T. 26 January 2010, pp. 33, 39 (CS); Defence Exhibit D59 (Personal Identification Sheet of Witness KG46). 229 T. 26 January 2010, p. 32 (CS). 230 T. 26 January 2010, pp. 33, 35 (CS). 231 T. 26 January 2010, p. 35 (CS). 232 T. 26 January 2010, pp. 35, 36 (CS). 233 T. 26 January 2010, p. 35 (CS).

Page 28

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

25 Defence Witness Xavérina Muhayimana 109. Witness Xavérina Muhayimana has known Kanyarukiga since the 1980s, and in April 1994, she lived about 200 meters from Kanyarukiga in Ndera.²³⁴ 110. The witness saw Kanyarukiga outside her house between 4.00 and 5.00 p.m. on 15 April 1994.²³⁵ She “heard the engine running and we came out to see who was driving the vehicle.”²³⁶ Kanyarukiga arrived in Ndera in a red Pajero and was accompanied by a soldier carrying a weapon.²³⁷ The witness talked to Kanyarukiga within the compound of his house

where Kanyarukiga told the witness that he had come to evacuate his family members.²³⁸ The witness asked Kanyarukiga to take the witness and her children, Henriette Mutonweshwa, who was aged ten, and Raphaël Banderere, who was eight years old, with him.²³⁹ Kanyarukiga could not take her but agreed to take her children because they were young and did not need to have individual seats to fit in the vehicle.²⁴⁰ 111. On 16 April 1994, Witness Muhayimana took her children to Kanyarukiga's house around 7.00 or 8.00 a.m.²⁴¹ The witness recalled that they left on 16 April 1994 because she was a Seventh Day Adventist and 16 April "was a Saturday morning, and according to the Adventist tradition, it was the Sabbath day."²⁴² The vehicle used to evacuate Kanyarukiga's family was full with people, including the witness's children, Kanyarukiga's mother, his wife and children.²⁴³ Witness Muhayimana recalled that Kanyarukiga told her they were going to Nyange in Kivumu commune.²⁴⁴ Defence Witness Henriette Mutonweshwa Isaro 112. In 1994, Witness Mutonweshwa, a Hutu, was a 10-year-old student living in Ndera with her parents.²⁴⁵ She knew Kanyarukiga well because he was a friend of the witness's family, they were neighbours in Ndera and she liked going to his house.²⁴⁶ Witness Mutonweshwa was also friends with Kanyarukiga's daughters.²⁴⁷ 113. Witness Mutonweshwa testified that the Accused took the witness and her younger brother from Ndera to Nyange about a week to ten days after the President was killed in April 1994.²⁴⁸ Due to the insecurity in Ndera, the witness's mother sent her and her brother with Kanyarukiga so they could be taken to Kibuye.²⁴⁹ Witness Mutonweshwa testified that they took a very long route that started very early in the morning.²⁵⁰ According to the witness, the party encountered roadblocks along their route.²⁵¹ Witness Mutonweshwa testified that they stopped at a house in Gitarama.²⁵² She

234 T. 20 January 2010, pp. 2-3. 235 T. 20 January 2010, pp. 3, 4, 17. 236 T. 20 January 2010, p. 3. 237 T. 20 January 2010, pp. 3, 4. 238 T. 20 January 2010, pp. 4, 17. 239 T. 20 January 2010, pp. 4, 5, 6; French Transcript, T. 20 January 2010, p. 5. 240 T. 20 January 2010, p. 5. 241 T. 20 January 2010, p. 5. 242 T. 20 January 2010, pp. 7, 11, 12, 32. 243 T. 20 January 2010, p. 6. 244 T. 20 January 2010, p. 7. 245 T. 21 January 2010, pp. 48-49, 52. Witness Mutonweshwa is the daughter of Xavérina Muhayimana. 246 T. 21 January 2010, p. 49. 247 T. 21 January 2010, pp. 49, 53. 248 T. 21 January 2010, pp. 49-50, 52, 54-55. 249 T. 21 January 2010, p. 50. 250 T. 21 January 2010, p. 50. 251 T. 21 January 2010, pp. 51, 54.

Page 29

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

26 remembered this stop because they took a small break during the trip, and there were people in the house.²⁵³ The witness testified that the roads were bad, the route was not well-kept and the vehicle had some trouble.²⁵⁴ They travelled the entire day and arrived late in the evening.²⁵⁵ Defence Witness Aaron Ephrem Sebitabo Sebisukiro 114. Witness Sebisukiro has known Kanyarukiga since 1984; he met Kanyarukiga through a mutual acquaintance.²⁵⁶ Witness Sebisukiro often met Kanyarukiga in "town" in 1994.²⁵⁷ 115. Witness Sebisukiro saw Kanyarukiga just outside the witness's residence in Rusororo secteur, Runyombya cellule, Rubungu commune,

Kigali-Rural préfecture between 11.00 a.m. and 12.00 p.m. for no more than five minutes on 16 April 1994.²⁵⁸ The witness's house was located about 50 metres away from the road where Kanyarukiga was passing on 16 April 1994.²⁵⁹ Kanyarukiga was travelling in a "Land Cruiser type Jeep" with other persons and coming from Kigali.²⁶⁰ According to the witness, Kanyarukiga left in the direction of Kibungo.²⁶¹ Defence Witness KG24 116. Witness KG24 has known Kanyarukiga through business dealings since October 1993.²⁶² He testified that he saw Kanyarukiga almost every Saturday between October 1993 and April 1994.²⁶³ In April 1994, the witness worked in a shop in Ruhuha.²⁶⁴ 117. On 16 April 1994, Witness KG24 saw Kanyarukiga around 4.00 or 5.00 p.m. in the Ruhuha Trading Centre when Kanyarukiga stopped by the shop where the witness worked.²⁶⁵ The witness testified that the other roads appeared to be no longer serviceable, so the traffic was centred around Ruhuha.²⁶⁶ Kanyarukiga and his party stayed at the the Ruhuha Trading Centre for about an hour at the bar and left around sunset.²⁶⁷ Nine or ten people accompanied Kanyarukiga in a full vehicle, including adults, children and a soldier; the witness did not know any of the people in the vehicle.²⁶⁸ 118. When leaving, Kanyarukiga attempted to start the car, but it would not start.²⁶⁹ Kanyarukiga asked the witness to help him start the car, and then he noticed that one of the tyres had a puncture.²⁷⁰ The witness helped Kanyarukiga change the tyre.²⁷¹ Kanyarukiga told Witness KG24 that he was going to the village where he was born due to security concerns.²⁷²

252 T. 21 January 2010, p. 50. 253 T. 21 January 2010, p. 50. 254 T. 21 January 2010, p. 51. 255 T. 21 January 2010, pp. 50, 51. 256 T. 25 January 2010, pp. 31, 32. 257 T. 25 January 2010, p. 32. 258 T. 25 January 2010, pp. 31, 34, 35, 59-60. 259 T. 25 January 2010, p. 35. 260 T. 25 January 2010, p. 34. 261 T. 25 January 2010, p. 35. 262 T. 2 February 2010, p. 6 (CS); Defence Exhibit D61 (Personal Identification Sheet of Witness KG24). 263 T. 2 February 2010, pp. 6, 7 (CS). 264 T. 2 February 2010, pp. 5-6 (CS). 265 T. 2 February 2010, pp. 8, 9 (CS). 266 T. 2 February 2010, p. 22 (CS). 267 T. 2 February 2010, pp. 9, 10 (CS). See also T. 2 February 2010, p. 22 (CS). 268 T. 2 February 2010, pp. 10, 14, 22 (CS). 269 T. 2 February 2010, p. 10 (CS). 270 T. 2 February 2010, p. 10 (CS). 271 T. 2 February 2010, p. 10 (CS). 272 T. 2 February 2010, p. 10 (CS).

Page 30

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

27 119. The day the witness saw Kanyarukiga, the witness's shop was looted.²⁷³ Kanyarukiga comforted Witness KG24 and gave him 2000 Rwandan francs. 274 1.3. Deliberations 120. In *Zigiranyirazo*, the Appeals Chamber recalled the applicable standard regarding a defence of alibi: An alibi does not constitute a defence in its proper sense. By raising an alibi, an accused is simply denying that he was in a position to commit the crime with which he was charged. An accused does not bear the burden of proving his alibi beyond reasonable doubt. Rather he must simply produce the evidence tending to show that he was not present at the time of the alleged crime or, otherwise stated, present evidence likely to raise a reasonable doubt in the Prosecution case. If the alibi is reasonably possibly true, it must be accepted. Where an alibi is properly raised, the

Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true. The Prosecution may do so, for instance, by demonstrating that the alibi does not in fact reasonably account for the period when the accused is alleged to have committed the crime. Where the alibi evidence does *prima facie* account for the accused's activities at the relevant time of the commission of the crime, the Prosecution must "eliminate the reasonable possibility that the alibi is true," for example, by demonstrating that the alibi evidence is not credible.²⁷⁵ General Observations 121. There are a number of factors that ultimately contribute to the Chamber's view of the alibi. The first of these factors is that the Defence filed its short notice of alibi after the Prosecution case, and then filed its final list of alibi witnesses only a month prior to the beginning of the Defence case. Secondly, of the Defence witnesses who were brought, all but three had a close familial, close personal or business relationship with the Accused which leads the Chamber to place little to no weight on their evidence. The Chamber does not find these three remaining witnesses to be credible. Finally, the Chamber undertook a site visit in Rwanda, which confirmed to the Chamber that the Defence witness testimony with regard to 15 April 1994 was unreliable and that the route described by the Defence witnesses was too long and precarious to be taken at all on 16 April 1994. Therefore, as discussed further below, these three factors lead the Chamber to conclude that the alibi is a contrived story, provided by Defence witnesses, who each gave evidence that fits too neatly in favour of the Accused and the alibi. The alibi is therefore not reasonably possibly true. ¹²². The Chamber will now discuss its particular concerns with regard to its general observations. Late filing of notice of alibi and witness particulars ¹²³. The Chamber recalls that it has discretion to consider whether the late filing of a notice of alibi undermined the credibility of the alibi itself.²⁷⁶ The Chamber will consider here what effect the late filing of the notice of alibi and more poignantly, the identities of the Defence witnesses, have on the Chamber's view of the alibi.

²⁷³ T. 2 February 2010, pp. 8-9 (CS). ²⁷⁴ T. 2 February 2010, p. 10 (CS). ²⁷⁵ Zigiranyirazo, Judgement (AC), paras. 17-18 (internal quotations and citations omitted). ²⁷⁶ Kalimanzira, Judgement (AC), para. 56, citing Rutaganda, Judgement (AC).

Page 31

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

²⁸ ¹²⁴. The Defence filed its notice of alibi after the conclusion of the Prosecution case.²⁷⁷ The Chamber recalls that it has accepted the filing of this instrument in a procedural sense (notwithstanding it did not fully comply with the terms of Rule 67(A)(ii)(a)) and notes that the Chamber's decision regarding the alleged disappearance of laissez-passers was rendered after the close of the Prosecution case.²⁷⁸ However, the Chamber notes that, not only was the notice of alibi filed after the close of the Prosecution case, but the Defence referred to only eight alibi witnesses in its Provisional Notice of Alibi.²⁷⁹ It then followed this with a list of witness particulars on 6 November 2009, which removed three witnesses from those it had mentioned a week before and added thirteen additional witnesses.²⁸⁰ The Defence proceeded to file a further

list of alibi witnesses on 1 December 2009, which removed one witness from the enlarged list and added two more.²⁸¹ It was only in this document that the Defence provided detail as to what kind of evidence each witness would attest to; this document, in the words of the Defence, “harmoni[s]ed” the list of alibi witnesses.²⁸² Nevertheless, in its Pre-Defence Brief, filed on 18 December 2009, the Defence added another four alibi witnesses, one of which was, according to the Defence, a key witness in support of Kanyarukiga’s journey to and from Ndera on 15 and 16 April 1994.²⁸³ The Defence therefore did not file a fulsome and complete list of witnesses and evidence in support of the Accused’s alibi until 18 December 2009,²⁸⁴ a month prior to the start of the Defence case.²⁸⁵ This leads the Chamber to believe that the Defence witnesses, having had time after the Prosecution witnesses were heard, moulded their evidence to fit the Prosecution case. Further, by initially presenting the story of where Kanyarukiga was but not providing a list of witnesses until later, it appears to the Chamber that Kanyarukiga actually sought out witnesses to accord with his story of the alibi. 125. Given the late filing of the Notice of Alibi and the even later filing of the Defence witness list, this contributes to the Chamber’s suspicion that the alibi has been constructed over a period of time to respond to the Prosecution evidence and to meet the particular needs of the Accused. Defence alibi witnesses and quality of their evidence 126. The Chamber is further comforted in its belief that Kanyarukiga’s alibi cannot be reasonably possibly true given that the evidence provided by Defence witnesses has no gaps and is too neatly tailored to match the specific days on which the criminal conduct is alleged to have taken place at Nyange Parish. According to witnesses presented by the Defence, Kanyarukiga left Kivumu commune on 12 April 1994 – the day before the Tutsi at Nyange Parish were attacked for the first time, the day of one of the alleged meetings in the Amended Indictment and the date from which assailants are alleged to have surrounded the parish – and returned on the evening of 16 April 1994,

277 Provisional Formal Notice of Alibi. Discussed in detail in the Preliminary Issues section of this judgement at paragraphs 68-69. See also T. 17 September 2009, p. 40 (OTP Senior Trial Attorney Holo Makwaia rests the Prosecution case). 278 Decision on Defence Motion for Disclosure and Return of Exculpatory Documents Seised from the Accused (TC), 30 October 2009. 279 Provisional Formal Notice of Alibi, filed on 30 September 2009, paras. 3-6, 10. The Defence referred to Witnesses KG1, KG2, KG3, KG5, KG7, KG8, KG20 and KG36. 280 Defence Alibi Witnesses Particulars, filed 6 November 2009. 281 Further Defence Alibi Witnesses Particulars, filed 1 December 2009. 282 Further Defence Alibi Witnesses Particulars, p. 2. 283 Pre-Defence Brief, filed 18 December 2009, pp. 16, 17, 18. Witness KG16 reappeared in this document after having been previously deleted. While, Witnesses KG45, KG59 and Ndaberetse appeared for the first time. Further, a detailed Will-Say Statement for Witness Ndaberetse was not filed until two days prior to the witness giving his testimony (sent to the Chamber and Prosecution on 19 January 2010 at 17.30 via email). 284 Pre-Defence Brief, pp. 6-20. 285 T. 18 January 2010, p. 14 (opening the Defence case).

Page 32

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

29 only a few hours after the church had been destroyed and after the killings had ended.²⁸⁶ In other words, Kanyarukiga was absent, according to the Defence evidence, exactly during the time the events in the Amended Indictment are alleged to have taken place. 127. The Chamber notes that for each part of his trip and each location Kanyarukiga visited, the Defence presented one or two witnesses who remember having seen him. There is no gap in the evidence, which the Chamber expects would occur naturally 16 years after the event. Similarly, the Chamber does not believe that, as the Defence alibi witnesses attest, Kanyarukiga would spend five days attempting to rescue his family in the circumstances that existed in April 1994. In particular, the Chamber does not accept that Kanyarukiga spent five days, including three days being stationary in Gitarama, on a journey that could have been completed in one or two,²⁸⁷ when according to the evidence of the Defence witnesses, urgency was required to “evacuate” Kanyarukiga’s family from Ndera.²⁸⁸ 128. The profile of the alibi witnesses further supports the Chamber’s view that the alibi cannot reasonably be true. Ten of the thirteen Defence witnesses who testified as to the whereabouts of Kanyarukiga during the relevant period were either related to the Accused, had business or other relationships with the Accused or depended financially on the Accused.²⁸⁹ All these witnesses have an interest in a positive outcome for the Accused in this trial. For example, Witness Nshogozabahizi, who is the Accused’s son, stated that he believes Kanyarukiga is unjustly accused and believes he should be freed.²⁹⁰ Further, Witness KG45 testified that, she has always been grateful to Kanyarukiga and she responded affirmatively to questioning that suggested that she would willingly help Kanyarukiga if she could.²⁹¹ With regard to the three remaining Defence witnesses, the Chamber does not believe they are credible given their evidence, which fits extraordinarily neatly into the alibi “story”.²⁹² The first of these is Witness Ndaberetse, who gave three different explanations as to why he and Kanyarukiga took a different route back to Gitarama

²⁸⁶ See “Evidence” section above. Defence Witnesses KG45, KG59, Nshogozabahizi, KG18, Rukabyatorero, Ndaberetse, Mutoneshwa, Muhayimana, KG55, KG44, KG46, Hitimana, Sebisukiro and KG24 provide evidence in favour of the alibi for these dates. ²⁸⁷ See Registry Exhibit R4 (Kanyarukiga Mission Report), p. 2. ²⁸⁸ Witness Nshogozabahizi testified that, when Kanyarukiga left Nyange, he had sworn that he would do everything possible to go and evacuate the family members who were in Ndera. T. 3 February 2010, p. 28. Witness KG45 testified that Kanyarukiga told her he was going to evacuate his family from Ndera. T. 21 January 2010, pp. 61, 70, 77 (CS). See Kalimanzira, Judgement (AC), para. 68 (finding no error in the Trial Chamber’s rejection of Kalimanzira’s claim that he remained overnight in Kibungo due to security reasons). ²⁸⁹ Witness KG45, T. 21 January 2010, pp. 59, 62, 66, 67, 68-69 (CS); Witness KG59, T. 25 January 2010, p. 9 (CS); Witness Nshogozabahizi, T. 3 February 2010, pp. 22, 51-52; Witness KG18, T. 10 February 2010, p. 8 (CS); Witness Rukabyatorero, T. 2 February 2010, pp. 26-27; Witness Mutoneshwa, T. 21 January 2010, pp. 49, 53 (This witness is Witness Muhayimana’s daughter,

which also indicates that she has a close association with the Accused via her mother. T. 20 January 2010, pp. 4, 30); Witness Muhayimana, T. 20 January 2010, pp. 2-3, 21; Witness KG55, T. 19 January 2010, pp. 37, 39 (CS); Witness Sebisukiro, T. 25 January 2010, pp. 31-32; Witness KG24, T. 2 February 2010, pp. 6-7, 10 (CS). Each witness admitted to having a personal, business or other close relationship with the Accused. See also Kalimanzira, Judgement (AC), para. 70 (“Even if the Trial Chamber incorrectly characterized Witness Siniyobewe as a friend rather than a former subordinate, the Appeals Chamber considers that a degree of caution would still apply to Witness Siniyobewe’s testimony.”). 290 Witness Nshogozabahizi testified that he loves Kanyarukiga and said that all children love their fathers. He testified that he knows very well that Kanyarukiga is unjustly being accused. The witness testified that he would like to see Kanyarukiga free, because if he is freed and released then justice will have been served and because he knows that Kanyarukiga is innocent before God and before the law. T. 3 February 2010, pp. 51-52. 291 T. 21 January 2010, pp. 63, 66. 292 The remaining witnesses who the Chamber finds not credible are Witnesses Ndaberetse, KG44 and KG46.

Page 33

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

30 on 16 April 1994 than the route they took on 15 April 1994.²⁹³ Further, notification of this witness was only provided by Defence one month before the Defence case commenced. 129. The other witnesses that the Chamber does not believe to be credible are Witnesses KG44 and KG46. These two witnesses manned the roadblocks that Kanyarukiga supposedly passed through in Ndera. However, they could only remember that Kanyarukiga and those with him passed through their roadblock and could not recall the name of any other person who did.²⁹⁴ This leads the Chamber to treat these witnesses with caution. Secondly, Witnesses KG44 and KG46 gave evidence with regard to Kanyarukiga’s whereabouts on 15 and 16 April 1994, and based on its observations during the site visit, as discussed below, the Chamber disbelieves this evidence in its totality. The Chamber does not believe the accounts of any of the Defence witnesses for these reasons and believes their accounts, in combination with the other issues discussed, support the Chamber’s view that the alibi is a fabricated story, contrived in favour of the Accused. Site Visit 130. The Chamber recalls that it undertook a site visit in Rwanda from 19 to 21 April 2010. During this visit, measurements were taken as to the distance and time taken to travel between Gitarama and Ndera, making stops in the locations where the Defence witnesses say Kanyarukiga stopped. After the site visit, the Registry issued a report containing the measurements taken during the site visit as well as a transcript and audio and visual recordings.²⁹⁵ 131. Having undertaken the site visit in Rwanda, the Chamber finds that, in addition to the reasons given above, the alibi for 15 and 16 April 1994 cannot be reasonably possibly true in light of the timings recorded and the routes that were observed.²⁹⁶ The Chamber notes that neither Party has disputed the records provided by the Registry from this visit. Further, the Chamber notes that the site visit routes were based on the Defence witnesses accounts as well as some information provided solely by Defence

Investigator Dick Prudence Munyeshuri about stops allegedly made during the 16 April journey.²⁹⁷

293 The first time the witness answered that question on direct examination, Witness Ndaberetse testified that as a soldier, he had learnt that on a return journey he should avoid taking the same route. When asked again during the same course of questioning, the witness said that he had suggested to Kanyarukiga that they should change the route because there were too many roadblocks. T. 21 January 2010, p. 14. During cross-examination, the witness was asked about this point and testified that in the course of his military training, he was taught that he had to avoid using the same road that he had used the first time. T. 21 January 2010, p. 39. When the Bench sought to clarify the discrepancy between the answers by asking the same question again, the witness said that as he had previously testified (during direct examination) during military training he was told that he had to avoid using the same itinerary going to and from any given place. T. 21 January 2010, p. 39. Witness Ndaberetse also added that the camp commander had authorised him to take a different road. T. 21 January 2010, p. 40. 294 Witness KG44, T. 26 January 2010, p. 22 (CS); Witness KG46, T. 26 January 2010, p. 54. 295 Registry Exhibit R4 (Kanyarukiga Mission Report), admitted into evidence on 7 May 2010; Registry Exhibit R1 (DVD Site Visit Day 1, 2 & 3 - Under Seal); Registry Exhibit R2 (Four CD ROMS of Site Visit Under Seal); Registry Exhibit R3(I) (Transcripts of Site Visit dated 19 April 2010); Registry Exhibit R3(II) (Transcripts of Site Visit dated 20 April 2010); Registry Exhibit R3(III) (Transcripts of Site Visit dated 21 April 2010). 296 The Chamber has considered the documents provided by Defence Investigator Dick Prudence Munyeshuri and the testimony of this investigator in its deliberations. See Defence Exhibit D52 (Black and White Photograph of Kanyarukiga's Residence in Ndera); Defence Exhibit D53 (Black and White Photograph of Ruins of Kanyarukiga's Residence in Kivumu); Defence Exhibit D54 (Map of Rwanda as Marked by Witness Prudence Munyeshuri); T. 19 January 2010, pp. 2-33. 297 Investigator Munyeshuri gave a number of places that he passed through when he travelled from Ndera to Gitarama via Ruhuha. T. 19 January 2010, p. 14. However, Witness Ndaberetse only gave evidence that they went through Ruhuha on their way from Ndera to Gitarama (this witness was the only witness who gave details about the stops and route taken). T. 21 January 2010, p. 18. Witness Mutoneshwa gave evidence that she travelled this route with

Page 34

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

31 132. With regard to the route taken on 15 April 1994, the Chamber observed during the site visit that the total time taken to drive the distance from Gitarama to the Accused's residence in Ndera, via Witness KG55's house and Celestin Hitimana's shop in Kigali, is approximately one hour and fifty minutes.²⁹⁸ If the Chamber adds another one hour to this time for the stops that the evidence suggests Kanyarukiga made on the journey from Gitarama to Ndera on 15 April 1994, the journey should have taken him around three hours. On the evidence provided by the Defence witnesses for this day, with particular reference to Witness Ndaberetse's evidence that

they left Gitarama at 9.00 a.m. and arrived in Ndera at around 3.00 p.m., the journey the Accused made on 15 April 1994 took around six hours; more if the Chamber considers Witness Muhayimana's evidence that they arrived between 4.00 and 5.00 p.m.²⁹⁹ 133. The Chamber notes that, according to the Defence witnesses, the journey on 15 April 1994 took just under double the time that was measured on the site visit. Given the discrepancy in times recorded by the Chamber and the evidence given by the Defence, this solidifies the Chamber's view that the Defence witnesses have contrived the alibi in view of the charges against the Accused. This leads the Chamber to conclude that it can place no weight on the Defence witnesses providing evidence for this date. Thus, in combination with the Chamber's discussion above, and based on the above analysis of the time the evidence suggests was taken by Kanyarukiga to undertake the journey from Gitarama to Ndera, the alibi for 15 April 1994 is not reasonably possibly true. 134. The Chamber also has misgivings about the route taken on 16 April 1994. The site visit confirmed to the Chamber that this route, particularly given the insecurity in Rwanda in April 1994, would be precarious, long and difficult with many people in the vehicle. The route, as described, causes the Chamber to have serious concerns as to whether this route was taken at all on 16 April 1994.³⁰⁰ The Chamber does not accept that the Accused would have taken this precarious, fourteen-hour journey with his family including, Kanyarukiga claims, his sick mother and many children, the day after he had travelled the Gitarama highway, which purportedly took far less time. Further, there is no evidence on the record that any major difficulties were encountered on that highway, which would then lead Kanyarukiga to take this long and precarious journey instead. Given the Chamber does not believe, having undertaken the specific route the Defence witnesses described, that the route through Ruhuha would have reasonably been taken at all on 16 April 1994, this leads the Chamber to disbelieve the Defence witnesses that attest to the alibi on this day.

Kanyarukiga but could not recall details of the route taken, other than that it was "a very long route" on bad roads with roadblocks. T. 21 January 2010, pp. 50-51. 298 Registry Exhibit R4 (Kanyarukiga Mission Report), p. 2. From where Kanyarukiga stayed overnight to Witness KG55's house was recorded as taking 33 minutes; Witness KG55's former residence to Celestin Hitimana's shop was recorded as taking 42 minutes; Celestin Hitimana's shop to the Accused's residence in Ndera was recorded as taking 35 minutes. 299 On 15 April 1994, evidence was provided by the Defence that Kanyarukiga left the house where he was staying in Gitarama in the morning, between approximately 7.00 and 9.00 a.m. (Witness Nshogozabahizi, T. 3 February 2010, p. 29; Witness KG18, T. 10 February 2010, p. 15 (CS)), proceeded to stop at Gitarama Military Camp to pick up his soldier escort and left there at 9.00 a.m. (Witness Ndaberetse, T. 21 January 2010, pp. 10, 11, 13). Defence evidence suggests that Kanyarukiga spent about 30-60 minutes at the house of Witness KG55 near Gitarama between 10.00 and 11.00 a.m. (Witness KG55, T. 19 January 2010, p. 39 (CS); Witness Ndaberetse, T. 21 January 2010, p. 1) and five minutes at Witness Hitimana's shop in Kigali between 10.00 a.m. and 12.00 p.m. (Witness Hitimana, T. 1 February 2010, pp. 7, 8, 20-21). Evidence provided by Witnesses KG44 and KG46 place Kanyarukiga at a roadblock in Ndera during the day or in the afternoon of 15 April 1994 (Witness KG44, T. 26 January 2010, pp. 5, 27 (CS); Witness KG46, T. 26 January 2010, p. 33 (CS)), and both Witness Muhayimana and Witness

Ndaberetse provide evidence that Kanyarukiga arrived in Ndera in the afternoon or evening. However, Witness Muhayimana testified that the Accused arrived at his Ndera residence between 4.00 and 5.00 p.m. in the evening (T. 20 January 2010, pp. 3, 17), whereas Witness Ndaberetse testified that he and Kanyarukiga arrived at this residence between 2.00 p.m. and 3.00 p.m. (T. 21 January 2010, p. 13). 300 Registry Exhibit R4 (Kanyarukiga Mission Report), pp. 1-2 (notes on road condition).

Page 35

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

32 135. The Chamber notes that, based on the evidence adduced by the Defence, the Accused's journey from Ndera to Kanyarukiga's residence in Kivumu commune on 16 April 1994 took approximately 14 hours.³⁰¹ In total, the site visit report provides that the time taken from Ndera to Gaseke was just over six hours without stops.³⁰² If the Chamber was to include two hours to account for the problems that occurred at the "kilomètre 19" roadblock, another hour and a half for the time the Accused and his party spent at Ruhuha Centre and an hour and a half for the time spent in Gitarama, the total time would be eleven hours. The Chamber finds that the alignment between the site visit results and the evidence provided by Defence witnesses is consistent with a fabricated story. 1.4.

Conclusion

136. After having carefully considered the totality of the evidence, the Chamber finds that, in combination, the following factors lead it to believe that the alibi cannot be reasonably possibly true: the late filing of the notice of alibi and in particular, the Defence alibi witness particulars; the quality of evidence, which is too "neat" given the events took place almost 16 years prior to the witnesses' testimony; the credibility of the Defence witnesses themselves, in particular the fact that ten out of thirteen witnesses are closely associated to the Accused and the Chamber's finding that the remaining three witnesses are unreliable; and the Chamber's conclusion concerning the parameters of the trip from Nyange via Gitarama to Ndera and back based on the site visit. The Chamber therefore rejects the alibi in its totality. 137. Having reached this conclusion, the Chamber recalls that the burden of proof remains on the Prosecution to establish the events alleged in the Amended Indictment beyond reasonable doubt.

301 Witness Ndaberetse purported that Kanyarukiga left his Ndera residence between 8.00 and 9.00 a.m. on 16 April 1994 (T. 21 January 2010, pp. 14, 15), after Witness Muhayimana took her children to Kanyarukiga's residence, between 7.00 and 8.00 a.m., for them to be transported out of the Ndera area (T. 20 January 2010, p. 5). Witnesses KG44 and KG46 place Kanyarukiga at a roadblock in Ndera either "during the day" or prior to midday on 16 April 1994 (Witness KG44, T. 26 January 2010, pp. 6-7 (CS); Witness KG46, T. 26 January 2010, p. 35 (CS)). Witness Ndaberetse

then testified that he and Kanyarukiga arrived at a roadblock called “kilomètre 19” where they encountered significant problems because of their travel documents and that they spent between 40 and 60 minutes there (T. 21 January 2010, pp. 15-16, 28). As a result, Witness Ndaberetse stated that they had to turn around and went to Kanombe Military Camp to organise alternative travel documents and then returned to the same roadblock. (T. 21 January 2010, pp. 17-18, 30-31, 37, 42. The group, Witness Ndaberetse recounted, returned back to the roadblock and were allowed through, but he could not recall what time this occurred. T. 21 January 2010, p. 18. Witness Sebisukiro then places Kanyarukiga in Rubungo, between Ndera and Kigali, between 11.00 a.m. and 12.00 p.m. for five minutes on 16 April

1994. T. 25 January 2010, pp. 34-35. Witness KG24 places Kanyarukiga in Ruhuha Centre later on the day of 16 April 1994, between 4.00 and 5.00 p.m. The witness stated that Kanyarukiga’s party stayed there for approximately one hour and then left “that place” around sunset after changing a flat tyre. T. 2 February 2010, pp. 8, 10 (CS). Witness Ndaberetse also testified that the party stopped in Ruhuha for about one hour. T. 21 January 2010, p. 18. Witnesses Nshogozabahizi and KG18 then testified to seeing Kanyarukiga at the house they were staying at in Gitarama for between 30 minutes and two hours after 8.00 p.m. on the evening of 16 April 1994. Witness Nshogozabahizi, T. 3 February 2010, pp. 30, 31, 41; Witness KG18, T. 10 February 2010, pp. 16-18 (CS). Witness KG59 then places Kanyarukiga in Gaseke late in the evening of 16 April 1994, when he asserts that Kanyarukiga came to his house to retrieve the keys to Kanyarukiga’s Gaseke residence that he had left with the witness. T. 25 January 2010, p. 11 (CS). 302 Registry Exhibit R4 (Kanyarukiga Mission Report), p. 2.

Page 36

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

33 2. Killings of Tutsi Civilians in Kivumu commune after 6 April 1994 2.1.

Introduction

138. Paragraphs 9 and 10 of the Amended Indictment read as follows:

9. Following the death of the Rwandan President on 6 April 1994[,] Tutsi civilians were attacked in their homes in Kivumu Commune[,] resulting in the death of some of them[,] including Grégoire NDAKUBANA, Martin KAREKEZI and Thomas MWENDEZI.
10. As a result of the said attacks[,] Tutsi civilians sought refuge in public buildings such as the [c]ommunal office and the Nyange Parish Church. 2.2. Evidence Prosecution Witness CDL 139. Witness CDL, a Hutu, participated in the killings at the Nyange Parish Church in April 1994.³⁰³ He was arrested in 1997, tried by the Gacaca courts and sentenced to 20 years of imprisonment for his involvement in the crimes committed in Nyange.³⁰⁴ 140. Witness CDL

testified that on 7 April 1994, he met Ndungutse, the vice-chair of the MRND party in Kivumu, who told him that everything had to be done to avenge the death of the President, “who had been shot down by the [i]nyenzi [i]nkotanyi.”³⁰⁵ Witness CDL further testified that Ndungutse had asked young people from his locality to attack members of the Tutsi population, but they refused because they were afraid of being punished.³⁰⁶ Ndungutse told Witness CDL that he had just been to the communal office, where he had requested authorisation to attack the Tutsi.³⁰⁷ The witness testified that Ndungutse received authorisation for the attacks from the inspector of the judicial police and the canton court president.³⁰⁸ “[Ndungutse] wanted to make the assailants in this locality understand that they would not be prosecuted for any attacks they launched against their neighbours.”³⁰⁹ 141. On the night of 7 April 1994, Ndungutse led attacks at the home of Grégoire Ndakubana, during which some children in Ndakubana’s family were killed.³¹⁰ On 8 April 1994, the IPJ, the president of the canton court and the brigadier of the commune went to the home of Grégoire Ndakubana, who had asked for assistance.³¹¹ These officials did not prepare a report but rather

303 Prosecution Exhibit P52 (Personal Identification Sheet of Witness CDL); T. 10 September 2009, p. 32; T. 10 September 2009, pp. 54-55 (CS); T. 11 September 2009, p. 23. 304 T. 10 September 2009, p. 55 (CS). 305 T. 10 September 2009, pp. 20, 21, 22. According to Witness CDL, Ndungutse was a primary school teacher from Murambe. 306 T. 10 September 2009, pp. 21-22 307 T. 10 September 2009, pp. 21-22. 308 T. 10 September 2009, pp. 21-23 (“Ndungutse went to the commune office in the Kivumu commune, and when he got there, the bourgmestre was not present. [So,] he talked to the collaborator of the bourgmestre, notably, the IPJ at the time, and the [c]anton court president. ... The president of the [c]anton court was called Habiyaambere, Joseph. He was nicknamed Gaca Buterezi. The IPJ was called Fulgence Kayishema.”). 309 T. 10 September 2009, p. 23. 310 T. 10 September 2009, p. 21. Others were wounded and were taken to the Nyange Health Centre the following day. Witness CDL testified that Ndakubana, a Tutsi, was Ndungutse’s neighbour, “and every time there was trouble or there were disturbances, Ndungutse would go and attack Ndakubana’s family”. T. 10 September 2009, p. 23; T. 11 September 2009, p. 28. 311 T. 10 September 2009, p. 25.

Page 37

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

34 asked people to bury the victims and stated that it was not important to carry out an investigation “because no one was going to know who had ... shot the [P]resident of the [R]epublic.”³¹² 142. Witness CDL testified that on the night of 7 to 8 April 1994, assailants led by someone named Callixte went and looted cattle from a Tutsi in Ngobagoba cellule.³¹³ 143. On 9 April 1994, assailants led by someone named Gasigwa killed a Tutsi named Thomas.³¹⁴ A Tutsi agricultural trainer called Martin Karekezi was also killed during an attack on 9 April 1994.³¹⁵ Witness CDL testified that some people were arrested in connection with the murder of Martin

Karekezi, but the IPJ released the suspects and ordered that the bodies of the victims be buried without investigation.^{316 144.} On the same day, assailants killed a Tutsi called Muhigirwa, who was called by his neighbours to the Statue of the Virgin Mary.³¹⁷ Witness CDL testified that, after these events, the IPJ went to the Statue of the Virgin Mary and ordered that the people be buried without any investigations.^{318 145.} Witness CDL testified that the first Tutsi sought refuge at the Nyange Parish on Sunday, 10 April 1994.³¹⁹ Prosecution Witness CBR 146. Prosecution Witness CBR, a Hutu, was 29 years old in April 1994.³²⁰ He surrendered to soldiers in August 1994 and was detained until 1995, when he was released.³²¹ He was arrested again in 1996 and confessed to the public prosecutor's office in 1998.³²² Witness CBR has received multiple prison sentences, the heaviest of which was 20 years imprisonment.^{323 147.} Witness CBR testified that Téléphone Ndungutse, a teacher and the chairperson of the MRND political party, informed him of President Habyarimana's death on 7 April 1994.³²⁴ Ndungutse told the witness "that the president had been killed by [i]nyenzis and that we had to avenge the death of the father of the nation."³²⁵ The witness testified that, beginning on

312 T. 10 September 2009, p. 25. 313 T. 10 September 2009, p. 23. 314 T. 10 September 2009, p. 23. The witness did not know Thomas's last name. T. 10 September 2009, p. 25. 315 T. 10 September 2009, pp. 23, 25. Martin was killed on the night of Saturday to Sunday. T. 10 September 2009, p. 25. 316 T. 10 September 2009, p. 25. 317 T. 10 September 2009, pp. 23-24. Witness CDL testified that Muhigirwa's neighbours were also business people, and they carried out business activities at the Statue of the Virgin Mary. 318 T. 10 September 2009, p. 25. 319 T. 10 September 2009, p. 26. 320 Prosecution Exhibit P51 (Personal Identification Sheet of Witness CBR); T. 9 September 2009, pp. 2, 64. 321 T. 9 September 2009, p. 33. The Trial Chamber assumes that the soldiers to whom the witness surrendered were members of the RPF. 322 T. 9 September 2009, p. 33. The witness later testified that he confessed in 1999. T. 9 September 2009, p. 49. 323 T. 9 September 2009, p. 33. 324 T. 9 September 2009, pp. 3, 4 ("[T]he president had died the day before in the night of the 6th to the 7th."). The witness testified that Ndungutse was also the head of the Banque Populaire at the Kivumu level. T. 9 September 2009,

p. 4. 325 T. 9 September 2009, p. 3. Witness CBR testified that, "[u]sually people will explain to us that the [i]nyenzis were people that had attacked the country, and it was obvious that they were asking us to kill the Tutsi, and that is what was done. And they were killed because it was said that they were the ones who had killed the head of state." T. 9 September 2009, p. 4.

Page 38

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

35 7 April 1994, he and other Hutu were "constantly armed" because they were told that the Tutsi were in the vicinity.^{326 148.} On 7 April 1994, Ndungutse asked Witness CBR and others to attack the home of a Tutsi named Grégoire Ndakubana.³²⁷ That night, Witness CBR and others went to Ndakubana's house and killed two of his grandchildren, who were also Tutsi.³²⁸ "[O]ther people

were wounded[.]”³²⁹ The witness testified that Grégoire Ndakubana and his wife had died before the war.³³⁰ He also testified that Ndakubana’s sons escaped the attack.³³¹ Following the attack, communal officials, including IPJ Kayishema, came to the house and buried the bodies of those who had been killed.³³² Prosecution Witness CNJ 149. In April 1994, Prosecution Witness CNJ, a Hutu, had completed secondary school.³³³ The witness participated in killings in the Gasave and Nyange secteurs in Kivumu commune.³³⁴ Witness CNJ was arrested in Rwanda in 1997 and placed in the “second category” of offenders.³³⁵ The witness was convicted by a Gacaca court in 2007.³³⁶ Witness CNJ has been detained in both the Kibuye and Gitarama Prisons.³³⁷ 150. Witness CNJ heard about the death of President Habyarimana on 7 April 1994, while in Kivumu commune.³³⁸ On the night of 7 April 1994, there was an attack in the Karuteyi locality “at the home of a certain Ndakubana.”³³⁹ The witness testified that Ndakubana was a Tutsi, but Witness CNJ did not know Ndakubana’s first name.³⁴⁰ [T]he next morning, the police—the IPJ, Kayishema, came to take down a report of what had happened[,] and he realised that two people had died. Some persons were arrested, but there was no follow up. They were somewhat trying to dissuade the people who were responsible for these acts. Subsequently, Tutsis were still being killed, but as far as I know, no one was prosecuted for those killings.³⁴¹ 151. People of Hutu ethnicity were called upon to kill the Tutsi, “who were considered as the enemies of the country.”³⁴² Witness CNJ testified that these calls could be heard over Radio

326 T. 9 September 2009, p. 11. 327 T. 9 September 2009, p. 4. 328 T. 9 September 2009, pp. 4, 6. 329 T. 9 September 2009, p. 4. 330 T. 9 September 2009, p. 6. 331 T. 9 September 2009, p. 6. 332 T. 9 September 2009, p. 4. 333 Prosecution Exhibit P44 (Personal Identification Sheet of Witness CNJ) (This exhibit says that Witness CNJ was a student in 1994.); T. 7 September 2009, p. 57 (“I stated that I ended my studies in secondary school[.]”). 334 T. 7 September 2009, pp. 9-10, 39. 335 T. 7 September 2009, pp. 9, 51-52. 336 T. 7 September 2009, pp. 9, 39. 337 T. 7 September 2009, p. 44. 338 T. 7 September 2009, p. 9. 339 T. 7 September 2009, p. 9. 340 T. 7 September 2009, p. 9. 341 T. 7 September 2009, p. 9. The witness did not say how he learned about the killings at Ndakubana’s house. During cross-examination, the witness stated that he committed killings “after the killings that were committed on the 8th.” He reiterated that IPJ Kayishema arrived in the morning and arrested the people who committed “the killings” but did not say whether these were the killings committed at Ndakubana’s house. T. 7 September 2009, p. 58. 342 T. 7 September 2009, p. 10. “At that time people were killed because of their ethnicity, and that was a national policy. Authorities or officials asked members of the population [sic] to kill Tutsi, and we had to carry out the orders given by the authorities.” T. 7 September 2009, p. 57.

Page 39

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

36 Rwanda and other radio stations.³⁴³ At the local level, the bourgmestre of Kivumu commune, Grégoire Ndahimana, IPJ Kayishema and other authorities asked them to go to Nyange “where thousands of Tutsis had sought refuge.”³⁴⁴ 152. The witness testified that he started killing people

on 9 April 1994.³⁴⁵ According to the witness, “[n]o one among the killers was detained or punished in any other manner whatsoever.”³⁴⁶ He testified that, “[i]f the authorities had not agreed with us, they would have punished us. Yet, they did not do anything against us.”³⁴⁷ 153. Witness CNJ explained that, “[m]any Tutsis had sought refuge in Nyange and there were almost no Tutsis left on the neighbouring hills and everyone knew that those Tutsis had assembled in Nyange because that is where the authorities had channelled the flow of Tutsi refugees.”³⁴⁸ Witness CNJ testified that his paternal uncle, who was a conseiller, attended a security meeting at the communal office on the evening of 11 April 1994.³⁴⁹ That same evening, Witness CNJ’s uncle told the witness that it had been noted that many people had already taken refuge at the communal office.³⁵⁰ According to Witness CNJ, “when it was realised that the space at the communal office was not enough, the refugees were sent to the parish and gendarmes were also supposed to be made available to ensure the security of the refugees who had assembled at the parish.”³⁵¹ Prosecution Witness CBN 154. Prosecution Witness CBN was a Tutsi farmer in April 1994.³⁵² The witness sought refuge at the Nyange Parish Church after the death of President Juvénal Habyarimana on 6 April 1994.³⁵³ 155. Witness CBN testified that, after the death of President Habyarimana, Tutsi were hunted down in the area where he was living, and he and other Tutsi were attacked by Hutus using traditional weapons, such as machetes, clubs, spears, arrows and stones.³⁵⁴ On 12 April 1994, Witness CBN fled to the Nyange Parish with his father’s wife, his sisters and members of his older brother’s family, who were all of Tutsi ethnicity.³⁵⁵ 156. Witness CBN testified that, on his way to the Nyange Church on Tuesday (12 April 1994), he saw the corpse of a shop owner named Muhigirwa near the road leading towards the parish.³⁵⁶ The witness knew Muhigirwa to be of Tutsi ethnicity.³⁵⁷

343 T. 7 September 2009, p. 10. 344 T. 7 September 2009, p. 10. During cross-examination, the witness testified that, “[A]s far as I am concerned, it was very important for me to obey the orders of the authorities and to participate together with them in the killings because that enabled me to easily find a job later on.” T. 7 September 2009, p. 57. 345 T. 7 September 2009, p. 57. 346 T. 7 September 2009, p. 58. 347 T. 7 September 2009, p. 58. 348 T. 7 September 2009, p. 11. 349 T. 7 September 2009, p. 11. 350 T. 7 September 2009, p. 11. 351 T. 7 September 2009, p. 11. Witness CNJ testified that his uncle told them that the meeting was attended by communal service heads, veterinarians, an agronomist, and the conseillers of all the secteurs in Kivumu commune. The bourgmestre, the Deputy Bourgmestre Védaste Murangwabugabo and the president of the canton court, Mr. Habiyaambere, were also present. 352 Prosecution Exhibit P34 (Personal Identification Sheet of Witness CBN); T. 1 September 2009, pp. 49-50; T. 2 September 2009, p. 7 (CS). 353 T. 1 September 2009, pp. 49-50. 354 T. 1 September 2009, pp. 49-50; T. 2 September 2009, p. 13. 355 T. 1 September 2009, p. 50. Other members of CBN’s family stayed behind in the village. 356 T. 1 September 2009, p. 55. 357 T. 1 September 2009, pp. 55-56.

Page 40

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

37 157. Witness CBN arrived at the Nyange Church between midnight and 1.00 a.m.³⁵⁸ Witness CBN found women, young people and children, who were all Tutsi, inside the church.³⁵⁹ The witness testified that more Tutsi arrived at the church on 13 April 1994.³⁶⁰ Prosecution Witness CBS 158. Witness CBS, a Tutsi, is a survivor of the massacres at the Nyange Parish Church.³⁶¹ He worked as a labourer for the Ministry of Public Works in April 1994.³⁶² 159. Witness CBS testified that the atmosphere in his cellule changed after the death of the President on 6 April 1994.³⁶³ Witness CBS testified that members of his family were killed on 11 April 1994, and his father was killed on 12 April 1994.³⁶⁴ The witness sought refuge at the Nyange Church with his mother, cousin and other Tutsi because they were being targeted by the “Hutu ethnic group”.³⁶⁵ 160. Witness CBS arrived at the Nyange Church at around 6.00 a.m. on Tuesday, 12 April 1994.³⁶⁶ He testified that there were already slightly more than 1000 people in the church and that those in the church “were virtually standing on one another”.³⁶⁷ “[I]n the days that followed, refugees continued coming in large numbers.”³⁶⁸ When asked why Tutsi had sought refuge there, Witness CBS testified that, “[i]t was obvious ... [t]he reason was simply that people had been attacked or were attacked in our homes, so we sought refuge at that place. They killed people, looted cattle, cows, and killed them.”³⁶⁹ Prosecution Witness YAU 161. Prosecution Witness YAU, a Tutsi, was 22 years old in April 1994.³⁷⁰ She sought refuge at the Nyange Parish Church after the death of President Habyarimana.³⁷¹ 162. Witness YAU could not recall the date on which President Habyarimana died.³⁷² She testified, however, that after the president’s death, she fled her home due to attacks perpetrated by Hutu and sought refuge at the Nyange Parish.³⁷³

358 T. 1 September 2009, p. 50; T. 2 September 2009, p. 13. 359 T. 1 September 2009, p. 50. 360 T. 1 September 2009, p. 60. Witness CBN’s wife arrived at the church on 15 April 1994. The witness testified that she had been wounded with a machete and was carrying a child on her back. T. 1 September 2009, p. 62. 361 Prosecution Exhibit P61 (Personal Identification Sheet of Witness CBS); T. 16 September 2009, p. 44; T. 17 September 2009, p. 9. 362 T. 17 September 2009, p. 9. 363 T. 16 September 2009, p. 43 (“The Hutus were angry, and I remember that there was an announcement that asked the population to stay home. At that moment the Hutus became wary of the Tutsis. The atmosphere was tense. ... [T]he Hutus were angry and the Tutsis were afraid.”). The witness noted that the killings began around 10 or 11 April 1994. T. 16 September 2009, p. 44. 364 T. 16 September 2009, p. 44. 365 T. 16 September 2009, pp. 44, 45. 366 T. 16 September 2009, p. 45; T. 17 September 2009, p. 9. 367 T. 16 September 2009, p. 45. 368 T. 16 September 2009, p. 45. 369 T. 16 September 2009, p. 44. 370 T. 15 September 2009, p. 55; Prosecution Exhibit P58 (Personal Identification Sheet of Witness YAU). 371 T. 15 September 2009, p. 10. 372 T. 15 September 2009, p. 10. 373 T. 15 September 2009, p. 10. The witness testified that she fled on foot with her father, her mother and her brothers. On cross-examination, the witness testified that she had two sisters, but they did not go to the Nyange Parish with the witness and their other family members. T. 15 September 2009, p. 29 (CS).

Page 41

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

38 163. Witness YAU testified that other Tutsi civilians arrived at the Nyange Parish after she did.³⁷⁴ According to the witness, Fulgence Kayishema and Gaspard Kanyarukiga brought Tutsi to the church in a vehicle.³⁷⁵ “They were dropping the refugees and would go back to bring others.”³⁷⁶ The witness could not say how many trips these two people made but testified that they were driving a red vehicle, which she recognised as belonging to Kanyarukiga.³⁷⁷ Witness YAU testified that this “transportation exercise” was carried out on the day she arrived at the church and began before midday.³⁷⁸ Prosecution Witness CBY 164. Prosecution Witness CBY, a Hutu, was at the Nyange Parish in April 1994.³⁷⁹ Witness CBY recalled that, “[a]fter President Habyarimana’s death, there was tension amongst the people. Hutus tried to kill Tutsis, and Tutsis tried to find refuge at the parish.”³⁸⁰ The first Tutsi sought refuge at the parish on 7 April 1994.³⁸¹ Witness CBY testified that Father Seromba asked the Tutsi to spend the night in a building used for prayers, which was located approximately eight metres from the church.³⁸² According to the witness, Tutsi continued to arrive at the parish on 8 April 1994; “they said that they were being threatened in their home areas.”³⁸³ More Tutsi arrived on 9 and 10 April 1994.³⁸⁴ The Tutsi who took refuge at the parish during this period were received in the building that was used for prayers, which had four rooms.³⁸⁵ 165. Tutsi continued to arrive at the parish in large numbers on 11 and 12 April 1994, but the prayer rooms were already full.³⁸⁶ Witness CBY testified that the Tutsi were allowed into the church.³⁸⁷ The witness estimated that as many as 2500 to 3000 people sought refuge in the church.³⁸⁸ The witness testified that he did not know whether Tutsi came to the church after 13 April 1994, but there were many Tutsi at the parish by this date.³⁸⁹ 166. Witness CBY testified that “a certain Muhigirwa ... was killed at the roadblock located not far away from the war front. He was coming from where he went to look for food.”³⁹⁰

374 T. 15 September 2009, pp. 11, 36-37. 375 T. 15 September 2009, pp. 11, 36-38. 376 T. 15 September 2009, p. 36. 377 T. 15 September 2009, p. 37. 378 T. 15 September 2009, pp. 11, 37. 379 T. 8 September 2009, p. 32 (CS). 380 T. 8 September 2009, p. 29. 381 T. 8 September 2009, pp. 29, 30. 382 T. 8 September 2009, p. 29. 383 T. 8 September 2009, p. 29. 384 T. 8 September 2009, pp. 29, 35. 385 T. 8 September 2009, p. 29. 386 T. 8 September 2009, pp. 30, 35. 387 T. 8 September 2009, pp. 30, 36. Those who arrived on 12 April 1994 also occupied an entire room in the presbytery, which was used for catechumen classes. T. 8 September 2009, p. 36. Witness CBY testified that catechumens are new converts to Christianity. T. 2 September 2009, p. 65. 388 T. 8 September 2009, p. 30. 389 T. 8 September 2009, p. 30. 390 T. 8 September 2009, p. 45. Witness CBY provided this evidence in relation to the attack on 14 April 1994. However, given the similarity between this evidence and the evidence of Witnesses CBN and CDL, the Chamber has considered Witness CBY’s testimony with these others.

“Q: How long did the attack of 14th April last?”

A: About two hours.

Q: Were there many victims as a result of that attack? A: No. There was only one victim, a certain Muhigirwa who was killed at the roadblock located not far away from the war front. He was coming from where he went to look for food.”

Page 42

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

39 Prosecution Witness CBK 167. Prosecution Witness CBK, a Hutu, was a teenager in April 1994.³⁹¹ The witness was at the Nyange Parish during the relevant events in April 1994.³⁹² 168. Witness CBK testified that, on 7 April 1994, Tutsi civilians began streaming into the Nyange Parish.³⁹³ “Those people were coming from the same locality, and when they arrived at the parish, they told us that Hutus were trying to kill them and that was why they were seeking refuge at the parish[.]”³⁹⁴ The Tutsi who sought refuge at the parish included women, men, old people, children, intellectuals and uneducated people.³⁹⁵ The witness testified that he saw these Tutsi with his own eyes.³⁹⁶ 169. According to the witness, the Tutsi “[i]nitially ... stayed in a room, and others sought refuge at the presbytery. They did not directly go inside the church.”³⁹⁷ “Every day refugees were arriving to seek refuge in the Nyange [P]arish. When the numbers increased, they were moved from the presbytery and the house ... to the inside of the church.”³⁹⁸ The witness testified that the Tutsi moved into the church between 11 and 13 April 1994.³⁹⁹ Witness CBK said that, on 13 April 1994, the church capacity was 3000 people, and the church was full of people.⁴⁰⁰ Defence Witness KG15 170. Witness KG15, a Hutu of mixed parentage, was at the Nyange Parish during the period from 10 April to 16 April 1994.⁴⁰¹ 171. Witness KG15 stated that he arrived at the Nyange Parish at around 11.00 a.m. on 10 April 1994 and was received by Father Seromba.⁴⁰² Witness KG15 did not provide any direct evidence regarding the arrival of the Tutsi at the Nyange Parish or the date on which those who had sought refuge at the parish were allowed into the church. However, when asked how many people were in the church when it was destroyed on 16 April 1994, Witness KG15 responded by saying, “[t]hat is difficult, because the last time I entered the church was Tuesday [12 April 1994]. In the interval, other persons came in.”⁴⁰³

³⁹¹ Prosecution Exhibit P35 (Personal Identification Sheet of Witness CBK); T. 2 September 2009, p. 63 (CS); T. 3 September 2009, p. 66 (CS). ³⁹² T. 2 September 2009, pp. 63-64 (CS). ³⁹³ T. 2 September 2009, p. 64 (CS); T. 2 September 2009, p. 65. ³⁹⁴ T. 2 September 2009, p. 64 (CS). See also T. 3 September 2009, p. 66 (CS). He testified that, “it was common knowledge that anyone who sought refuge in God’s house could not be attacked.” T. 2 September 2009, p. 64 (CS). ³⁹⁵ T. 2 September 2009, p. 65. ³⁹⁶ T. 2 September 2009, p. 64 (CS). ³⁹⁷ T. 2 September 2009, p. 65. The witness clarified that the room he was referring to was “a house where Catechumens [new converts, being taught Christianity] were trained.” ³⁹⁸ T. 2 September 2009, p. 65. ³⁹⁹ T. 2 September 2009, p. 69. ⁴⁰⁰ T. 2 September 2009, p. 70. ⁴⁰¹ T. 11 February 2010, pp. 7, 18, 28 (CS). Witness KG15 testified that he was a Hutu because his father was Hutu, but his mother was Tutsi. ⁴⁰² T. 11 February 2010, pp. 7, 8 (CS). ⁴⁰³ T. 11 February 2010, p. 27 (CS). See also T. 11 February 2010, pp. 29, 33, 41 (CS).

Page 43

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

40 Defence Witness Fulgence Tugirumukiza 172. Witness Tugirumukiza is from Gishiru cellule, Kibanda secteur, Kivumu commune.⁴⁰⁴ In 1994, the witness was a 21-year-old student at the National University of Rwanda, Butare campus.⁴⁰⁵ Witness Tugirumukiza testified that he attended mass at the Nyange Parish on Easter, 3 April 1994, and then again on 10 April 1994.⁴⁰⁶ The witness testified during cross-examination that there were displaced Tutsi in the church on 10 April 1994.⁴⁰⁷ The witness did not hear Father Seromba say anything about the displaced Tutsi who were at mass that day.⁴⁰⁸ Defence Witness KG19 173. Witness KG19 was 18 years old and a secondary school student in 1994.⁴⁰⁹ Witness KG19 testified that in April 1994, Tutsi civilians were targeted and killed and took refuge at the Nyange Parish Church.⁴¹⁰ Witness KG19 testified that he went to mass at the Nyange Church on 3 April 1994, during Easter.⁴¹¹ He went to the Nyange Church for the last time on 10 April 1994.⁴¹² During cross-examination, the witness testified that he did not see anyone taking refuge at the parish on 10 April 1994.⁴¹³ Defence Witness KG59 174. Witness KG59 was 33 years old in April 1994.⁴¹⁴ He testified that he remembered that Kanyarukiga left Kivumu on 12 April 1994 because that was the first day that there was a killing in Ngobagoba secteur.⁴¹⁵ Witness KG59 testified that he was told by a Tutsi woman on 12 April 1994 that people from Kibilira had attacked his region.⁴¹⁶ According to the witness, a Tutsi named Nyandara, Jean-Bosco was killed that same day.⁴¹⁷ 2.3. Deliberations 175. The Prosecution alleges in its closing brief that, “[i]n the days after President Habyarimana’s plane was shot down ... Tutsis throughout Kivumu commune were threatened and victimised in reprisal attacks, including by the communal authorities.”⁴¹⁸ The Prosecution submits that, during these attacks, Thomas, Martin Karekezi, Muhigirwa and two persons at Grégoire Ndakubana’s house were killed.⁴¹⁹ The Prosecution submits that these attacks were sanctioned and ordered by persons named in paragraph 4 of the Amended Indictment and that the Accused endorsed the sentiments of these assailants.⁴²⁰

⁴⁰⁴ T. 1 February 2010, p. 51. ⁴⁰⁵ T. 1 February 2010, p. 52. ⁴⁰⁶ T. 1 February 2010, p. 54. ⁴⁰⁷ T. 1 February 2010, p. 61. ⁴⁰⁸ T. 1 February 2010, p. 62. ⁴⁰⁹ T. 26 January 2010, p. 57; T. 26 January 2010, pp. 58, 60. (CS). ⁴¹⁰ T. 27 January 2010, p. 8. ⁴¹¹ T. 27 January 2010, p. 9. ⁴¹² T. 27 January 2010, p. 9. ⁴¹³ T. 27 January 2010, p. 9. ⁴¹⁴ T. 25 January 2010, p. i (extract). ⁴¹⁵ T. 25 January 2010, p. 25. ⁴¹⁶ T. 25 January 2010, p. 25. ⁴¹⁷ T. 25 January 2010, p. 25. ⁴¹⁸ Prosecutor’s Final Trial Brief, para. 97. ⁴¹⁹ Prosecutor’s Final Trial Brief, paras. 97, 104. ⁴²⁰ Prosecutor’s Final Trial Brief, paras. 101, 104-105.

Page 44

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

41 176. As a result of these attacks, Tutsi civilians sought refuge at the Nyange Parish Church.⁴²¹ According to the Prosecution, the evidence “establishes that members of the JCE concentrated Tutsis in one area so that it was easier to kill them.”⁴²² 177. The Defence does not dispute that Tutsi civilians were attacked after 6 April 1994 or that they sought refuge at the Nyange Parish Church, but it maintains that the Prosecution has not adduced any evidence to link these attacks to the Accused.⁴²³ Attacks on Tutsi Civilians in Kivumu Commune 178. It is undisputed that Tutsi civilians were attacked by persons of Hutu ethnicity after the death of President Habyarimana on 6 April 1994.⁴²⁴ Thus, the only questions for the Chamber are whether the persons named in the Indictment were among the victims of these attacks and whether the attacks can be attributed to the Accused or other members of the joint criminal enterprise pled in paragraph 4 of the Amended Indictment. 179. The Prosecution alleges in the Amended Indictment that Grégoire Ndakubana, Martin Karekezi and Thomas Mwendezi were killed in attacks after the death of the president.⁴²⁵ Prosecution Witnesses CBR, CDL and CNJ all testified that Ndakubana’s house was attacked on the night of 7 April 1994.⁴²⁶ Witness CBR testified that he was one of the perpetrators of the attack on Grégoire Ndakubana’s home and that, during this attack, two of Ndakubana’s grandchildren were killed and other persons were wounded.⁴²⁷ Witness CNJ corroborated Witness CBR’s testimony that two people were killed during the attack.⁴²⁸ Witness CDL, for his part, corroborated Witness CBR’s testimony that those who were killed were members of Grégoire Ndakubana’s family and that other people were wounded.⁴²⁹ All three witnesses testified that the Inspector of Judicial Police (IPJ) Kayishema went to Ndakubana’s house the following morning.⁴³⁰ Witnesses CBR and CDL testified that Kayishema was involved in burying the bodies of those who had been killed.⁴³¹ None of the witnesses testified that Grégoire Ndakubana was killed during this attack. 180. At this point, the witnesses’ accounts diverge. While Witness CBR testified that Grégoire Ndakubana had died before the war, Witness CDL testified that, after his family members were

⁴²¹ Amended Indictment, para. 10. ⁴²² Prosecutor’s Final Trial Brief, para. 112. The Prosecution argues in its closing brief that the JCE was formed in a series of meetings beginning on 7 April 1994. Prosecutor’s Final Trial Brief, para. 54. ⁴²³ Defence Final Brief, para. 489 (“While there is some evidence regarding paragraphs 9 and 10 in a very general sense, there was no evidence whatsoever that would have tied the Accused to the alleged attacks on and killing of civilians. In point of fact, when the Chamber permitted evidence to be led regarding the killing of individuals not named in the Indictment, the Chamber indicated that the evidence was admissible because it did not concern the Accused. Similarly, the Tutsi refugees sought refuge in public buildings is not disputed, but no criminal liability flows to the Accused for such.”). ⁴²⁴ Witness CBN, T. 1 September 2009, p. 49; Witness CNJ, T. 7 September 2009, pp. 9-10, 57-59; Witness CBR, T. 9 September 2009, pp. 4, 6; Witness CDL, T. 10 September 2009, pp. 20-26; Witness YAU, T. 15 September 2009, p. 10; Witness CBS, T. 16 September 2009, pp. 43-45; Witness KG59, T. 25 January 2010, pp. 25-26; Witness KG19, T. 27 January 2010, p. 8. ⁴²⁵ Amended Indictment, para. 9. ⁴²⁶ Witness CBR, T. 9 September 2009, p. 4; Witness CDL, T. 10 September 2009, pp. 21, 23; Witness CNJ, T. 7 September 2009, p. 9. ⁴²⁷ T. 9 September 2009, pp. 4, 6. ⁴²⁸ T. 7 September 2009, p. 9. ⁴²⁹ T. 10 September 2009, p. 21. ⁴³⁰ Witness CNJ, T. 7 September 2009, p. 9; Witness CBR, T. 9

September 2009, p. 4; Witness CDL, T. 10 September 2009, p. 25. 431 Witness CBR, T. 9 September 2009, p. 4; Witness CDL, T. 10 September 2009, p. 25.

Page 45

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

42 killed, Ndakubana asked the IPJ and the president of the canton court to assist him.⁴³² Moreover, while Witness CDL testified that the IPJ and the canton court president did not prepare a report on the attack, Witness CNJ testified that IPJ Kayishema did make a report and that some persons were arrested.⁴³³ Witness CBR, one of the perpetrators of the attack, did not mention any investigation or arrests. 181. As discussed further in paragraphs 452 to 453, Witnesses CBR, CDL and CNJ were all accomplices to the attacks at the Nyange Parish. The Chamber therefore has treated their evidence with necessary caution. However, the Chamber finds that as an acknowledged participant in the attack on Ndakubana's home, Witness CBR provided a first-hand account of the events he personally experienced. As discussed further in paragraphs 591 to 595, the Chamber has found that Witness CBR, although an accomplice, is generally credible. Moreover, in crediting his testimony on this particular attack, the Chamber notes that Witness CBR's evidence is incriminating to the witness but not to the Accused, suggesting a lack of motivation for fabrication or exaggeration. 182. In contrast, neither Witness CNJ nor Witness CDL said how he learned about this attack. Thus, the Chamber finds that, without further information regarding their bases for knowledge, it cannot rely on the testimony of Witnesses CDL and CNJ to determine what happened at Grégoire Ndakubana's house. Indeed, the Chamber notes that, because Witnesses CDL and CNJ were detained and participated in Gacaca sessions with Witness CBR,⁴³⁴ they could have obtained this information while in prison rather than at the time of the events.⁴³⁵ The Chamber therefore has disregarded their evidence on this point. 183. The Chamber finds that Witness CBR's first-hand account is sufficient to establish that, on the night of 7 April 1994, an attack was launched against the family of Grégoire Ndakubana and that the attack was instigated by Ndakubana's neighbour, Télesphore Ndungutse. During the attack, two of Ndakubana's grandchildren were killed and other persons were injured. Contrary to the allegation in paragraph 9 of the Amended Indictment, Grégoire Ndakubana was not killed during this attack. Moreover, given Witness CBR's testimony that Ndakubana died prior to 7 April 1994, the Chamber does not accept Witness CDL's evidence that Ndakubana asked IPJ Kayishema to investigate the attack. The Chamber is satisfied, however, that on the morning of 8 April 1994, IPJ Kayishema came to Ndakubana's residence and buried the bodies of those who had been killed. There is no evidence that anyone was prosecuted for these killings during April 1994. 184. In Paragraph 9 of the Amended Indictment, the Prosecution also alleges that Martin Karekezi and Thomas Mwendezi were killed after the death of President Habyarimana.⁴³⁶ The Prosecution relies on the testimony of Witness CDL to support this allegation. Witness CDL testified that a group of assailants, led by Gasigwa, attacked the family of a Tutsi named "Thomas"

432 Witness CBR, T. 9 September 2009, p. 6; Witness CDL, T. 10 September 2009, p. 25. 433 Witness CDL, T. 10 September 2009, p. 25; Witness CNJ, T. 7 September 2009, p. 9. 434 Witness CNJ, T. 8 September 2009, pp. 10-11; Defence Exhibit D18 (List of Protected Names shown to Witness CNJ); Witness CBR, T. 9 September 2009, pp. 49-52; Defence Exhibit D25 (List of Protected Names shown to Witness CBR); Witness CDL, T. 10 September 2009, pp. 72-75; Defence Exhibit D28 (List of Protected Names shown to Witness CDL). See also Prosecution Exhibit P44 (Personal Identification Sheet of Witness CNJ); Prosecution Exhibit P51 (Personal Identification Sheet of Witness CBR); Prosecution Exhibit P52 (Personal Identification Sheet of Witness CDL). 435 The Chamber notes that certain witnesses testified that the purpose of the Gacaca sessions was to refresh each other's memories of the events that happened in 1994. According to Witness CDL, "Gacaca sessions are organised in order to enable members of the population to be able to refresh one another's memory regarding the events of 1994. That was the main objective of the information collection phase." T. 10 September 2009, p. 73. Witness CNJ likewise testified that, "[a]s was the case in other secteurs, it was necessary for us to refresh our memories regarding what had happened." T. 8 September 2009, p. 10. 436 Amended Indictment, para. 9.

Page 46

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

43 on 9 April 1994 and killed Thomas.⁴³⁷ The witness testified that he did not know Thomas's second name.⁴³⁸ The same group of attackers killed Martin Karekezi on the night of 9 April 1994.⁴³⁹ 185. The Chamber recalls that a finding of fact may be based on the evidence of a single accomplice witness where the Chamber finds that the evidence is relevant and credible.⁴⁴⁰ In this case, however, the Chamber finds that it cannot rely on Witness CDL's testimony to establish that Martin Karekezi and Thomas Mwendezi were killed on 9 April 1994. The Chamber notes that Witness CDL did not say how he learned that Martin Karekezi and Thomas were killed on 9 April 1994. Moreover, the Chamber finds that, without further identifying information, the Prosecution has failed to establish that the "Thomas" referred to by Witness CDL is in fact Thomas Mwendezi. Hence, the Chamber finds that the Prosecution has not proven beyond reasonable doubt that Martin Karekezi and Thomas Mwendezi were killed following the death of President Habyarimana. 186. In addition to the victims named in the Indictment, the Prosecution alleges in its closing brief that Muhigirwa was attacked and killed on 9 April 1994.⁴⁴¹ The Chamber recalls that, on 15 January 2010, it denied a Defence request to exclude Prosecution Witness CDL's testimony that Muhigirwa was killed by assailants on 9 April 1994.⁴⁴² 187. Three Prosecution witnesses, CBN, CDL and CBY, testified about the death of someone called Muhigirwa. Witness CBN testified that he saw Muhigirwa's corpse as he was fleeing towards the Nyange Parish on 12 April 1994.⁴⁴³ Witness CDL corroborated Witness CBN's testimony regarding the killing of Muhigirwa but testified that Muhigirwa was killed on 9 April 1994, after being called by his neighbours to the Statue of the Virgin Mary.⁴⁴⁴ Both witnesses testified that Muhigirwa was a Tutsi.⁴⁴⁵ Finally, Witness CBY testified that Muhigirwa was killed at a roadblock while coming

back to the Nyange Church after going to look for food on 14 April 1994.⁴⁴⁶ 188. Witness CDL did not provide any basis for his knowledge that Muhigirwa was killed on 9 April 1994, nor did Witness CBY explain how he knew that Muhigirwa was killed at a roadblock on 14 April 1994. Indeed, it is not clear from the evidence that the Muhigirwa referred to by Witness CBY is the same person described by Witnesses CBN and CDL. However, because the Chamber has found that Witness CBN, who testified that he saw Muhigirwa's corpse, is generally credible, the Chamber is satisfied that a Tutsi civilian by this name was killed in the vicinity of the Nyange Trading Centre after President Habyarimana's death. The Chamber further notes that, while there is no direct evidence regarding the specific perpetrators of this attack, it may be inferred from the surrounding circumstances that Muhigirwa was killed by Hutu assailants. The Chamber finds, however, that the evidence is inconclusive with respect to the exact date on which Muhigirwa was killed.

437 T. 10 September 2009, p. 23. 438 T. 10 September 2009, p. 25. 439 T. 10 September 2009, pp. 23, 25. 440 Nchamihigo, Judgement (AC), para. 48. See also Karera, Judgement (AC), para. 45; Musema, Judgement (AC), paras. 37-38. 441 Prosecutor's Final Trial Brief, para. 104. 442 Decision on Defence Motion for a Stay of Proceedings or Exclusion of Evidence outside the Indictment (TC), 15 January 2010. The Chamber found that, as a Tutsi civilian killed after the death of President Habyarimana, Muhigirwa's killing fell squarely within the scope of paragraph 9 of the Amended Indictment. Decision on Defence Motion for a Stay of Proceedings or Exclusion of Evidence outside the Indictment (TC), 15 January 2010, para. 19. 443 T. 1 September 2009, p. 55. 444 T. 10 September 2009, pp. 23-24. 445 Witness CBN, T. 1 September 2009, pp. 55, 56; Witness CDL, T. 10 September 2009, p. 23. 446 T. 8 September 2009, p. 45.

Page 47

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

44 189. Finally, based on Witness CBS's uncontradicted testimony, the Chamber finds that members of the witness's family, including his father, were killed on or about 11 April 1994 and that the witness sought refuge at the parish on 12 April 1994. The Chamber finds no evidence on the record regarding the perpetrators of these attacks but is again satisfied that the victims were killed by Hutu assailants. 190. According to the Prosecution, "[f]rom the very outset, the killing of Tutsis in Kivumu commune was not arbitrary or random, but was sanctioned and ordered by the persons of power, influence or authority in Kivumu commune."⁴⁴⁷ The Prosecution relies on the evidence of Witnesses CNJ, CBR and CDL to support this allegation. 191. Witness CNJ testified that Hutus were publicly called upon to kill the Tutsi.⁴⁴⁸ These calls were broadcast on Radio Rwanda and other radio stations.⁴⁴⁹ He testified that, at the local level, Grégoire Ndahimana, IPJ Kayishema and other authorities asked Hutus to go to Nyange to attack the Tutsi who had taken refuge there.⁴⁵⁰ Witnesses CBR and CDL both testified that Télesphore Ndungutse, a teacher and local vice-chair of the MRND Party, instigated the Hutu in his locality to launch attacks against Tutsi civilians.⁴⁵¹ Witness CDL testified that Ndungutse received permission for these attacks

from IPJ Fulgence Kayishema and Canton Court President Joseph Habiyambere.⁴⁵² Finally, Witnesses CDL, CBR and CNJ suggested between them that, after Tutsi were attacked, IPJ Kayishema ordered that the bodies be buried without investigation.⁴⁵³ 192. Based on this testimony, the Chamber is satisfied that Téléphone Ndungutse instigated attacks against Tutsi in his locality and, particularly, against the home of his neighbour Grégoire Ndakubana. Indeed, the Chamber recalls that Witness CBR was one of those instigated by Ndungutse to launch attacks against Tutsi civilians, including Ndakubana's family. The Chamber is further satisfied that, by declining to investigate the crimes committed at Ndakubana's house and elsewhere, IPJ Kayishema acquiesced to and encouraged the continuation of the attacks. 193. On the other hand, the Chamber attaches little weight to Witness CDL's testimony that Ndungutse received authorisation for these attacks from the IPJ and canton court president because it is both uncorroborated and double hearsay. Similarly, the Chamber notes that, while Witness CNJ testified that Ndahimana, Kayishema and other authorities "asked us to go to Nyange where thousands of Tutsis had sought refuge,"⁴⁵⁴ he did not provide any information regarding his basis for knowledge. Moreover, when considered in context, this testimony appears to refer to the attacks on the Nyange Church between 13 and 16 April 1994 and not to the attacks against Tutsi homes in the days immediately following the death of the president.⁴⁵⁵ For these reasons, the Chamber is not convinced that Ndahimana or Kayishema ordered attacks against Tutsi civilians prior to their arrival at the Nyange Parish.

447 Prosecutor's Final Trial Brief, para. 101. 448 T. 7 September 2009, pp. 10, 58. 449 T. 7 September 2009, pp. 10, 58. 450 T. 7 September 2009, p. 10. 451 Witness CBR, T. 9 September 2009, pp. 3-4, 23; Witness CDL, T. 10 September 2009, pp. 21-23, 33. Although neither witness explicitly states that those instigated by Ndungutse were Hutu, the Chamber finds that this can be inferred from the context. 452 T. 10 September 2009, pp. 21-23. 453 Witness CDL, T. 10 September 2009, p. 25; Witness CBR, T. 9 September 2009, p. 4; Witness CNJ, T. 7 September 2009, p. 9. 454: T. 7 September 2009, p. 10. 455 T. 7 September 2009, p. 10.

Page 48

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

45 Tutsi Civilians Seek Refuge at the Nyange Parish and Kivumu Commune Office 194. It is undisputed that, following the attacks in their neighbourhoods, Tutsi civilians sought refuge in the Nyange Parish Church.⁴⁵⁶ The Prosecution, however, goes further in its closing brief, alleging that persons who were members of the joint criminal enterprise with the Accused channelled Tutsi towards the Nyange Parish and "lured" those who had sought refuge at the parish into the church.⁴⁵⁷ 195. The Chamber recalls that, on 2 September 2009, it sustained a Defence objection to Witness CBK's evidence that "officials," including Kanyarukiga, Ndahimana, Kayishema, Mbakirirehe and Rushema, decided to move the Tutsi at the Nyange Parish from the presbytery into the church.⁴⁵⁸ The Chamber therefore has not considered this evidence in its deliberations. 196. Prosecution Witnesses CNJ and YAU also testified that local "authorities"

played a role in channelling the Tutsi towards the parish.⁴⁵⁹ Witness CNJ testified that he was told by his paternal uncle that on 11 April 1994, local officials and community leaders decided to relocate the Tutsi who had sought refuge at the communal office to the Nyange Parish and to provide gendarmes to “ensure the security of the refugees.”⁴⁶⁰ 197. While the Defence did not object to Witness CNJ’s evidence about this meeting, the Chamber has exercised caution and considered whether the Accused was given adequate notice of the meeting at the communal office. The Chamber recalls that neither the communal office nor 11 April 1994 is mentioned in the Amended Indictment. Nevertheless, because Witness CNJ did not testify that Kanyarukiga attended this meeting or that any decisions taken at that meeting could be imputed to the Accused, the Chamber does not consider this evidence to constitute a material fact that should have been pleaded in the Amended Indictment. As such, the Chamber will consider Witness CNJ’s evidence on this point. 198. The Chamber recalls that Witness CNJ was an accomplice to the massacres at the Nyange Parish and that his testimony about this particular incident is based on hearsay.⁴⁶¹ The Chamber therefore has treated his evidence with extreme caution. For these reasons, the Chamber finds that Witness CNJ’s evidence is insufficient to support a finding that Tutsi civilians sought refuge at the Kivumu commune office or that they were moved from the commune office to the Nyange Parish after a meeting of officials and community leaders on 11 April 1994. At the same time, the witness’s testimony was partially corroborated by Witnesses CBN, CBS and YAU, who testified that there were gendarmes at the parish when they arrived.⁴⁶² Witnesses YAU, CBN, CBR and CBS also indicated that the gendarmes were meant to ensure the security of the Tutsi at the parish.⁴⁶³

⁴⁵⁶ See Witness CBN, T. 1 September 2009, pp. 49, 50; Witness CBK, T. 2 September 2009, p. 64 (CS); T. 2 September 2009, p. 65; Witness CNJ, T. 7 September 2009, pp. 10, 11; Witness CBY, T. 8 September 2009, pp. 29-30; Witness CDL, T. 10 September 2009, p. 26; Witness YAU, T. 15 September 2009, pp. 10, 11; Witness CBS, T. 16 September 2009, p. 44; Witness KG19, T. 27 January 2010, p. 8; Witness Tugirumukiza, T. 1 February 2010, pp. 61-62. ⁴⁵⁷ Prosecutor’s Final Trial Brief, paras. 55, 112, 114-115. ⁴⁵⁸ T. 2 September 2009, pp. 66, 69. In sustaining this objection, the Chamber (Judge Park) noted that “there was no [disclosure] on this area” and that the Defence objection was reasonable given the Prosecution’s theory of joint criminal enterprise. ⁴⁵⁹ Witness CNJ, T. 7 September 2009, p. 11; Witness YAU, T. 15 September 2009, pp. 11, 36-37. ⁴⁶⁰ T. 7 September 2009, p. 11. ⁴⁶¹ T. 7 September 2009, pp. 9-11, 39. ⁴⁶² Witness CBK, T. 2 September 2009, pp. 18-19; Witness YAU, T. 15 September 2009, pp. 14, 39; Witness CBS, T. 16 September 2009, pp. 46-48; T. 17 September 2009, p. 11. ⁴⁶³ Witness CBK, T. 2 September 2009, pp. 18-19; Witness CBR, T. 9 September 2009, pp. 11-12; Witness YAU, T. 15 September 2009, p. 14; Witness CBS, T. 16 September 2009, p. 48.

Page 49

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

46 Based on this evidence, the Chamber is satisfied that gendarmes were posted at the Nyange Parish to “ensure the security” of the Tutsi at the parish. 199. Witness YAU testified that, on the day she arrived at the parish, she saw Fulgence Kayishema and Gaspard Kanyarukiga transporting Tutsi civilians to the parish in Kanyarukiga’s red vehicle.⁴⁶⁴ As discussed further in paragraph 317, the Chamber finds that, in light of the inconsistencies and irregularities in Witness YAU’s testimony, it cannot rely on her testimony unless corroborated by credible evidence. Because no other witness testified that Kanyarukiga and Kayishema brought Tutsi to the Nyange Parish in Kanyarukiga’s vehicle, the Chamber has disregarded Witness YAU’s testimony on this point. 2.4.

Conclusion

200. For the foregoing reasons, the Chamber finds that the Prosecution has proven beyond reasonable doubt that in Kivumu commune, Tutsi civilians were attacked in their homes after the death of President Habyarimana, that at least some of these attacks were instigated by Télesphore Ndungutse and that IPJ Kayishema declined to investigate or prosecute such attacks. However, the Prosecution has failed to establish that Grégoire Ndakubana, Martin Karekezi and Thomas Mwendezi were among the victims of these attacks, as alleged in paragraph 9 of the Amended Indictment. 201. Second, the Chamber finds that the Prosecution has proven beyond reasonable doubt that Tutsi civilians sought refuge from attacks in Kivumu commune at the Nyange Parish and that gendarmes were posted to the parish, ostensibly to ensure the security of the Tutsi.⁴⁶⁵ However, it has not been established; that Tutsi civilians sought refuge at the Kivumu commune office; that they were relocated to the parish after a meeting at the commune office; that Kanyarukiga and Kayishema transported Tutsi to the parish or that Tutsi were “channelled” to the parish by communal authorities.

⁴⁶⁴ T. 15 September 2009, pp. 11, 36-37. ⁴⁶⁵ The Chamber notes that this finding overlaps with the findings with regard to paragraph 13 to Amended Indictment and is equally relevant to the allegation in that paragraph.

Page 50

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

47 3. Meetings at Nyange Parish, “on or about 10 April 1994” and “on or about 12 April 1994” 3.1.

Introduction

202. Paragraphs 11 and 12 of the Amended Indictment read as follows:

11. On or about 10 April 1994, Gaspard KANYARUKIGA, Father Athanase SEROMBA, Fulgence KAYISHEMA, Grégoire NDAHIMANA and others attended a meeting in the presbytery at Nyange Parish at which the state of insecurity and killings were discussed. At this meeting Father Seromba blamed the inkotanyi for killing President Habyarimana.
12. On or about 12 April 1994, Gaspard KANYARUKIGA, Father Athanase SEROMBA, Fulgence KAYISHEMA, Grégoire NDAHIMANA, Téléphore NDUNGUTSE and others attended another meeting on Seromba's balcony at Nyange Parish. 203. Prosecution Witnesses CBY, CDL, CBK, CBR, YAU, CBS and CBN all gave evidence that Kanyarukiga attended meetings with Kayishema, Ndahimana, Seromba and others prior to 15 April 1994. The Defence challenges the reliability of these Prosecution witnesses and points to the evidence of Defence Witnesses KG15 and Damien Nayituriki, who denied witnessing any meetings at the alleged times and places.⁴⁶⁶ 3.2. Evidence Prosecution Witness CBY 204. Witness CBY testified that, on the afternoon of 8 April 1994, "officials" arrived at the Nyange Parish.⁴⁶⁷ Among these "officials" were the IPJ Kayishema, a person called Ndungutse, Grégoire Ndahimana and Kanyarukiga.⁴⁶⁸ "On that day[,] when they arrived at the parish, Father Seromba also came there and spoke to them in the inner courtyard of the presbytery."⁴⁶⁹ The witness testified that these people were at the presbytery for approximately 30 minutes to one hour.⁴⁷⁰ 205. These same "authorities" returned on 9 April 1994, before 5.00 p.m., and spoke to Father Seromba in the inner courtyard of the presbytery for less than an hour.⁴⁷¹ Witness CBY was not far from the courtyard when he saw these men arrive. ⁴⁷² 206. On 10 April 1994, Félicien, a young man who worked with Witness CBY, arrived at the parish with some of the people who were seeking refuge there.⁴⁷³ Félicien told the witness that

⁴⁶⁶ Defence Final Brief, paras. 125-134, 197-202. ⁴⁶⁷ T. 8 September 2009, p. 34. ⁴⁶⁸ T. 8 September 2009, p. 34; T. 14 September 2009, p. 9 (CS). The witness only mentioned the first three initially, but when asked again, the witness testified that Kanyarukiga accompanied these other men. ⁴⁶⁹ T. 8 September 2009, p. 34. ⁴⁷⁰ T. 8 September 2009, p. 34. ⁴⁷¹ T. 8 September 2009, p. 35; T. 14 September 2009, p. 11 (CS). ⁴⁷² T. 14 September 2009, p. 11 (CS). ⁴⁷³ T. 8 September 2009, p. 35.

Page 51

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

⁴⁸ Father Seromba had gone to the communal office to attend a meeting regarding the possible extermination of the Tutsi.⁴⁷⁴ Witness CBY did not say how Félicien had obtained this information. 207. Witness CBY testified that Kayishema, Ndungutse, Grégoire Ndahimana and Kanyarukiga visited the Nyange Parish again on 10 April 1994.⁴⁷⁵ They met Father Seromba in the inner courtyard of the presbytery for approximately 40 minutes.⁴⁷⁶ 208. On 11 April 1994, Kayishema, Ndungutse, Grégoire Ndahimana and Kanyarukiga came back to the presbytery and met with Father Seromba for between 30 minutes and one hour.⁴⁷⁷ There were no other visitors

to the parish on that day.⁴⁷⁸ 209. Witness CBY testified that Kayishema, Ndungutse, Grégoire Ndahimana and Kanyarukiga returned to the presbytery on 12 April 1994 and met with Father Seromba.⁴⁷⁹ After the meeting, Father Seromba left the presbytery and did not return for two hours.⁴⁸⁰ The witness testified that, upon Father Seromba's return, the church door was opened to allow the Tutsi to enter.⁴⁸¹ Witness CBY said he was in the presbytery courtyard during each of these meetings.⁴⁸² 210. On 13 April 1994, a group of Hutu assailants attacked the Tutsi at the parish.⁴⁸³ After the attackers left, Kayishema, Ndungutse, Grégoire Ndahimana, Kanyarukiga and another businessman named Théodomir, known as Kiragi, came to the parish.⁴⁸⁴ They arrived in the afternoon between 3.00 and 4.00 p.m.⁴⁸⁵ Upon arrival, these men entered the presbytery and went upstairs to meet with Father Seromba.⁴⁸⁶ "Shortly afterwards they left Seromba's room to move into another room that was used by the bishop."⁴⁸⁷ The witness testified that the meeting went for about an hour.⁴⁸⁸ Afterwards, Father Seromba went out to accompany the visitors and remained outside for approximately two hours.⁴⁸⁹ When he returned, Father Seromba asked the witness to accompany him to the church to remove material that was used during mass.⁴⁹⁰ Prosecution Witness CDL 211. Witness CDL testified that, on 13 April 1994, a meeting was held at the communal office in order to discuss preparing the "assailants" to attack the church, as well as the nature of the weapons possessed by the Tutsi who had taken refuge in the church.⁴⁹¹ The meeting was attended by Bourgmestre Grégoire Ndahimana, Father Seromba, Deputy Bourgmestre Gilbert Kanani Rugwizangoga, Fulgence Kayishema, Gaspard Kanyarukiga, Télésphore Ndungutse and Joseph

474 T. 8 September 2009, p. 35. 475 T. 8 September 2009, p. 35. 476 T. 8 September 2009, p. 35. 477 T. 8 September 2009, pp. 35, 36. 478 T. 8 September 2009, p. 35. 479 T. 8 September 2009, p. 36. 480 T. 8 September 2009, p. 36. 481 T. 8 September 2009, p. 36. 482 T. 14 September 2009, p. 11 (CS). 483 T. 8 September 2009, p. 36. 484 T. 8 September 2009, pp. 36, 39-40. 485 T. 8 September 2009, p. 40. 486 T. 8 September 2009, p. 40. 487 T. 8 September 2009, p. 40. 488 T. 8 September 2009, p. 40. 489 T. 8 September 2009, p. 40. 490 T. 8 September 2009, p. 40. Father Seromba told the witness that the reason why these objects were being taken out of the church was that there were so many people in the church that "they could spoil the objects." 491 T. 10 September 2009, p. 46; T. 11 September 2009, pp. 7-8.

Page 52

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

49 Habiyaambere.⁴⁹² At the end of the meeting, Seromba and Gilbert Kanani Rugwizangoga, the Deputy Bourgmestre, went to the church to determine whether the Tutsi were armed.⁴⁹³ Witness CDL did not attend the meeting but was informed about it by Kanani.⁴⁹⁴ 212. Witness CDL also testified that he attended a meeting at Mutanoga Centre on 14 April 1994.⁴⁹⁵ Witness CDL testified that he arrived at the Mutanoga Centre around 2.30 p.m.⁴⁹⁶ According to the witness, the gathering "looked like a public rally."⁴⁹⁷ Witness CDL estimated that there were hundreds of people, but he could not give a number.⁴⁹⁸ He testified that the meeting was attended by

Bourgmestre Ndahimana, IPJ Fulgence Kayishema, Canton Court President Joseph Habiyaambere, Brigadier Bakiwiri,⁴⁹⁹ MRND Chairman Jean Baptiste Kagenza, Assistant Bourgmestre Gilbert Rugwizangoga Kanani, MRND Vice-Chairman Télesphore Ndungutse and the businessman Gaspard Kanyarukiga.⁵⁰⁰ 213. Witness CDL testified that he saw Kanyarukiga arrive at the Mutanoga Centre in a Toyota Corolla and park in front of the first house at the marketplace.⁵⁰¹ According to the witness, Kanyarukiga had a pistol in his belt and asked those present whether all the Tutsi at the Nyange Church had been killed.⁵⁰² Kanyarukiga was told that the Tutsi at the church had resisted the attacks.⁵⁰³ According to the witness, Kanyarukiga “advised the assailants that they had to proceed quickly and exterminate the refugees at the parish, because their kinsmen were already at Mushubati” and were coming to “liberate” the Tutsi in Nyange.⁵⁰⁴ Witness CDL testified that, through his words, “Kanyarukiga meant to say that the [i]nkotanyis were related to the Tutsis, that they were, therefore, their kinsmen.”⁵⁰⁵ Prosecution Witness CBK 214. Witness CBK testified that, in the afternoon of 13 April 1994, the former bourgmestre of Kivumu commune, IPJ Kayishema, Mbakirirehe, Rushema and Kanyarukiga held a meeting at the Nyange Parish to discuss “disarming the refugees.”⁵⁰⁶ Witness CBK testified that Kanyarukiga and Father Seromba were among those who decided to disarm the Tutsi.⁵⁰⁷ According to the witness, all of the meetings were held in a room known as the “bishop’s room,” which was one of the rooms in the parish.⁵⁰⁸ Witness CBK testified that each time these men met at the parish, he saw them come and go from the bishop’s room.⁵⁰⁹ He acknowledged, however, that he did not attend any of these meetings.⁵¹⁰

492 T. 10 September 2009, pp. 46-47. 493 T. 10 September 2009, p. 46. 494 T. 10 September 2009, pp. 46-47; T. 11 September 2009, pp. 7-9. 495 T. 10 September 2009, p. 26, T. 11 September 2009 p. 3. 496 T. 11 September 2009, p. 1. 497 T. 10 September 2009, p. 26. 498 T. 11 September 2009, p. 2. 499 Phonetic spelling from transcript. 500 T. 10 September 2009, p. 27. 501 T. 10 September 2009, p. 31; T. 11 September 2009, p. 3. 502 T. 10 September 2009, pp. 30, 31; T. 11 September 2009, p. 3. 503 T. 10 September 2009, p. 30. 504 T. 11 September 2009, p. 4. See also T. 10 September 2009, p. 30. According to Witness CDL, Kanyarukiga also suggested that the assailants request reinforcements from other secteurs in the commune. 505 T. 11 September 2009, p. 5. See also T. 10 September 2009, p. 30. 506 T. 2 September 2009, p. 70; T. 4 September 2009, p. 4. 507 T. 4 September 2009, p. 16 (CS). 508 T. 3 September 2009, p. 65 (CS). 509 T. 3 September 2009, p. 66 (CS). 510 T. 3 September 2009, p. 68 (CS).

Page 53

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

50 215. During cross-examination, Witness CBK testified that “the meeting during which it was decided to disarm refugees was held at the parish.”⁵¹¹ He then testified that, “on the 13th of April, Father Seromba went to the communal office where a meeting had been held. But when they returned from the communal office, they held another meeting at the parish.”⁵¹² 216. Witness CBK confirmed that Defence Witness KG15 was at the Nyange Parish during April

1994.513 Prosecution Witness CBR 217. Witness CBR testified that, on 13 April 1994, Ndungutse attended a meeting at the communal office along with Assistant Bourgmestre Gilbert Kanani and Presiding Judge Joseph Habiyaambere.514 Ndungutse later informed the witness and others that those at the meeting had talked about attacking the Nyange Parish.515 After the meeting, Kanani and Habiyaambere went to the parish with Father Seromba to assess whether those who had taken refuge at the parish were armed and capable of defending themselves.516 Prosecution Witness YAU 218. Witness YAU testified that Father Seromba, Gaspard Kanyarukiga, Fulgence Kayishema, Grégoire Ndahimana, Nyange Conseiller Habarugira and Jean-Marie Vianney were at the Nyange Parish when she arrived.517 Witness YAU testified that these persons were standing in front of the office of the secretariat in the parish compound.518 “They seemed to be talking, to be discussing.”519 The witness was not close enough to hear their conversation, but she testified that the distance between them was “not significant.”520 Prosecution Witness CBS 219. Witness CBS testified that around 1.00 p.m. on Thursday, 14 April 1994, “the Hutus who were leading the commune” came to see Seromba at the Nyange Parish.521 According to the witness, these people were Bourgmestre Grégoire Ndahimana, IPJ Kayishema, Brigadier Mbakirirehe, Assistant Bourgmestre Rushema and communal policemen.522 The witness also saw Gaspard Kanyarukiga and Téléphore Ndungutse “at the priest’s.”523 220. Witness CBS was outside the church in the courtyard,524 and saw these men on the balcony “of the house where Father Seromba had his apartment.”525 Witness CBS did not see the men arrive

511 T. 4 September 2009, pp. 4-5. The participants may have come from the communal office, but the meeting was held at the presbytery. See also T. 4 September 2009, p. 6. 512 T. 4 September 2009, p. 6. 513 T. 4 September 2009, p. 23 (CS). 514 T. 9 September 2009, pp. 7, 10. 515 T. 9 September 2009, p. 10. 516 T. 9 September 2009, pp. 10, 11. 517 T. 15 September 2009, p. 10. 518 T. 15 September 2009, p. 11. 519 T. 15 September 2009, p. 11. 520 T. 15 September 2009, p. 11. 521 T. 16 September 2009, pp. 48, 49, 50, 51; T. 17 September 2009, pp. 9, 10. 522 T. 16 September 2009, p. 48. 523 T. 16 September 2009, p. 50. According to the witness, Kanyarukiga was wearing a jacket that was not black, trousers and a shirt. T. 17 September 2009, p. 10. 524 T. 16 September 2009, pp. 51, 53, 61; T. 17 September 2009, p. 10. 525 T. 16 September 2009, pp. 51, 60, 61; T. 17 September 2009, p. 10.

Page 54

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

51 at the parish.526 According to the witness, the visitors “spent a lot of time with that priest as if they were holding a meeting”.527 The men remained on the balcony for approximately one hour.528 Witness CBS attested that, “they were discussing amongst themselves and they left subsequently”529 in the direction of the Statue of the Virgin Mary, with only Seromba and “other priests who were linked with Seromba” remaining behind.530 According to the witness, this was the first meeting at the parish.531 Prosecution Witness CBN 221. Witness CBN testified that at approximately 1.00 p.m. on the afternoon of Thursday, 14 April 1994, Bourgmestre Grégoire

Ndahimana came to Nyange Parish with the brigadier, Christophe Mbakirirehe, IPJ Kayishema, Court President Gaca Butelezi and Kanyarukiga.⁵³² The witness testified that he saw these men come to the church.⁵³³ “They continued and went right up to Seromba’s room, which was located on the upper floor[.]”⁵³⁴ Witness CBN was in the courtyard in front of the church and could see the Statue of the Virgin Mary from where he was standing.⁵³⁵ Ndahimana, Mbakirirehe, Kayishema, Kanyarukiga and Gaca Butelezi “passed in front of us and entered through the small gate by which one passed in order to go to the rear courtyard.”⁵³⁶ The witness saw the men standing on the balcony of the presbytery.⁵³⁷ 222. Witness CBN testified that he could not hear the men’s conversation, but he had the impression they were holding a meeting “because as they talked they pointed at us, and that is why I concluded that they were holding a meeting with regards to the people who were at the church.”⁵³⁸ The witness estimated that the meeting did not last for more than an hour.⁵³⁹ 223. As the “authorities” left the presbytery, the Tutsi approached them and told the bourgmestre that they had been attacked.⁵⁴⁰ They asked the bourgmestre what he had done to arrest the assailants.⁵⁴¹ The bourgmestre said there was nothing he could do to help the refugees because the inyenzi had attacked the country and had shot down the plane of President Habyarimana. He said that the Tutsis who were in the country had to be exterminated.⁵⁴² Witness CBN testified that Kanyarukiga was with the bourgmestre when he said these words.⁵⁴³

526 T. 16 September 2009, pp. 60, 61. He testified, however, that there was only one entrance into the presbytery. 527 T. 16 September 2009, p. 48. 528 T. 16 September 2009, p. 53. 529 T. 16 September 2009, p. 51. 530 T. 16 September 2009, p. 53. 531 T. 17 September 2009, p. 10. 532 T. 1 September 2009, pp. 56, 57, 58. Witness CBN testified that Gaca Butelezi was a nickname for the “president of the court”. T. 1 September 2009, pp. 56-57. 533 T. 1 September 2009, p. 56. 534 T. 1 September 2009, p. 56. 535 T. 1 September 2009, p. 57. 536 T. 1 September 2009, p. 57. 537 T. 1 September 2009, p. 57. 538 T. 1 September 2009, p. 57. 539 T. 1 September 2009, pp. 58-59. 540 T. 1 September 2009, p. 59. 541 T. 1 September 2009, p. 59. 542 T. 1 September 2009, p. 59. 543 T. 1 September 2009, p. 59.

Page 55

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

52 224. The “authorities” left together in the direction of the Statue of the Virgin Mary.⁵⁴⁴ After the “authorities” left, the assailants who had been waiting opposite Kanyarukiga’s pharmacy, came forward and threw stones at those who had taken refuge at the parish.⁵⁴⁵ Defence Witness KG15 225. Witness KG15 arrived at the Nyange Parish at around 11.00 a.m. on 10 April 1994 and was received by Father Seromba.⁵⁴⁶ He testified that he spent the night of 10 April 1994 at the Nyange Parish.⁵⁴⁷ 226. Witness KG15 testified that on Monday, 11 April 1994, he spent no more than ten minutes outside the presbytery.⁵⁴⁸ Witness KG15 testified that he remained inside the presbytery for the rest of the day, either in his room or in the inner courtyard between the priests’ quarters and the secretariat.⁵⁴⁹ He subsequently asserted that he went to church with

Father Seromba on this day.⁵⁵⁰ 227. The witness testified that he saw only two people come to the presbytery on 11 April 1994: the bourgmestre and the IPJ.⁵⁵¹ According to Witness KG15, the bourgmestre and IPJ met Seromba in the inner courtyard in front of the priests' living quarters for a few minutes.⁵⁵² Witness KG15 testified that, during this time, he and Father Seromba were in the inner courtyard.⁵⁵³ Father Seromba introduced the witness to the bourgmestre and the IPJ, after which the two men asked Witness KG15 and Father Seromba security-related questions.⁵⁵⁴ Witness KG15 testified that the bourgmestre and IPJ remained in the courtyard for around ten minutes but did not enter any of the rooms in the presbytery.⁵⁵⁵ 228. Witness KG15 spent the duration of Tuesday, 12 April 1994, inside the presbytery.⁵⁵⁶ Witness KG15 did not see the bourgmestre, IPJ, local authorities or other persons enter the presbytery on this day, nor did he hear about a meeting in the presbytery from anyone else.⁵⁵⁷ 229. Witness KG15 testified that he did not leave the presbytery on Wednesday, 13 April 1994, owing to the "tense" situation.⁵⁵⁸ He testified that there was no meeting inside the presbytery at any time this day. 559 230. Witness KG15 testified that he did not leave the presbytery on Thursday, 14 April 1994.⁵⁶⁰ When asked whether he witnessed anything around 1.00 p.m., or had otherwise learnt that a

544 T. 1 September 2009, p. 59. 545 T. 1 September 2009, p. 59. 546 T. 11 February 2010, pp. 7, 8 (CS). 547 T. 11 February 2010, p. 8 (CS). 548 T. 11 February 2010, p. 11 (CS). 549 T. 11 February 2010, p. 11 (CS). 550 T. 11 February 2010, p. 41 (CS). 551 T. 11 February 2010, pp. 11, 26 (CS). 552 T. 11 February 2010, pp. 11, 12 (CS). The witness later said it had been ten minutes. T. 11 February 2010, p. 13 (CS). 553 T. 11 February 2010, p. 11 (CS). 554 T. 11 February 2010, pp. 12-13 (CS). 555 T. 11 February 2010, p. 13 (CS). 556 T. 11 February 2010, p. 14 (CS). Witness KG15 later testified that he went to the church on Tuesday with Father Seromba. T. 11 February 2010, pp. 27, 29, 33, 41 (CS). 557 T. 11 February 2010, pp. 14, 26 (CS). 558 T. 11 February 2010, p. 14 (CS). 559 T. 11 February 2010, pp. 14, 26 (CS). 560 T. 11 February 2010, p. 15 (CS).

Page 56

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

53 meeting had taken place in the presbytery, Witness KG15 stated that 1.00 p.m. was the lunch hour, so he did not see anybody during that hour.⁵⁶¹ Defence Witness Damien Nayituriki 231. Defence Witness Damien Nayituriki, a Hutu, was in his fourth year at the Butare Groupe Scolaire in 1994.⁵⁶² 232. Witness Nayituriki testified that, on 14 April 1994, he went to buy drinks near the Statue of the Virgin Mary with his brother and a man from Kigali who had taken refuge at the witness's house.⁵⁶³ They could not buy the drinks at the Statue of Virgin Mary, so they left around 3.30 or 4.00 p.m. and headed towards Mutanoga, where they spent two hours drinking.⁵⁶⁴ Witness Nayituriki testified that he did not see Kanyarukiga or Kanyarukiga's vehicle while he was at the Mutanoga Centre.⁵⁶⁵ Witness Nayituriki also denied seeing the bourgmestre of Kivumu commune, or IPJ Kayishema at the Mutanoga Centre.⁵⁶⁶ Witness Nayituriki did not witness any meeting or gathering at Mutanoga Centre for the entire period he was there, nor did he hear that Kanyarukiga or Grégoire attended a meeting at that location on 14 April 1994.⁵⁶⁷ 3.3.

Deliberations 233. Paragraphs 11 and 12 of the Amended Indictment allege that the Accused attended “a” meeting at the Nyange Parish “on or about 10 April 1994” and “another meeting” “on or about 12 April 1994.” The Prosecution submits in its closing brief that Kanyarukiga attended a number of meetings at various locations in Kivumu commune, including the communal office, the presbytery, the courtyard of the Nyange Parish, CODEKOKI and near the Accused’s pharmacy.⁵⁶⁸ According to the Prosecution, “[e]vidence adduced demonstrates that the purpose of these pre-killing meetings was to plan the killings.”⁵⁶⁹ 234. The Defence, for its part, submits that several of the meetings about which the Prosecution has led evidence are outside the scope of the Amended Indictment. The Defence maintains that the Prosecution has transformed “a single specifically described occurrence [in the Amended Indictment] into multiple similar occurrences.”⁵⁷⁰ The Defence further contends that the Prosecution evidence is either “patently unreliable” or does not prove any criminal activity on the part of the Accused.⁵⁷¹ 235. The Chamber notes that it has found, in paragraphs 121 to 137, that the alibi for 12 to 14 April 1994 is not reasonably possibly true, for the reasons outlined in that section. The Chamber recalls, however, that its finding that the alibi is not reasonably possibly true does not

561 T. 11 February 2010, pp. 15, 16 (CS). 562 T. 8 February 2010, pp. 5, 17. Witness Nayituriki testified that he is of mixed Hutu-Tutsi parentage but was a Hutu in April 1994 because his father was Hutu. T. 8 February 2010, pp. 14-15. “Q. So in April 1994 you were considered a Hutu as yours is a patriarchal ... society, correct? A. That is correct.” 563 T. 8 February 2010, pp. 7-9, 19. 564 T. 8 February 2010, pp. 9, 10, 11, 19. 565 T. 8 February 2010, p. 11. The witness testified that he knew Kanyarukiga’s vehicle very well. 566 T. 8 February 2010, pp. 13, 14. 567 T. 8 February 2010, pp. 13-14. 568 Prosecutor’s Final Trial Brief, para. 109. 569 Prosecutor’s Final Trial Brief, para. 109. 570 Defence Final Brief, para. 455. 571 Defence Final Brief, paras. 121, 135, 153, 179.

Page 57

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

54 relieve the Prosecution of its burden to prove any allegations with regard to these dates, beyond reasonable doubt. Notice 236. The Chamber recalls that in its 15 January 2010 decision on the Defence motion for exclusion of evidence, the Trial Chamber reserved until the judgement its decision on whether to exclude Prosecution evidence of certain meetings allegedly attended by the Accused.⁵⁷² Before assessing the evidence on its merits, the Chamber therefore shall consider the Defence request, as reiterated in its closing brief, that the Trial Chamber exclude the following Prosecution evidence for lack of notice: 1) Prosecution Witness CBK’s testimony that Kanyarukiga attended a meeting in the “bishop’s room” on 13 April 1994; 2) Prosecution Witness CBR’s testimony that Kanyarukiga attended a meeting on 13 April 1994 at the communal office; 3) Prosecution Witness CDL’s testimony that Kanyarukiga attended a meeting at the communal office on 13 April 1994 to verify weapons of “refugees”;⁵⁷³ 4) Prosecution Witness CBN’s testimony that Kanyarukiga attended a meeting on 14 April 1994; 5) Prosecution Witness CDL’s testimony that Kanyarukiga attended a meeting at Mutanoga Centre on 14 April 1994; and 6)

Prosecution Witness CBS's testimony that Kanyarukiga attended a meeting on 14 April 1994.⁵⁷⁴ 237. The Defence submits that the Prosecution adduced evidence of material facts that were included in the original indictment but withdrawn from the Amended Indictment in 2007.⁵⁷⁵ The Prosecution does not address this argument in its closing brief but asserted in its closing argument that, "the Defence has suffered no prejudice because timely, clear and consistent disclosure ... has been effected."⁵⁷⁶ The Prosecution contends that defects in the Amended Indictment were cured through witness statements, the witnesses' testimony in the Seromba trial, disclosed confession statements and paragraph 36 of the Prosecutor's Pre-Trial Brief, which states that the Accused attended meetings at "Seromba's home" and elsewhere from 10 April through 16 April 1994.⁵⁷⁷ 238. The Chamber recalls that, in exceptional circumstances, a vague or ambiguous provision in an indictment may be cured through timely, clear and consistent information detailing the factual basis underpinning the charge.⁵⁷⁸ The Appeals Chamber has found that defects in an indictment may be cured through post-indictment submissions, such as the prosecution's pre-trial brief,

⁵⁷² Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010, para. 17. ⁵⁷³ Defence Final Brief, para. 152. ⁵⁷⁴ Defence Final Brief, para. 175. ⁵⁷⁵ Defence Final Brief, paras. 434-447. ⁵⁷⁶ T. 24 May 2010, p. 23. ⁵⁷⁷ T. 24 May 2010, pp. 23-25. ⁵⁷⁸ Ntagerura et al., Judgement (AC), paras. 28, 114. See also Karera, Judgement (AC), para. 293; Muvunyi, Judgement (AC), para. 20.

Page 58

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

55 annexed witness summaries or the opening statement.⁵⁷⁹ However, a clear distinction must be drawn between vagueness in an indictment and an indictment omitting certain charges altogether.⁵⁸⁰ 239. The Chamber notes that paragraphs 11 and 12 of the Amended Indictment charge the Accused with participation in two particular meetings at the Nyange Parish prior to 15 April 1994. Because the Amended Indictment is unambiguous with respect to the number of meetings that the Accused is alleged to have attended, the Prosecution cannot "cure" the Indictment by including additional meetings in its subsequent submissions. Hence, the Chamber will not rely on any Prosecution evidence that does not relate to one of the two meetings specifically charged in the Amended Indictment. The Chamber acknowledges, however, that certain Prosecution evidence, while possibly at variance with the specific pleading in the Amended Indictment, could relate to one of the meetings charged in paragraphs 11 and 12 thereof. Thus, the Chamber shall consider the Prosecution evidence on a case-by-case basis to determine whether it relates to these two particular meetings.

- (a) Meeting at the Presbytery on 10 April 1994 ²⁴⁰. Prosecution Witness CBY testified that Kayishema, Ndungutse, Ndahimana and Kanyarukiga met Father Seromba at the inner courtyard of the Nyange Parish Presbytery on 10 April 1994.⁵⁸¹ The Chamber finds that the

date, venue and participants given by the witness closely track those alleged in paragraph 11 of the Amended Indictment. Thus, the Chamber is satisfied that this evidence relates to the meeting charged in paragraph 11 of the Amended Indictment and shall consider it in its deliberations below.

- (b) Meetings on 8, 9 and 11 April 1994 241. Prosecution Witness CBY also testified that the Accused attended meetings in the courtyard of the Nyange Parish Presbytery on 8, 9 and 11 April 1994.⁵⁸² The Amended Indictment does not mention any meetings on 8, 9 or 11 April 1994. While the Chamber acknowledges that each of these meetings could fall within the timeframe alleged in paragraph 11 of the Amended Indictment, the Accused is only charged with attending one meeting “on or about 10 April 1994.” Considering Witness CBY’s testimony about the meeting on 10 April 1994 more closely matches the allegation in the Amended Indictment, the Chamber has disregarded the evidence of meetings on 8, 9 and 11 April 1994.

579 Bagosora et al., Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), para. 35; Niyitegeka, Judgement (AC), para.

197. See also Muhimana, Judgement (AC), para. 82. Accord Karera, Judgement (AC), para. 297; Muvunyi, Judgement (AC), para. 97. The Chamber notes that many of the “disclosures” upon which the Prosecution relies to “cure” the indictment, including witness statements, confession statements and the witnesses’ testimony in the Seromba trial, pre-date the Amended Indictment. 580 Karera, Judgement (AC), para. 293. In Karera, the Appeals Chamber found that, where the amended indictment contained allegations of two particular incidents of weapons distribution in locations other than Rushashi, the inclusion of a third incident in Rushashi in the Prosecution’s pre-trial brief, annexed witness summaries and opening statement did not cure a vague paragraph in the indictment. Rather, it expanded the charges specifically pleaded in the indictment by charging an additional incident of weapons distribution in Rushashi. The Appeals Chamber found that this was “an impermissible de facto amendment of the Amended Indictment.” Karera, Judgement (AC), paras. 295-296. 581 T. 8 September 2009, p. 35. 582 T. 8 September 2009, pp. 34-36 (illustrating that the Defence did not object during Witness CBY’s testimony on these meetings).

Page 59

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

56

- (c) Meeting at the Communal Office on 10 April 1994 242. Prosecution Witness CBY testified that on 10 April 1994 he was informed by a young man who worked with him that Father Seromba had gone to the communal office to attend a meeting regarding the possible

extermination of the Tutsi.⁵⁸³ The Chamber recalls that paragraph 8 of the original indictment alleged that several important meetings were held at the Nyange Parish and the communal office on or about 10 April 1994.⁵⁸⁴ The Prosecution deleted the reference to meetings at the communal office when it amended the indictment in 2007. The Chamber finds that, by removing this allegation, the Prosecution clearly indicated that it would not rely on this evidence at trial.⁵⁸⁵ Therefore, the Chamber has disregarded Witness CBY's testimony on this point.

- (e) Meeting on Father Seromba's Balcony on or about 12 April 1994 ²⁴³. Paragraph 12 of the Amended Indictment alleges that Kanyarukiga attended "another" meeting on Father Seromba's balcony on or about 12 April 1994.⁵⁸⁶ The Prosecution has not adduced any evidence of a meeting on Seromba's balcony on 12 April 1994. However, Witness CBY testified that Kanyarukiga, Kayishema, Ndungutse and Ndahimana met with Father Seromba at the presbytery on 12 April 1994,⁵⁸⁷ and Witnesses CBN and CBS testified that Kanyarukiga, Ndahimana, Kayishema, Mbakirirehe and others attended a meeting on Seromba's balcony on 14 April 1994.⁵⁸⁸ ²⁴⁴. The Chamber has considered the possibility that Witnesses CBY, CBN and CBS gave evidence about the same meeting but placed it on different dates. However, given the context in which each of these meetings is alleged to have occurred, the Chamber finds this proposition untenable. The Chamber recalls that, while Witness CBY testified that the Tutsi were not allowed into the church until after the alleged meeting on 12 April 1994, Witnesses CBN and CBS testified that Tutsi were already inside the church when the Accused met at the presbytery on 14 April 1994.⁵⁸⁹ Furthermore, while Witness CBN testified that assailants attacked the Tutsi at the parish shortly after the meeting on the balcony on 14 April 1994, the first attack mentioned by Witness CBY occurred on 13 April 1994, the day after the alleged meeting on 12 April 1994.⁵⁹⁰ Thus, the Chamber finds that the witnesses were in fact describing two different meetings. ²⁴⁵. The Chamber recalls that a date preceded by "on or about" may be sufficiently specific to put an accused on notice of the crimes with which he or she is charged.⁵⁹¹ The Chamber finds in this case that "on or about 12 April 1994" is an approximate timeframe, which encompasses dates on either side of 12 April 1994. Thus, the Chamber is satisfied that either the alleged meeting on 12 April 1994 or the meeting on 14 April 1994 could be that charged in paragraph 12 of the Amended Indictment. ²⁴⁶. Having considered the locations of the alleged meetings, the number of witnesses who testified about each event and the information available to the Prosecution when the indictment was

⁵⁸³ T. 8 September 2009, p. 35. The Defence has not objected to this evidence. ⁵⁸⁴ [Original] Indictment, filed on 21 February 2002, para. 8. ⁵⁸⁵ See Prosecutor v. Setako, Case No. ICTR-04-81-T, Judgement and Sentence (TC), 25 February 2010, paras. 44, 46. ⁵⁸⁶ Amended Indictment, para. 12. ⁵⁸⁷ T. 8 September 2009, pp. 35-36; T. 14 September 2009, pp. 11-12 (CS). ⁵⁸⁸ Witness CBN, T. 1 September 2009, pp. 56-59; Witness CBS, T. 16 September 2009, pp. 48-51. ⁵⁸⁹ Witness CBY, T. 8 September 2009, p. 36; Witness CBN, T. 1 September 2009, pp. 50, 55-57; Witness CBS, T. 16 September 2009, p. 53. ⁵⁹⁰ Witness CBN, T. 1 September 2009, pp. 58-59; Witness CBY, T. 8 September 2009, pp. 34-36. Witness CBN also testified that assailants attacked the Tutsi on 13

April 1994, the day before the alleged meeting. T. 1 September 2009, pp. 50-52, 54-55, 58. 591 See, e.g., Gacumbitsi, Judgement (AC), para. 13.

Page 60

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

57 amended,⁵⁹² the Chamber finds that the alleged meeting on the presbytery balcony on 14 April 1994 is that charged in paragraph 12 of the Amended Indictment. Thus, because the Amended Indictment is clear with respect to the number of meetings that the Accused is alleged to have attended, the Chamber has disregarded Witness CBY's evidence of a meeting on 12 April 1994 and only considered the evidence of the meeting on 14 April 1994. 247. The Chamber has also considered the Defence argument that the Prosecution withdrew references to 14 April 1994 when it amended the indictment in 2007. While the Chamber acknowledges that paragraph 12 of the original indictment charged Kanyarukiga with a meeting at the parish "on or about 14 April 1994," the Chamber finds that the meeting charged in paragraph 12 of the original indictment is the same as that charged in paragraph 12 of the Amended Indictment. In reaching this conclusion, the Chamber has considered that both meetings are alleged to have occurred at the Nyange Parish and been attended by virtually the same people.⁵⁹³ Moreover, in both indictments, the meeting in question is the first meeting charged after the alleged meeting(s) "on or about 10 April 1994." Thus, notwithstanding the revision to the date, the Chamber finds that the Accused had sufficient notice that he was charged with attending a meeting on Father Seromba's balcony prior to the events of 15 and 16 April 1994 and will therefore consider the evidence of Witnesses CBN and CBS in its deliberations below. 248. The Chamber further notes that the summary of Witness CBN's anticipated testimony in the Prosecutor's Pre-Trial Brief clarified that Witness CBN would testify about a meeting on Seromba's balcony on 14 April 1994.⁵⁹⁴ Accordingly, the Chamber is satisfied that paragraph 12 of the Amended Indictment and the Prosecutor's Pre-Trial Brief put the Accused on notice of the alleged meeting on the balcony on 14 April 1994. 249. Finally, the Chamber recalls that the Prosecution alleged in paragraph 12 of the original indictment that, following the meeting at the Nyange Parish on 14 April 1994, Bourgmestre Ndahimana replied to a request for help from the displaced Tutsi by stating that the "war was caused by the [i]nyenzi who killed the President."⁵⁹⁵ The Chamber finds that, by deleting this paragraph from the Amended Indictment, the Prosecution unambiguously indicated that it would not rely on this evidence at trial. Thus, the Chamber has not considered Witness CBN's testimony that, following the meeting on Seromba's balcony on 14 April 1994, Bourgmestre Ndahimana told those who had sought refuge at the parish that he could not help them because the inyenzi had attacked the country and the Tutsi had to be exterminated.

⁵⁹² Compare Statement of Witness CBN, dated 17 August 2000, p. 4 (English version) and Statement of Witness CBS, dated 17 August 2000, p. 3 (English version) (describing a meeting on Seromba's balcony/upstairs on Thursday or 14 April 1994 that was attended by the Accused), to Defence Exhibit D34(B) (Statement of Witness CBY, dated 4 October 2000), p. 4 (describing

meetings on 11 and 12 April 1994, after which the church doors were opened, but not mentioning the presence of the Accused or Seromba's balcony). 593 Compare Amended Indictment, para. 12 (listing Kanyarukiga, Seromba, Kayishema, Ndahimana, Ndungutse and others) to [Original] Indictment, filed on 21 February 2002, para. 12 (listing Seromba, Kanyarukiga, Kayishema, Ndahimana and others). The Chamber further notes that, while the original indictment did not specify that the meeting on or about 14 April 1994 was held on the presbytery balcony, the pre-trial statements of Witnesses CBN and CBS, upon which both indictments were based, place the meeting on the balcony or "upstairs." Statement of Witness CBN, dated 17 August 2000, p. 4 (English version); Statement of Witness CBS, dated 17 August 2000, p. 3 (English version). 594 The Prosecutor's Pre-Trial Brief, p. 30. 595 [Original] Indictment, para. 12.

Page 61

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

58

- (f) Meetings at Nyange Parish on 13 April 1994 250. Witnesses CBK, CBY and YAU all testified about meetings at the Nyange Parish on 13 April 1994.⁵⁹⁶ While it is possible that one or more of these testimonies relates to the meeting described in paragraph 12 of the Amended Indictment, none of these witnesses placed the meeting explicitly on Seromba's balcony. In view of the evidence of a meeting on 12 April 1994 and on Seromba's balcony on 14 April 1994, the Chamber is not convinced that Witnesses CBY, CBK and YAU were testifying about the meeting described in paragraph 12 of the Amended Indictment. Rather, the witnesses appear to describe one or more additional meetings that were not pled in the Indictment. Because the Amended Indictment is neither vague nor ambiguous with regard to the number of meetings that the Accused is alleged to have attended, the Chamber has disregarded the testimony of Witnesses CBY, CBK and YAU about a meeting(s) at the Nyange Parish on 13 April 1994.
- (g) Meeting at the Communal Office on 13 April 1994 251. Prosecution Witnesses CDL and CBR both testified about a meeting at the Kivumu commune office on 13 April 1994.⁵⁹⁷ Witness CDL placed Kanyarukiga at this meeting while Witness CBR did not. The Chamber notes that neither the commune office nor 13 April 1994 appears in the Amended Indictment. For these reasons, the Chamber finds that the meeting at the communal office constitutes a new allegation that was not pleaded in the Amended Indictment. The Chamber further notes that the Prosecution deleted a reference to meetings at the communal office when it amended the indictment in 2007,⁵⁹⁸ thereby suggesting that it would not pursue this allegation at trial.⁵⁹⁹ The Chamber therefore has disregarded the testimony of Witnesses CBR and CDL regarding a meeting at the communal office on 13 April 1994.

- (h) Meeting at Mutanoga Centre on 14 April 1994 252. Prosecution Witness CDL testified that, on 14 April 1994, Kanyarukiga attended a meeting at the Mutanoga Centre, where he incited members of the population to attack the Tutsi at the church.⁶⁰⁰ The Amended Indictment does not mention either 14 April 1994 or the Mutanoga Centre. Because the Indictment is neither vague nor ambiguous with regard to the meetings the Accused is alleged to have attended, the Prosecution's omission of this meeting cannot be cured through subsequent submissions. Rather, this meeting should have been added through an amendment to the indictment.⁶⁰¹ As this information was in the possession of the Prosecution long before the indictment was amended in 2007,⁶⁰² the Prosecution could have included the meeting at the Mutanoga Centre in the Amended Indictment.⁶⁰³ As it did not, the Chamber has disregarded Witness CDL's testimony on this point.

596 Witness CBK, T. 2 September 2009, p. 70; T. 3 September 2009, pp. 65-66 (CS); T. 4 September 2009, pp. 4-7, 9; Witness CBY, T. 8 September 2009, pp. 39-40; Witness YAU, T. 15 September 2009, pp. 10-11 (The Chamber recalls that Witness YAU did not provide a date for the meeting but placed it on her first day at the parish, which the Chamber believes was most likely 13 April 1994.). 597 Witness CDL, T. 10 September 2009, pp. 46-47; T. 11 September 2009, pp. 7-9; Witness CBR, T. 9 September 2009, pp. 7-10. 598 [Original] Indictment, para. 8. 599 See Setako, Judgement (TC), paras. 44, 46. 600 T. 10 September 2009, pp. 26-31; T. 11 September 2009, pp. 1-3. 601 Karera, Judgement (AC), para. 293. 602 Defence Exhibit D29(A) (Statement of Witness CDL, dated 10 October 2001), p. 3. 603 See Setako, Judgement (TC), paras. 60, 63; Muvunyi, Judgement (AC), paras. 99-100.

Page 62

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

59

- (i) Conclusion 253. For the foregoing reasons, the Chamber finds that the only pieces of evidence for which sufficient notice was provided are Witness CBY's testimony regarding a meeting at the Nyange Parish on 10 April 1994 and the testimony of Witnesses CBN and CBS about a meeting "upstairs" or on the balcony of the presbytery on 14 April 1994. The Chamber therefore has disregarded all other evidence of meetings prior to 15 April 1994. On the Merits 254. The Trial Chamber shall now consider the merits of the Prosecution evidence regarding the alleged meeting at the Nyange Parish Presbytery on 10 April 1994 and the alleged meeting on the presbytery balcony on 14 April 1994.
- (a) Meeting at Nyange Parish Presbytery "on or about 10 April 1994" 255. Paragraph 11 of the Amended Indictment alleges that, on or about 10 April 1994, the Accused attended a meeting at the Nyange Parish Presbytery, at which the state of insecurity and killings were discussed. The Prosecution relies on the evidence of Witness CBY to support this allegation.⁶⁰⁴ The Defence responds that there is nothing in the Prosecution evidence of

meetings between 6 and 11 April 1994 that indicates or proves any criminal activity on the part of the Accused.⁶⁰⁵ 256. Prosecution Witness CBY testified that, on 10 April 1994, Kayishema, Ndungutse, Ndahimana and Kanyarukiga came to the Nyange Parish and met with Father Seromba in the inner courtyard of the presbytery for approximately 40 minutes.⁶⁰⁶ The witness did not say when the meeting occurred or provide any evidence regarding its alleged content. Nor is there any evidence that, during this meeting, Father Seromba blamed the “inkotanyi” for the death of the President as alleged in the Amended Indictment. Defence Witness KG15, who testified that he arrived at the Nyange Parish around 11.00 a.m. on 10 April 1994, did not mention a meeting at the presbytery on that day.⁶⁰⁷ 257. As discussed further below, the Chamber has found that Witness CBY is generally credible but has trouble recalling dates.⁶⁰⁸ With respect to this particular event, however, the Chamber finds that, without corroboration, it cannot rely on Witness CBY’s testimony to establish that Kanyarukiga attended a meeting in the presbytery of the Nyange Parish on 10 April 1994. The Chamber notes that Witness CBY did not mention any meetings at the Nyange Parish in his statement to ICTR investigators on 2 February 1996.⁶⁰⁹ Rather, he told investigators that Bourgmestre Ndahimana was the only “authority” he saw at the parish prior to the attacks.⁶¹⁰ When asked about this omission at trial, the witness insisted that he had reported these meetings to ICTR investigators.⁶¹¹ The Chamber does not find this explanation persuasive. Furthermore, while

⁶⁰⁴ The Chamber recalls that a finding of fact may be based on the evidence of a single witness where the Chamber finds that the evidence is relevant and credible. Karera, Judgement (AC), para. 45; Musema, Judgement (AC), paras. 37-38. ⁶⁰⁵ Defence Final Brief, para. 121. ⁶⁰⁶ T. 8 September 2009, p. 35. ⁶⁰⁷ T 11 February 2010, pp. 7-8 (CS). Compare T 11 February 2010, pp. 11-20 (CS). ⁶⁰⁸ See paragraph 498. ⁶⁰⁹ Defence Exhibit D33(B) (Statement of Witness CBY, dated 2 February 1996). See also Prosecution Exhibit D33(A) (Statement of Witness CBY in Kinyarwanda). ⁶¹⁰ Defence Exhibit D33(B) (Statement of Witness CBY, dated 2 February 1996), p. 3; T. 14 September 2009, p. 13. ⁶¹¹ T. 14 September 2009, p. 13.

Page 63

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

⁶⁰ Witness CBY mentioned a number of meetings in his statement of 4 October 2000, he did not say anything about a meeting at the parish on 10 April 1994.⁶¹² 258. Thus, the Chamber finds that the Prosecution has failed to establish beyond reasonable doubt that, on or about 10 April 1994, Kanyarukiga attended a meeting in the presbytery of the Nyange Parish at which the state of insecurity and killings were discussed.

- (b) Meeting on Seromba’s Balcony “on or about 12 April 1994” ²⁵⁹. Paragraph 12 of the Amended Indictment alleges that Gaspard Kanyarukiga, Fulgence Kayishema, Grégoire Ndahimana, Téléphore Ndungutse, Father Athanase Seromba and others attended “another” meeting on

Father Seromba's balcony on or about 12 April 1994.⁶¹³ The Prosecution relies on the evidence of Witnesses CBN and CBS to support this allegation. ^{260.} Witnesses CBN and CBS both testified that Kanyarukiga met with Father Seromba at the Nyange Parish on 14 April 1994. According to Witness CBN, Ndahimana, Brigadier Mbakirirehe, Kayishema, and Court President Gaca Butelezi all came to the parish at around 1.00 p.m. on that day and went to Seromba's room, which was located on the upper floor of the presbytery.⁶¹⁴ The witness testified that he saw these men arrive at the parish and then saw them on Seromba's balcony, pointing at the Tutsi in front of the church.⁶¹⁵ Witness CBS similarly testified that Kanyarukiga, Ndahimana, Kayishema, Mbakirirehe, Ndungutse, Rushema and communal policemen attended a meeting with Father Seromba on the balcony at around 1.00 p.m.⁶¹⁶ Witness CBS did not see the men arrive but testified that he saw them on the balcony and then saw them depart.⁶¹⁷ Both witnesses testified that the meeting lasted about an hour.⁶¹⁸ ^{261.} The Defence submits that the Prosecution witnesses are unreliable and that the Defence evidence has called into question both the very existence of these alleged meetings and the participation of the Accused.⁶¹⁹ The Defence points to the evidence of Witness KG15, who testified that he was at the parish on 14 April 1994 and did not see a meeting at the presbytery, particularly around 1.00 p.m.⁶²⁰ ^{262.} The Chamber accepts that Witness KG15 was at the Nyange Parish on 14 April 1994.⁶²¹ However, the Chamber has serious concerns about the witness's overall credibility.⁶²² Witness

⁶¹² Defence Exhibit D34(B) (Statement of Witness CBY, dated 4 October 2000). The Chamber notes that Witness CBY said in that statement that he heard from others that Father Seromba had attended a meeting at the communal office on 10 April 1994. Defence Exhibit D34(B) (Statement of Witness CBY, dated 4 October 2000), p. 4. ⁶¹³ Amended Indictment, para. 12. ⁶¹⁴ T. 1 September 2009, pp. 56-58. ⁶¹⁵ T. 1 September 2009, p. 57. The Chamber notes that the witness said that "as they talked they pointed at us," rather than at the Tutsi in front of the church. However, based on the witness's testimony that he, a Tutsi, was in the courtyard in front of the church when the men arrived, that "they passed in front of us" and that he "concluded that they were holding a meeting with regards to the people who were at the church," the Chamber has inferred that the witness was referring to the Tutsi in front of the church when he said "us." ⁶¹⁶ T. 16 September 2009, pp. 48-51. ⁶¹⁷ T. 16 September 2009, pp. 53, 60-61. ⁶¹⁸ Witness CBN, T. 1 September 2009, pp. 58-59; Witness CBS, T. 16 September 2009, p. 53. ⁶¹⁹ Defence Final Brief, paras. 124, 179. ⁶²⁰ Defence Final Brief, paras. 125-134, 183, 202; T. 11 February 2010, pp. 15-16 (CS). ⁶²¹ The Chamber recalls that Prosecution Witness CBK confirmed that Witness KG15 was at the Nyange Parish in April

^{1994.} T. 4 September 2009, p. 23 (CS); Defence Exhibit D63 (Personal Identification Sheet of Witness KG15). ⁶²² The Chamber also notes that, despite Father Seromba's conviction for genocide, Witness KG15 maintained during trial that Seromba was not responsible for the destruction of the Nyange Church or the killing of Tutsis at the parish. T. 11 February 2010, pp. 23-24 (CS). Given the evidence against Father Seromba in this case alone, the Chamber considers that this position is untenable and therefore casts doubt on the witness's overall credibility.

Page 64

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

61 KG15's testimony was evasive, internally inconsistent and inconsistent with his testimony during the Seromba trial.⁶²³ The Chamber recalls, for example, that Witness KG15 testified in this case that it would have been impossible for people to enter the presbytery without his knowledge,⁶²⁴ whereas he admitted that, he said largely the opposite during the Seromba trial.⁶²⁵ Further, while Witness KG15 suggested in this case that he was present during every conversation that Father Seromba had with visitors to the presbytery, he said during the Seromba trial that he was "not an umbilical cord and [that he] could not be with Seromba at all times".⁶²⁶ In light of these irregularities, the Chamber finds that Witness KG15's testimony does not cast doubt on the Prosecution evidence. ²⁶³. The Chamber has also considered the Defence submission that Witnesses CBN and CBS could not have seen a meeting on the presbytery balcony from the courtyard in front of the church, where both witnesses said they were standing.⁶²⁷ The Chamber is aware that, from the courtyard where Witnesses CBN and CBS said they were standing, the view of the presbytery balcony is largely obstructed by the secretariat.⁶²⁸ The Chamber has no further evidence before it as to how these witnesses could see the balcony from where they were standing. Thus, while the Chamber is satisfied that Witnesses CBN and CBS provided a truthful narration of the events as they remember them, it is reticent to make a finding beyond reasonable doubt that these men specifically met Father Seromba on the presbytery balcony.⁶²⁹ ²⁶⁴. As discussed further in paragraphs 456 to 458, the Chamber has found that Witnesses CBN and CBS are both generally credible and reliable. The witnesses identified Kanyarukiga in court, and Witness CBS testified that he owned property near the Accused's and lived near a member of Kanyarukiga's family in Kivumu commune.⁶³⁰ Accordingly, the Chamber accepts that Witnesses CBN and CBS could recognise the Accused on 14 April 1994 and saw Kanyarukiga and others arrive at the presbytery around 1.00 p.m. on that day and/or depart from there. Furthermore, notwithstanding certain minor inconsistencies between their accounts of the persons who visited the parish on 14 April 1994, the Chamber is satisfied that at least Kanyarukiga, Kayishema, Ndahimana

⁶²³ In addition to the inconsistencies mentioned below, the Chamber notes that Witness KG15 testified in this trial that he was stopped at a roadblock near the Nyange Parish on 10 April 1994 and that his identity card was checked. T. 11 February 2010, pp. 7-8, 38-40 (CS). However, in the Seromba trial, Witness KG15 denied that his identity card was checked at the roadblock. T. 11 February 2010, pp. 40, 42 (CS), citing Prosecutor v. Seromba, Case No. ICTR-01-66-I, T. 20 April 2006, p. 68 (CS). ⁶²⁴ T. 11 February 2010, pp. 33, 34 (CS). ⁶²⁵ T. 11 February 2010, p. 34 (CS), citing Prosecutor v. Seromba, Case No. ICTR-2001-66-I, T. 21 April 2006, p. 24 (CS). When asked about this discrepancy at trial, the witness said he would not have known if someone arrived at the presbytery after midnight or came to the door of the presbytery without coming inside. T. 11 February 2010, p. 34 (CS). ⁶²⁶ T. 11 February 2010, p. 31 (CS). ⁶²⁷ Defence Final Brief, paras. 183, 186-187. Witness CBN, T. 1 September 2009, p. 57; Witness CBS, T. 16 September 2009, pp. 51, 53,

61; T. 17 September 2009, p. 10. 628 Registry Exhibit R1 (DVD Site Visit Day, 1, 2, & 3), at Day 2, 30:45-32:00, 54:00-54:19; Registry Exhibit R3(II) (T. 20 April 2010, pp. 19-21, 33-34 (CS)); Prosecution Exhibit P19 (Photograph K027-1665 Secretariat Building); Prosecution Exhibit P20 (Photograph K027-1715 Secretariat Building 2); Prosecution Exhibit P62 (Colour Photocopy of Photo K027-1715 the Secretariat as marked by Witness CBS); Prosecution Exhibit P36 (Colour Photocopy of Photo K027-1715 as marked by Witness CBK). The Chamber notes that, when asked to indicate the presbytery on this photograph, Witness CBK remarked that, “[t]he presbytery is not quite visible on this photograph.” T. 3 September 2009, p. 15. Accord Registry Exhibit R3(II) (T. 20 April 2010, pp. 25-30 (CS)) (discussing whether the front of the church could be seen by someone on the balcony of the presbytery). 629 Given the events in question were extremely traumatic and occurred almost 16 years prior to the witnesses’ testimony, the Chamber acknowledges that Witnesses CBN and CBS’s recollection of the events is likely to be imperfect. The Chamber does not believe, however, that the irregularities in their testimony are a product of deliberate fabrication. 630 Witness CBN, T. 1 September 2009, pp. 65-66; Witness CBS, T. 16 September 2009, p. 58; T. 16 September 2009, pp. 65, 66 (CS). Witness CBN estimated that he had seen Kanyarukiga three times prior to April 1994. T. 1 September 2009, p. 65.

Page 65

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

62 and Mbakirirehe visited the presbytery on that day and remained for approximately one hour.⁶³¹ Given the duration of their visit, the Chamber finds that the only reasonable inference to be drawn from the evidence is that the men were holding a meeting. 265. For these reasons, the Chamber finds that the Prosecution has established beyond reasonable doubt that at least Kanyarukiga, Kayishema, Ndahimana and Mbakirirehe visited the Nyange Parish Presbytery around 1.00 p.m. on 14 April 1994. The Prosecution, however, has not established that they met with Father Seromba on the presbytery balcony. 3.4.

Conclusion

266. The Chamber finds that the Prosecution has failed to prove beyond reasonable doubt that, on or about 10 April 1994, Gaspard Kanyarukiga, Father Athanase Seromba, Fulgence Kayishema, Grégoire Ndahimana and others attended a meeting in the presbytery at Nyange Parish at which the state of insecurity and killings were discussed. 267. On the other hand, the Chamber is satisfied that the Prosecution has established beyond reasonable doubt that at least Gaspard Kanyarukiga, Fulgence Kayishema, Grégoire Ndahimana and Brigadier Mbakirirehe held a meeting at the Nyange Parish Presbytery for approximately one hour on 14 April 1994. The Prosecution, however, has failed to establish that these men met on Seromba’s balcony, as alleged in paragraph 12 of the Amended Indictment, or that Ndungutse, Seromba and others were in attendance.

631 The evidence is inconclusive with respect to the other participants.

Page 66

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

63 4. Armed Attackers Surround Nyange Church from 12 April 1994 4.1.

Introduction

268. Paragraph 13 of the Amended Indictment reads as follows:

12. From 12 April 1994 armed attackers comprising interahamwe militiamen and gendarmes surrounded Nyange [C]hurch where the Tutsi civilian refugees were confined. 269. The Prosecution alleges in its closing brief that the Tutsi who took refuge at the Nyange Parish were surrounded by interahamwe and other assailants who prevented them from escaping.⁶³² Other than this, the Prosecution does not appear to have addressed the allegation in paragraph 13 directly. Rather, it has adduced evidence of various events between 12 and 15 April 1994 that indirectly support the broad allegation in paragraph 13. The Chamber shall consider this evidence in the context of this indictment paragraph. 4.2. Evidence Prosecution Witness CBN 270. Prosecution Witness CBN testified that, on 13 April 1994, assailants launched an attack against the Tutsi at the Nyange Parish.⁶³³ “Those assailants had grouped themselves at the place where you had the statue and they attacked between 9[.00] and 10[.00] a.m.”⁶³⁴ The attackers threw stones at the Tutsi, and the Tutsi threw stones back.⁶³⁵ The Tutsi succeeded in repulsing the attack “because the attackers were ... not many.”⁶³⁶ The attackers retreated to the Statue of the Virgin Mary, where they “joined the other group.”⁶³⁷ According to the witness “the attacks, strictly speaking, stopped at about 4 o’clock ... but they would come and return.”⁶³⁸ No one was killed on 13 April 1994.⁶³⁹ 271. Witness CBN testified that some of the Tutsi arrived at the parish with machetes.⁶⁴⁰ “[O]n the 13th, communal policemen ... took away the weapons and they assured us that our security would be guaranteed[.]”⁶⁴¹ The policemen arrived on foot and were accompanied by one gendarme, who provided security to the Tutsi.⁶⁴² Witness CBN testified that the following police officers disarmed the Tutsi at the parish: Brigadier Christophe Mbakirirehe, Abayisenga, Rangira

⁶³² Prosecutor’s Final Trial Brief, paras. 55, 122. ⁶³³ T. 1 September 2009, pp. 50, 54. ⁶³⁴ T. 1 September 2009, p. 50. ⁶³⁵ T. 1 September 2009, p. 54. Witness CBN testified that “when [the assailants] attacked us on that date, when I saw them, they were carrying clubs, but subsequently they also had grenades. Those grenades were later used against us.” It is not clear from the witness’s testimony whether grenades were used during the attack on 13 April 1994 or whether he is referring to the attacks on subsequent days. T. 1 September 2009, p. 54. Witness CBN also testified that, at some point during these attacks, the gendarmes who were guarding the church fired into the air to discourage the attackers. T. 2 September 2009, p. 19. However, when asked

about this comment, the witness stated that, “when the gendarmes fired into the air, they actually wanted to signal to the attackers to return to where they had been in order to rest and then come back later.” T. 2 September 2009, p. 51. 636 T. 1 September 2009, p. 54. 637 T. 1 September 2009, p. 54. 638 T. 1 September 2009, p. 55. 639 T. 1 September 2009, p. 55. 640 T. 2 September 2009, pp. 17-18. 641 T. 2 September 2009, p. 18. 642 T. 2 September 2009, p. 18. The witness later indicated that there was more than one gendarme involved. T. 2 September 2009, p. 19.

Page 67

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

64 Maharamou, someone nicknamed Bite me and Uzabakiriho.⁶⁴³ Witness CBN testified that his machete was taken away.⁶⁴⁴ He testified that the disarmament occurred around 4.00 p.m.⁶⁴⁵ The witness denied that Tutsi were disarmed on 14 April 1994,⁶⁴⁶ explaining that, “[o]n the 14th we did not have weapons because our arms had been confiscated on the 13th.”⁶⁴⁷ 272. Witness CBN testified there were over 2000 Tutsi at the Nyange Parish on 14 April 1994.⁶⁴⁸ On that day, the Tutsi “wanted to go find bananas in a banana farm”,⁶⁴⁹ but “Father Seromba told the gendarmes to shoot at refugees if they came back to look for bananas in his banana farm.”⁶⁵⁰ According to the witness, on Thursday, 14 April 1994, Father Kayiranga and another priest asked the Tutsi at the parish for money so that the priests could buy food for them.⁶⁵¹ 273. Witness CBN stated that assailants attacked the Tutsi at the church again between 9.00 and 10.00 a.m. on 14 April 1994.⁶⁵² The assailants “threw stones at the refugees,” but the Tutsi were able to repel the attacks because the assailants were “not very many” and were outnumbered by the Tutsi at the parish.⁶⁵³ The assailants used whistles to call for reinforcements.⁶⁵⁴ The witness testified that, “[t]here were Hutus who were in the villages. Around evening, whistles were blown and members of the population were called to come and attack the inyenzi who were at the church.”⁶⁵⁵ The attack continued until about 4.00 p.m., when “the attackers took a rest.”⁶⁵⁶ Prosecution Witness CBK 274. Prosecution Witness CBK testified that, on 13 April 1994, the Nyange Church was full of people.⁶⁵⁷ On that day, Hutu assailants attacked the Tutsi at the church with stones and the Tutsi civilians threw stones in self-defence.⁶⁵⁸ The witness suggested that the assailants were outnumbered by the Tutsi. 659 275. Witness CBK testified that Father Seromba went to the communal office on 13 April 1994.⁶⁶⁰ In the afternoon, “the authorities of Kivumu commune ... disarmed the Tutsis who were inside the church so that their plan could be executed.”⁶⁶¹ According to the witness, these authorities included the bourgmestre of Kivumu commune, IPJ Kayishema, Mbakirirehe,

643 T. 2 September 2009, p. 18. 644 T. 2 September 2009, pp. 19, 52. 645 T. 2 September 2009, p. 52. 646 T. 2 September 2009, p. 22. 647 T. 2 September 2009, p. 22. 648 T. 1 September 2009, p. 60. 649 T. 1 September 2009, p. 60. 650 T. 1 September 2009, p. 60. 651 T. 2 September 2009, p. 14. See also T. 2 September 2009, p. 15. In response to questions from the Defence about his testimony in the Seromba trial, Witness CBN clarified that on 13 April 1994, “another priest [not Father Kayiranga] asked us to give money for the purchase of food. And we gave the money in question to the priest

on the morning of the 14th in the presence of Father Kayiranga.” T. 2 September 2009, p. 16. 652 T. 1 September 2009, p. 58. 653 T. 1 September 2009, p. 59. 654 T. 1 September 2009, p. 59. 655 T. 1 September 2009, p. 59. 656 T. 2 September 2009, p. 20. See also T. 1 September 2009, p. 59. 657 T. 2 September 2009, p. 70. 658 T. 2 September 2009, p. 70. 659 T. 2 September 2009, p. 70 (“At that time the Hutus were not many, because people in the area had not been made aware for them to join the attack. So the Hutus threw stones at the Tutsis, but they noticed that they were powerless and that they could not do much, so they went back.”). 660 T. 4 September 2009, p. 6. 661 T. 2 September 2009, p. 70.

Page 68

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

65 Kanyarukiga and Rushema.⁶⁶² The witness testified that he personally saw Kanyarukiga and the others enter and leave the church.⁶⁶³ When they left the church, “they were carrying machetes, worn out hoes, spears, bamboos.”⁶⁶⁴ Witness CBK denied suggestions that he was involved in confiscating these weapons from the Tutsi at the church.⁶⁶⁵ 276. Witness CBK testified that Hutu assailants continued to throw stones at the Tutsi on 14 April 1994.⁶⁶⁶ The Tutsi tried to defend themselves by throwing stones back at the assailants.⁶⁶⁷ According to the witness, “[t]he assailants who attacked the church on the 14th were more than those who had attacked the church ... on the 13th.”⁶⁶⁸ Prosecution Witness CBR 277. Prosecution Witness CBR testified that, on 13 April 1994, Assistant Bourgmestre Gilbert Kanani and Presiding Judge Joseph Habiyaambere went to the Nyange Parish with Father Seromba in order to “verify whether the Tutsis who had taken refuge in the church were armed and whether ... the Tutsi could defend themselves with whatever weapons they had.”⁶⁶⁹ Witness CBR received this information from Télesphore Ntungutse.⁶⁷⁰ 278. Witness CBR testified that he went to the Nyange Parish on 14 April 1994.⁶⁷¹ IPJ Kayishema came to his cellule in a white Toyota vehicle⁶⁷² and asked the population “to go and defend Nyange because the inyenzi had attacked the Nyange [P]arish.”⁶⁷³ When the witness arrived at the Nyange Parish, the Tutsi were in the courtyard and were guarded by gendarmes.⁶⁷⁴ The gendarmes told Kayishema and Ntungutse that there were not enough attackers and that they would not be able to overpower the Tutsi, who were many in number.⁶⁷⁵ “But the leaders made the gendarmes understand that they had to allow us to try to attack the refugees.”⁶⁷⁶ The gendarmes conceded, and the assailants attacked the Tutsi with stones.⁶⁷⁷ The witness testified that the Tutsi were able to repel the attackers because they were greater in number.⁶⁷⁸ Witness CBR testified that the assailants left the church between 3.00 and 4.00 p.m.⁶⁷⁹ 279. According to the witness, all 800 to 1000 assailants left the Nyange Parish together and took the main road towards Gitarama.⁶⁸⁰ The attackers met a car in Cyambogo cellule.⁶⁸¹ The car was

662 T. 2 September 2009, p. 70. 663 T. 3 September 2009, p. 3. 664 T. 3 September 2009, p. 3. See also T. 4 September 2009, p. 9. The witness insisted that Kanyarukiga participated in all of the events that occurred at the parish. T. 4 September 2009, p. 6. 665 T. 3 September 2009, p. 69 (CS)

("I did not touch any weapon amongst the weapons that had been confiscated."). 666 T. 3 September 2009, p. 6. 667 T. 3 September 2009, p. 7. 668 T. 3 September 2009, p. 7. 669 T. 9 September 2009, pp. 10-11. 670 T. 9 September 2009, p. 10. 671 T. 9 September 2009, pp. 6-7. 672 The witness testified that this vehicle had been forcibly requisitioned from a Tutsi named Rwamasirabo, and a communication system had been mounted on the vehicle to allow Kayishema to address the public. T. 9 September 2009, pp. 6, 11. 673 T. 9 September 2009, p. 11. 674 T. 9 September 2009, p. 11. 675 T. 9 September 2009, pp. 11-12. 676 T. 9 September 2009, p. 12. 677 T. 9 September 2009, p. 12. 678 T. 9 September 2009, pp. 12, 52, 54. 679 T. 9 September 2009, pp. 15, 52. 680 T. 9 September 2009, p. 53. Kayishema did not come with them because Kayishema was from Nyange cellule. T. 10 September 2009 p. 2.

Page 69

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

66 coming from Gitarama and heading towards Nyange.682 Witness CBR testified that the vehicle was red and could not carry more than five people.683 The vehicle pulled over to the side of the road, and someone in the vehicle spoke to Ndungutse.684 Many of the assailants surrounded the vehicle, but Witness CBR stayed approximately 10 metres away.685 The witness could neither follow Ndungutse's conversation with the passengers nor see how many people were in the vehicle.686 Ndungutse later told Witness CBR and other assailants that he had been speaking to Gaspard Kanyarukiga, who told Ndungutse that the [i]nyenzi were at Mushubati and planned to cross the river.687 "Kanyarukiga was ... asking Ndungutse to look for reinforcement because the [i]nyenzis, who were in Mushubati, had the intention of coming to do to us what we had tried to do to the Tutsis in Nyange."688 Kanyarukiga told Ndungutse that he would also try to find reinforcements.689 Prosecution Witness CBY 280. Witness CBY testified that, on 13 April 1994, "some people formed a group to attack the Tutsis who were inside the church. The Tutsis were able to defend themselves, and the Hutus who had launched the attack, returned to their homes."690 The attack did not last long because the Hutu were fewer in number than the Tutsi.691 281. On 14 April 1994, the assailants "came [to the Nyange Parish] in big numbers," and the Hutu and Tutsi threw stones at one another.692 The witness testified that the attack lasted about two hours; he estimated that the fighting ended between 12.00 and 2.00 p.m.693 Witness CBY testified that the only person killed on 14 April 1994 was Muhigirwa, who was killed at a roadblock not far from the "war front."694 282. Witness CBY testified that the "officials" were present during the attack on 14 April 1994.695 He identified these "officials" as Kayishema, Ndahimana, Ndungutse, Kanyarukiga and Kiragi and testified that they were accompanied by communal police.696 Witness CBY testified that the "authorities" were in front of the church and were "looking at the fighting taking place between Hutus and Tutsis."697

681 T. 9 September 2009, p. 54. According to the witness, this encounter happened "on the main road between the place where the road forks off to Kibirira and another road." T. 10 September 2009, p. 2. 682 T. 9 September 2009 p. 54. 683 T. 9 September 2009, p. 54. The witness could not

identify the make of the vehicle but testified that it was not a Toyota pick-up. 684 T. 9 September 2009, p. 12. 685 T. 9 September 2009, pp. 12, 54; T. 10 September 2009, p. 2. 686 T. 9 September 2009, pp. 12, 54. 687 T. 9 September 2009, pp. 12, 15. 688 T. 9 September 2009, p. 12. 689 T. 9 September 2009, p. 15. 690 T. 8 September 2009, p. 36. See also T. 8 September 2009, p. 39. 691 T. 8 September 2009, p. 36. 692 T. 8 September 2009, p. 43. 693 T. 8 September 2009, pp. 44, 45; T. 14 September 2009, p. 15. “When I heard noise, I came out to find out what was happening.” The witness was in “the courtyard in front of the entrance” when the confrontation ended. T. 14 September 2009, p. 15. 694 T. 8 September 2009, p. 45. 695 T. 8 September 2009, p. 41. 696 T. 8 September 2009, pp. 43, 45. 697 T. 8 September 2009, p. 43.

Page 70

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

67 Prosecution Witness YAU 283. Witness YAU testified that she saw Kanyarukiga every day that she was at the parish.⁶⁹⁸ She testified that it was “Kanyarukiga’s group that led the attacks which took place at the church.”⁶⁹⁹ 284. Witness YAU testified that, the day after she arrived at the Nyange Parish,⁷⁰⁰ Fulgence Kayishema and Gaspard Kanyarukiga asked the displaced Tutsi to give them money so that Kayishema and Kanyarukiga could buy food for those hiding at the church.⁷⁰¹ The two men walked around the compound and took money from the Tutsi.⁷⁰² Witness YAU personally heard Kayishema and Kanyarukiga ask people for money.⁷⁰³ She testified that she gave Kayishema 100 francs and that her father also gave the men some money.⁷⁰⁴ “It was in our own interest [to give them money] because we were hungry.”⁷⁰⁵ According to the witness, Kayishema and Kanyarukiga were the only people to collect money from the Tutsi at the church.⁷⁰⁶ Father Seromba was present, but he never took any money.⁷⁰⁷ Witness YAU and the other displaced persons did not receive any food from Kayishema or Kanyarukiga.⁷⁰⁸ The witness denied that the Tutsi were asked for money on more than one occasion.⁷⁰⁹ 285. On another occasion, a nun named Sister Jean, also known as Mama Yohani, tried to give some rice and beans to those who had sought refuge at the church.⁷¹⁰ Mama Yohani brought the food out to the Tutsi, but Kayishema and Kanyarukiga threw it on the ground.⁷¹¹ The witness could not remember the day on which this occurred.⁷¹² 286. Witness YAU testified that, the day after she arrived, the Nyange Parish was attacked.⁷¹³ The assailants were covered in banana leaves and armed with traditional weapons.⁷¹⁴ She testified that these Hutu assailants intended to kill the Tutsi who were hiding at the church.⁷¹⁵ The witness testified that the Tutsi threw stones at the attackers to repel them.⁷¹⁶ The assailants advanced towards the church, but Father Seromba intervened and stopped them from attacking the Tutsi.⁷¹⁷

698 T. 15 September 2009, p. 44. 699 T. 15 September 2009, p. 44. 700 Based on her account of the time she spent at the Nyange Parish, the Chamber has inferred that Witness YAU is referring to 14 April 1994. 701 T. 15 September 2009, pp. 12, 40. Witness YAU testified that, the same day, she and others who had sought refuge at the parish asked Father Seromba to give them water to drink. According to the witness, Father Seromba told them that there was no need to look for water

because they “had to die in any case.” T. 15 September 2009, p. 12. 702 T. 15 September 2009, p. 13. 703 T. 15 September 2009, p. 13. 704 T. 15 September 2009, pp. 13, 40. 705 T. 15 September 2009, p. 13. She made clear that no one took money from them by force. T. 15 September 2009, p. 40. 706 T. 15 September 2009, pp. 40-41. 707 T. 15 September 2009, p. 40. Father Seromba did not prevent Kayishema and Kanyarukiga from taking money. 708 T. 15 September 2009, pp. 12, 40. 709 T. 15 September 2009, p. 42. 710 T. 15 September 2009, pp. 14, 42. 711 T. 15 September 2009, p. 14. 712 T. 15 September 2009, p. 42. 713 T. 15 September 2009, pp. 14-15. At first the witness says the small attacks happened on the day she arrived at the parish, but then she stated that was after she had spent one night in the church. See also T. 15 September 2009, p. 16. 714 T. 15 September 2009, pp. 14-16. According to the witness, the attackers looked like traditional intore dancers. T. 15 September 2009, pp. 16, 44. 715 T. 15 September 2009, p. 16. 716 T. 15 September 2009, pp. 15, 16. 717 T. 15 September 2009, p. 16.

Page 71

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

68 According to the witness, Seromba told the attackers that they were too few or that their numbers were not sufficient.⁷¹⁸ 287. Witness YAU testified that several of those who sought refuge at the Nyange Parish brought sticks with them to the church.⁷¹⁹ “[S]ome days” after Witness YAU’s arrival, “Father Seromba, accompanied by two gendarmes, came and ... collected those sticks so that the gendarmes could ensure our safety.”⁷²⁰ She saw the gendarmes take the sticks away but could not recall the day on which this occurred.⁷²¹ Prosecution Witness CBS 288. Witness CBS testified that, All refugees arriving at the parish were not carrying any weapons. They were not carrying traditional weapon [sic]. They were not carrying firearms. There were gendarmes who were at the parish. So when a refugee would arrive there with a tradition[al] weapon, the gendarmes would ask the refugee to put the weapon on the ground ... before entering into the church square or before going to the presbytery.⁷²² 289. Witness CBS denied that the Tutsi who had taken refuge in the church were disarmed.⁷²³ 290. Witness CBS testified that, after the Tutsi sought refuge at the Nyange Church, they could not leave the church compound.⁷²⁴ According to the witness, “the gendarmes who were protecting us were not even allowing us to go buy bread or any other food from the store that was nearby.”⁷²⁵ The gendarmes were already at the parish when the witness arrived.⁷²⁶ 291. Witness CBS testified that there were small-scale attacks on the Nyange Church on 12, 13 and 14 April 1994, but the Tutsi were able to push back the attackers.⁷²⁷ 292. Witness CBS testified that those who sought refuge in the church asked Father Seromba for food because they were hungry.⁷²⁸ When Father Seromba refused, some Tutsi tried to collect bananas from the parish banana plantation.⁷²⁹ According to the witness, Father Seromba asked the gendarmes who were posted at the parish to “shoot at any Tutsi who would venture or dare go into

718 T. 15 September 2009, pp. 14, 15. 719 T. 15 September 2009, p. 14 (“[T]hey had walking sticks and some others had big sticks.”). She denied that those who had taken refuge at the church had machetes. T. 15 September 2009, p. 39. 720 T. 15 September 2009, pp. 14, 39. The witness explained that the gendarmes were permanently posted at the church and that they were already there when she arrived. Witness YAU denied seeing policemen at the parish. T. 15 September 2009, pp. 39-40. 721 T. 15 September 2009, p. 14. 722 T. 17 September 2009, p. 11. 723 T. 17 September 2009, pp. 11-12 (“That operation never took place. I told you, no refugee had that traditional weapon inside the church. So that operation never took place.”). 724 T. 16 September 2009, p. 48. 725 T. 16 September 2009, p. 48. 726 T. 16 September 2009, p. 48. 727 T. 17 September 2009, p. 10. 728 T. 16 September 2009, pp. 45, 46. 729 T. 16 September 2009, pp. 45, 46.

Page 72

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

69 his banana plantation.”⁷³⁰ Witness CBS testified that he was five or six metres from Father Seromba when the priest made this statement.⁷³¹ 293. When asked whether nuns ever brought rice and beans to the Tutsi at the church or if such food was thrown on the ground, Witness CBS stated, “that never took place. In any case, I didn’t see it. ... No one told me about such a thing. And, personally, I did not witness such a thing.”⁷³² 294. Witness CBS testified that, in the evening of 14 April 1994, IPJ Kayishema and Mbakirirehe came to the church and took Hutu women who were married to Tutsi men out of the church “so that those women should not die together with the Tutsis.”⁷³³ Witness CBS testified that, when these women were removed, he was in the church courtyard, at the entrance to the church.⁷³⁴ Kayishema called out names, and when the women were found, they were taken away.⁷³⁵ Witness CBS heard Kayishema calling out the women’s names in a loud voice.⁷³⁶ Witness CBS testified that he recognised one of the women, Nyirantama, who was Mbakirirehe’s neighbour.⁷³⁷ The husbands of the women who were removed were later killed.⁷³⁸ Prosecution Witness CDL 295. Witness CDL testified that, on 13 April 1994, “there was some kind of a commission ... to identify the weapons that the refugees had. And the commission observed that there were no dangerous weapons because all the refugees had were sticks.”⁷³⁹ The witness testified that this “commission” was carried out by Father Seromba and Deputy Bourgmestre Gilbert Kanani Rugwizangoga, nicknamed Kanani.⁷⁴⁰ Witness CDL was not present during these events but testified that he received this information from Deputy Bourgmestre Kanani.⁷⁴¹ 296. Witness CDL testified that he went to the Mutanoga Centre around 2.30 p.m. on 14 April 1994.⁷⁴² Among those who came to the centre on that day “were people who were coming from the church where an attack had taken place.”⁷⁴³ Witness CDL testified that those who had come from the parish said that “the Tutsis at the church had resisted the attacks launched by their assailants”.⁷⁴⁴

730 T. 16 September 2009, p. 45. Witness CBS estimated that there were four gendarmes at the church on 13 April 1994. T. 16 September 2009, p. 47. 731 T. 16 September 2009, p. 46. None of those seeking refuge in the church ventured into the plantation after Seromba gave the

instruction to the gendarmes. T. 16 September 2009, p. 47. 732 T. 17 September 2009, p. 11. 733 T. 16 September 2009, pp. 53-54. 734 T. 16 September 2009, p. 54. 735 T. 16 September 2009, p. 54. 736 T. 16 September 2009, p. 54. 737 T. 16 September 2009, p. 54. According to Witness CBS, Nyirantama was still alive when the witness gave evidence in this case. 738 T. 16 September 2009, p. 54. 739 T. 10 September 2009, p. 45. 740 T. 10 September 2009, pp. 45-47. 741 T. 10 September 2009, pp. 46-46; T. 11 September 2009, pp. 8-10. 742 T. 10 September 2009, p. 30; T. 11 September 2009, pp. 1, 4. 743 T. 11 September 2009, pp. 1, 3. 744 T. 10 September 2009, p. 30.

Page 73

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

70 Defence Witness KG19 297. Witness KG19 testified that he was near the Statue of the Virgin Mary from 9.00 a.m. to 5.00 p.m. on 13 April 1994.⁷⁴⁵ He saw Tutsi going towards the church on 13 April 1994 but did not see any attackers.⁷⁴⁶ He said that people were “going on about their business. They were not there in order to launch an attack.”⁷⁴⁷ During re-examination, the witness testified that, on 13 April 1994, he was inside a shop in the Nyange Trading Centre.⁷⁴⁸ From inside the shop, the witness could see what was happening in the vicinity of the Statue of the Virgin Mary.⁷⁴⁹ 298. Witness KG19 testified that he was at the trading centre at around 2.00 p.m. on 14 April 1994, when a group of assailants, armed with traditional weapons, arrived.⁷⁵⁰ The assailants went “up passing by the statue and went to the church where some refugees had sought refuge.”⁷⁵¹ Witness KG19 testified that the assailants were shouting and whistling and started looting the shops as they went by.⁷⁵² Consequently, all of the shops in the trading centre, including Kanyarukiga’s pharmacy and the drinking spots, closed down.⁷⁵³ The witness left the trading centre and went home about 4.00 p.m. on 14 April 1994.⁷⁵⁴ People were still fighting when the witness left.⁷⁵⁵ Defence Witness KG45 299. Witness KG45 testified that Kanyarukiga’s pharmacy closed its doors around 12.00 or 1.00 p.m. on 14 April 1994 due to insecurity.⁷⁵⁶ Witness KG45 testified that assailants attacked the Tutsi at the church, and because Kanyarukiga’s pharmacy was located at the centre near the church, “the attackers could break down the doors of the pharmacy and steal drugs.”⁷⁵⁷ Defence Witness Damien Nayituriki 300. Witness Damien Nayituriki testified that he went to the Statue of the Virgin Mary on 14 April 1994 to buy drinks with his older brother and a man from Kigali, who had sought refuge with the witness’s family.⁷⁵⁸ When Witness Nayituriki arrived at the Statue of the Virgin Mary around 3.00 p.m., he noticed that all the shops and stores, including Kanyarukiga’s pharmacy, were closed.⁷⁵⁹

⁷⁴⁵ T. 27 January 2010, p. 9. He testified that he did not go to the church on 13 April 1994 but went to the Statue of the Virgin Mary. ⁷⁴⁶ T. 27 January 2010, p. 9. ⁷⁴⁷ T. 27 January 2010, p. 10. ⁷⁴⁸ T. 27 January 2010, p. 21 (CS). ⁷⁴⁹ T. 27 January 2010, p. 21 (CS). ⁷⁵⁰ T. 26 January 2010, p. 65 (CS) (“On the 14th, I saw assailants armed with clubs, with spears, and other traditional weapons, attacking the church.”). ⁷⁵¹ T. 26 January 2010, p. 66 (CS). ⁷⁵² T. 26 January 2010, p. 66 (CS). ⁷⁵³ T. 26 January 2010, p. 66 (CS). ⁷⁵⁴ T. 27 January 2010, p. 2. ⁷⁵⁵ T. 26 January 2010, p. 65 (CS). During cross-examination, Witness KG19 testified that he left the area about 4.30 p.m. and did not know

if anything occurred after he left. T. 27 January 2010, p. 12 (CS). 756 T. 21 January 2010, pp. 59, 60 (CS). The witness stated that she remembered the date “well” because the church was demolished two days later, on 16 April 1994. 757 T. 21 January 2010, p. 60 (CS). 758 T. 8 February 2010, pp. 7, 8. 759 T. 8 February 2010, p. 9.

Page 74

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

71 301. Witness Nayituriki could not buy drinks at the Statue of the Virgin Mary, so he left and headed towards Mutanoga.⁷⁶⁰ While en route, the witness encountered a group of people who were shouting, talking about attacks and moving slowly.⁷⁶¹ Witness Nayituriki testified that he met the group of people between 3.30 and 4.00 p.m.⁷⁶² The witness recognised some persons in the group, including Ndungutse, who was a teacher and a colleague of his older brother.⁷⁶³ Witness Nayituriki testified that Ndungutse accompanied the witness and his companions to the Mutanoga Centre.⁷⁶⁴ While they were drinking at the Mutanoga Centre, Ndungutse told the witness and his companions that “they” had attacked the persons taking refuge in the church, and those in the church had retaliated by throwing stones at the attackers.⁷⁶⁵ Witness Nayituriki testified that did not see Kanyarukiga or Kanyarukiga’s vehicle during the two hours he spent drinking at the Mutanoga Centre.⁷⁶⁶ Defence Witness KG15 302. Witness KG15 testified that he did not leave the presbytery on those days, due to insecurity.⁷⁶⁷ According to the witness, he went to the church for the last time on Tuesday, 12 April 1994.⁷⁶⁸ Witness KG15 testified there were no killings at the parish on 14 April 1994.⁷⁶⁹ 4.3. Deliberations 303. The Prosecution submits that, in the days leading up to the attacks on 15 April 1994, Hutu assailants, including those named in the Amended Indictment, took steps to weaken the Tutsi who had taken refuge at the parish and to reduce their capacity to defend themselves.⁷⁷⁰ The Prosecution implies that the actions undertaken at the parish prior to 15 April 1994 were all part of a larger plan to exterminate the Tutsi at the Nyange Parish.⁷⁷¹ The Prosecution has presented evidence that assailants, including the Accused, incited violence, confiscated weapons and withheld food from the Tutsi, launched small-scale attacks and separated Hutu women who had taken refuge at the parish from their Tutsi husbands. Given the alleged timing and nature of these events, the Chamber has considered them in relation to paragraph 13 of the Amended Indictment. The Defence does not respond to the allegation in paragraph 13 directly but, as discussed further below, argues that the Prosecution evidence for this period is unreliable and that any evidence of criminal activity on 13 and 14 April 1994 should be excluded for lack of notice.⁷⁷² Disarmament of Tutsi at the Nyange Parish 304. The Prosecution alleges that, on 13 April 1994, Kanyarukiga participated in a campaign to disarm the Tutsi at the Nyange Parish.⁷⁷³ The Prosecution relies on the testimony of Witnesses

760 T. 8 February 2010, pp. 9, 19. 761 T. 8 February 2010, p. 9. 762 T. 8 February 2010, p. 10. 763 T. 8 February 2010, pp. 9, 10. 764 T. 8 February 2010, pp. 22, 23. 765 T. 8 February 2010, pp. 10-11, 23. 766 T. 8 February 2010, pp. 10-11. The witness testified that he knows Kanyarukiga’s vehicle very

well. 767 T. 11 February 2010, pp. 14-16 (CS) 768 T. 11 February 2010, pp. 27, 29, 33 (CS). 769 T. 11 February 2010, p. 26 (CS). 770 Prosecutor's Final Trial Brief, paras. 116-122. 771 Prosecutor's Final Trial Brief, paras. 55, 101, 121, 122, 130. 772 Defence Final Brief, paras. 135, 151-153, 172, 174, 178-179. 773 Prosecutor's Final Trial Brief, paras. 116-118, 120-121. According to the Prosecution, "the authorities, including Gaspard Kanyarukiga, decided at a meeting [on 13 April 1994] that it was necessary to ascertain whether the refugees in the church were armed". Prosecutor's Final Trial Brief, para. 116. As discussed in paragraphs 250 to 251, the Chamber has disregarded this evidence on the basis that it is outside the scope of the Amended Indictment.

Page 75

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

72 CBK, CDL, CBN, CBR and YAU to support this allegation.⁷⁷⁴ The Defence responds that, "[t]he evidence regarding the alleged disarming is inconsistent to the point of incoherence."⁷⁷⁵ 305. Prosecution Witnesses CBK, CBN, CDL, YAU and CBS all testified that Tutsi civilians arrived at the Nyange Parish with traditional weapons.⁷⁷⁶ While the witnesses disagreed about the types of weapons that were brought to the parish,⁷⁷⁷ the Chamber is satisfied that those who took refuge at the parish had at least sticks and machetes. 306. Prosecution Witnesses CDL and CBR both testified that, on 13 April 1994, Father Seromba and Deputy Bourgmestre⁷⁷⁸ Gilbert Kanani Rugwizangoga went to the Nyange Parish to identify the types of weapons that the Tutsi had with them.⁷⁷⁹ Witness CBR testified that Judge Joseph Habiyaambere also participated in this inquiry.⁷⁸⁰ Witnesses CDL and CBR were both accomplices to the attacks at the Nyange Parish and were subsequently detained together at Kibuye Prison.⁷⁸¹ The Chamber therefore has treated their evidence with caution.⁷⁸² The Chamber further recalls that Witnesses CDL and CBR were not eye-witnesses to the event in question and that their evidence was based on hearsay.⁷⁸³ While the fact that this evidence is hearsay does not suffice to render it not

⁷⁷⁴ Prosecutor's Final Trial Brief, paras. 116-118, 120. See also T. 9 September 2009, pp. 10-11. ⁷⁷⁵ Defence Final Brief, para. 164. ⁷⁷⁶ Witness CBK, T. 3 September 2009, p. 3; T. 4 September 2009, p. 9; Witness CBN, T. 2 September 2009, pp. 16-19, 22; Witness CDL, T. 10 September 2009, p. 45; Witness YAU, T. 15 September 2009, pp. 14, 39; Witness CBS, T. 17 September 2009, p. 11. ⁷⁷⁷ Witness CBK attested that the Tutsi had a wide range of traditional weapons, including machetes, sticks, spears, arrows, hoes and "bamboos". T. 3 September 2009, p. 3; T. 4 September 2009, p. 9. Witness CBN denied that the Tutsi had spears but testified that many of the Tutsi had machetes and sticks and that he personally arrived at the parish with a machete. T. 2 September 2009, pp. 16-19, 52. Witnesses CDL and YAU stated that the Tutsi only had sticks. T. 10 September 2009, p. 45; T. 15 September 2009, pp. 14, 39. Witness YAU specifically denied that the Tutsi had machetes, spears, bows and arrows. T. 15 September 2009, p. 39. When discussing the disarmament, however, Witness YAU testified that the Tutsi gave the gendarmes their sticks and "other weapons," suggesting that the Tutsi may have had instruments other than sticks. T. 15 September 2009, p. 14. Finally, Witness CBS acknowledged that some Tutsi arrived with "traditional

weapons” but testified that they were not permitted to bring these weapons into the church square or the presbytery. T. 17 September 2009, p. 11. 778 The Chamber notes that there were multiple “deputy” or “assistant” bourgmestres identified by the Prosecution witnesses in this case. Witnesses CNJ and CBS identified Anastase Rushema as the deputy or assistant bourgmestre. Witness CNJ, T. 7 September 2009, p. 22; Witness CBS, T. 16 September 2009, p. 48; T. 17 September 2009, p. 12. Witness CBK similarly testified that Rushema worked for the commune. T. 2 September 2009, p. 66; T. 3 September 2009, p. 9. Witnesses CBT and CBY both testified that Anastase Rushema was a former assistant bourgmestre. Witness CBY, T. 14 September 2009, p. 27 (CS); T. 14 September 2009, pp. 41, 66. Witnesses CBR and CDL both identified Gilbert Kanani as a deputy or assistant bourgmestre. Witness CBR, T. 9 September 2009, p. 10; Witness CDL, T. 10 September 2009, pp. 27, 43, 46-47. Finally, Witnesses CNJ, CBR and CDL all mentioned a deputy or assistant bourgmestre named Védaste Murangwabugabo. Witness CNJ, T. 7 September 2009, p. 11; Witness CBR, T. 9 September 2009, pp. 16, 18, 23, 30, 32; Witness CDL, T. 10 September 2009, p. 43. 779 Witness CBR, T. 9 September 2009, pp. 10-11 (French Transcript, T. 9 September 2009, p. 12); Witness CDL, T. 10 September 2009, pp. 45-47. 780 T. 9 September 2009, pp. 10-11. 781 Witness CBR, T. 9 September 2009, pp. 48-52; Defence Exhibit D25 (List of Protected Names shown to Witness CBR); Witness CDL, T. 10 September 2009, pp. 72-75; Defence Exhibit D28 (List of Protected Names shown to Witness CDL); Prosecution Exhibit P51 (Personal Identification Sheet of Witness CBR); Prosecution Exhibit P52 (Personal Identification Sheet of Witness CDL). 782 Nchamihigo, Judgement (AC), paras. 42, 48; Muvunyi, Judgement (AC), para. 128; Ntagerura et al., Judgement (AC), paras. 203-206; Niyitegeka, Judgement (AC), para. 98. 783 The Chamber recalls that Witness CDL said that Kanani told him about the meeting and the inquiry and that Witness CBR testified that he received this information from Ndungutse. Witness CDL, T. 10 September 2009, p. 46; T. 11 September 2009, pp. 8-10; Witness CBR, T. 9 September 2009, p. 10.

Page 76

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

73 credible or unreliable,⁷⁸⁴ the Chamber is reticent to make a finding of fact based entirely on hearsay evidence from accomplice witnesses. Thus, the Chamber has only relied on this testimony where it is corroborated by other credible evidence. 307. Witness CBK provided some corroboration for this evidence, testifying that Father Seromba returned from the communal office on 13 April 1994 and that the Tutsi were disarmed the same day.⁷⁸⁵ However, as discussed further below, the Chamber has serious concerns about Witness CBK’s overall credibility. Thus, the Chamber finds that, even combined, the testimony of these three witnesses is insufficient to establish beyond reasonable doubt that Father Seromba, Gilbert Kanani and Judge Habiyaambere went to the Nyange Church on 13 April 1994 to determine whether the Tutsi were armed. 308. Witnesses CBN and CBK, however, both testified that the Tutsi were in fact disarmed on 13 April 1994.⁷⁸⁶ As discussed further in paragraphs 456 to 457, the Chamber has found that Witness CBN

provided a credible and reliable account of the events he witnessed at the Nyange Parish. With respect to this particular event, moreover, the Chamber recalls that Witness CBN testified that he personally had his machete confiscated.⁷⁸⁷ Thus, based on the combined testimony of Witnesses CBN and CBK, the Chamber is satisfied that the Tutsi at the parish were disarmed on 13 April 1994.³⁰⁹ In reaching this finding, the Chamber has also considered the evidence of Witnesses YAU and CBS. The Chamber recalls that Witness YAU testified that the Tutsi were disarmed “some days” after her arrival.⁷⁸⁸ However, because Witness YAU could not recall any important dates in April 1994, including the date on which President Habyarimana was killed,⁷⁸⁹ the Chamber has attached little weight to her timing of this event. Furthermore, while the Chamber accepts Witness CBS’s testimony that Tutsi who took refuge at the parish were asked to leave their weapons outside the parish grounds, it is not convinced that the witness’s testimony discredits the evidence of Witnesses CBN, CDL, YAU and CBK, who all testified that Tutsi had weapons in the church.³¹⁰ Finally, the Chamber recalls that Witness CBK testified that the Accused was among those who physically disarmed the Tutsi at the parish.⁷⁹⁰ The Defence submits that this allegation should

784 Karera, Judgement (AC), para. 39. See also Prosecutor v. Aleksovski, Decision on Prosecutor’s Appeal on Admissibility of Evidence (AC), para. 15 (“The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross- examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence.”). 785 T. 2 September 2009, p. 70; T. 3 September 2009, p. 3; T. 4 September 2009, pp. 4-6. The Chamber notes that Witness CBK was somewhat inconsistent regarding the date on which the Tutsi were disarmed. When questioned about a prior statement in which he indicated that the meeting regarding the disarmament of the Tutsi occurred on 13 April 1994, but the disarmament itself occurred the next day, Witness CBK responded that “the Tutsis were disarmed on the 14th, and that on the 14th Father Seromba was there and that the attackers carried machetes and spears, but the meeting to disarm the refugees had taken place on the 13th.” When confronted with the inconsistency between this statement and his earlier testimony, the witness stated that the Tutsi were disarmed on 13 April 1994. T. 4 September 2009, pp. 8, 9. 786 Witness CBN, T. 2 September 2009, p. 19; Witness CBK, T. 2 September 2009, p. 70; T. 3 September 2009, p. 3. The Chamber recalls that Witness CBN rejected suggestions that weapons were confiscated on 14 April 1994, noting that, “[o]n the 14th we did not have weapons because our arms had been confiscated on the 13th.” T. 2 September 2009,

p. 22. 787 T. 2 September 2009, pp. 19, 52. 788 T. 15 September 2009, pp. 14, 39. 789 T. 15 September 2009, pp. 10, 36. See also T. 15 September 2009, pp. 11, 14, 32, 41, 44. 790 T. 2 September 2009, p. 70; T. 3 September 2009, p. 3. Witness CBK also named Kayishema, Mbakirirehe and Rushema.

Page 77

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

74 be excluded for lack of notice.⁷⁹¹ The Trial Chamber, however, has already denied the Defence request for exclusion of Witness CBK's testimony⁷⁹² and will not revisit its decision. 311. Nevertheless, having considered Witness CBK's evidence on its merits, the Chamber finds that, without corroboration, it cannot rely on Witness CBK's evidence to establish that Kanyarukiga helped to disarm the Tutsi at the parish. As discussed further in paragraph 491, the Chamber has concerns about Witness CBK's overall credibility. Moreover, with respect to this particular event, the Chamber recalls that there were a number of inconsistencies between Witness CBK's testimony at trial and his prior statements. The witness did not mention the alleged disarmament in either his 2000 or 2001 statement, even though the 2001 statement dealt specifically with the Accused.⁷⁹³ Moreover, Witness CBK omitted the Accused when discussing the decision to disarm the Tutsi in his statement to ICTR investigators on 24 October and 19 and 20 November 2002.⁷⁹⁴ When asked to explain this omission, Witness CBK responded that, "I gave the investigators the names of all the people who attended the meeting. So if the investigators did not include some names in the statement, then that is their mistake."⁷⁹⁵ The Chamber does not accept this explanation. 312. Further, the Chamber recalls that Witness CBK was asked whether he ever took the confiscated weapons anywhere.⁷⁹⁶ The witness responded by saying, "I did not touch any weapon amongst the weapons that had been confiscated."⁷⁹⁷ When confronted with an interview in which he said he was one of those who transported the confiscated weapons from the church to the presbytery, Witness CBK stated that the human rights organisation that took the interview "collects testimonies and ... works with them in order to be able to sell its support to its clients."⁷⁹⁸ The Chamber finds that, even if the human rights organisation in question were in the habit of altering interview responses, which, in any event, has not been established, the revision in this case would not have assisted the organisation in "selling its support to its clients." Thus, the Chamber does not accept the witness's suggestion that his statements to the organisation were changed following his interview. 313. Finally, the Chamber recalls that Witness CBK's testimony is at odds with that of Witnesses CBN, YAU and CBS, who all attributed the disarmament to other people.⁷⁹⁹ 314. Accordingly, while the Chamber finds it established that the Tutsi who took refuge at the Nyange Parish were disarmed on 13 April 1994, the Chamber finds that the Prosecution has failed to prove beyond reasonable doubt that Kanyarukiga was involved in this disarmament.⁸⁰⁰

⁷⁹¹ Defence Final Brief, para. 152. The Defence contends that Kanyarukiga's alleged participation in the disarmament is an allegation of criminal acts physically committed by the Accused, which must appear in the Indictment. Defence Final Brief, filed on 11 May 2010, para. 166. Not only did the Chamber already decide this issue in its decision on the Defence motion for exclusion of evidence, but it also is not convinced that the alleged disarmament is a "criminal act physically committed by the Accused" that must be pled in the indictment. ⁷⁹² Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence outside the Scope of the Indictment, 15

January 2010 (TC), para. 24. 793 Defence Exhibit D15(A) (Statement of Witness CBK dated 26 April 2001); Defence Exhibit D16(A) (Statement of Witness CBK dated 15 August 2000). 794 Defence Exhibit D14(A) (Statement of Witness CBK dated 24 October, 19 & 20 November 2002). The Chamber notes, however, that Witness CBK did say in this statement that Kanyarukiga was involved in the physical disarmament of the Tutsi on 14 April 1994. 795 T. 4 September 2009, pp. 6-7. 796 T. 3 September 2009, p. 69 (CS). 797 T. 3 September 2009, p. 69 (CS). 798 T. 3 September 2009, p. 71 (CS). 799 Witness CBN testified that the Tutsi were disarmed by communal police officers and at least one gendarme. T. 2 September 2009, pp. 18, 19. Witness YAU said that the weapons were confiscated by Father Seromba and two gendarmes. T. 15 September 2009, pp. 14, 39. Witness CBS testified that gendarmes collected weapons from the Tutsi before they entered the churchyard. T. 17 September 2009, p. 11.

Page 78

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

75 Withholding of Food from the Tutsi 315. The Prosecution alleges that the Tutsi who sought refuge at the Nyange Parish were denied food and water prior to the demolition of the church.⁸⁰¹ The Prosecution relies on the testimony of Witnesses YAU and CBS to support this allegation.⁸⁰² 316. Witness YAU was the only Prosecution witness to implicate the Accused in events related to the denial of food at the Nyange Parish. Witness YAU testified that, the day after she arrived at the Nyange Parish, Gaspard Kanyarukiga and Fulgence Kayishema asked the Tutsi to give them money so that they could buy food for those who had sought refuge at the parish.⁸⁰³ According to the witness, the Tutsi never received any food from Kayishema or Kanyarukiga.⁸⁰⁴ 317. The Chamber is mindful that Witness YAU is a survivor of the massacres at the Nyange Parish and presumably an eye-witness to the events that transpired at that location. At the same time, the witness's testimony lacks detail and is called into question by her inability to recall dates or the chronology of particular events.⁸⁰⁵ The Chamber notes that the witness appeared confused throughout her testimony and failed to recognise or recall several of her prior statements.⁸⁰⁶ According to her September 1996 pro-justitia statement, for example, Witness YAU told IPJ Siméon Muragizi that, on 14 April 1994, Father Kayiranga asked the Tutsi for money so that he could buy them food and flour for porridge.⁸⁰⁷ Witness YAU denied having made this statement during cross-examination and,⁸⁰⁸ when confronted with a copy of the document, responded, "[f]or me, this is like a dream ... I'm telling you what I know about those events, but I really don't know what you're talking about here."⁸⁰⁹ Having considered her evidence as a whole, the Chamber is concerned that Witness YAU may still be traumatised by the events that she experienced in April 1994 and that her testimony is therefore insufficiently reliable to support a finding of fact without corroboration. 318. In this instance, Witness YAU's evidence was not only uncorroborated but also inconsistent with that of Witness CBN, who attested that it was Father Kayiranga and another priest who collected money from the Tutsi at the parish.⁸¹⁰ In view of these irregularities, the Chamber finds

800 The Chamber finds it unnecessary to determine exactly who disarmed the Tutsi at the parish on 13 April 1994. 801 Prosecutor's Final Trial Brief, paras. 122-124. 802 Prosecutor's Final Trial Brief, paras. 123-124. 803 T. 15 September 2009, pp. 12-13, 40-42. 804 T. 15 September 2009, pp. 12, 40. 805 See, e.g., T. 15 September 2009, p. 10 (Witness YAU could not remember the date on which President Habyarimana died.); T. 15 September 2009, p. 11 (Witness YAU could not recall the day or date on which Kayishema and Kanyarukiga transported Tutsi to the parish nor could she recall how many days she stayed at the Nyange Church.); T. 15 September 2009, p. 14 (Witness YAU could not recall on which day after her arrival the Tutsi were disarmed and Kanyarukiga and Kayishema threw food on the ground.); T. 15 September 2009, pp. 15-16 (Witness YAU mixed information about the different attacks that were launched against the Tutsi.); T. 15 September 2009, p. 32 ("For my entire life, I have never been interested in dates. I remember that even at the very beginning of my evidence I had to ask for today's date."); T. 15 September 2009, p. 36 (stating that she did not remember the day when the President died), 41 ("I never remember dates."); T. 15 September 2009, p. 43 (With regard to her testimony in the Seromba trial in 2004, Witness YAU stated, "Counsel, do not ask me questions regarding my evidence in Seromba's trial which took place last year."); T. 15 September 2009, p. 44 ("I know that the attack in question took place but I cannot tell you whether it was on the first day, the second day or the third day after my arrival at the parish."). 806 See, e.g., T. 15 September 2009, pp. 35, 41, 43, 47-49, 52, 54. 807 T. 15 September 2009, pp. 51-52; Defence Exhibit D45 (Pro-Justitia of Witness YAU dated 1 October 2004). 808 T. 15 September 2009, pp. 48-49. 809 T. 15 September 2009, p. 52. 810 T. 2 September 2009, pp. 14-16.

Page 79

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

76 that it cannot rely on Witness YAU's uncorroborated testimony to establish that Kanyarukiga was involved in collecting money from the Tutsi at the parish.⁸¹¹ 319. Witness YAU also testified that, at some point, a nun named Sister Jean or Mama Yohani tried to give rice and beans to the Tutsi civilians who had gathered at the parish.⁸¹² According to Witness YAU, Mama Yohani brought the food out, but Kayishema and Kanyarukiga poured it on the ground.⁸¹³ Witness YAU was the only witness to testify about this event. Indeed, Witness CBS, also a Tutsi survivor of the events at the parish, categorically denied that this incident occurred.⁸¹⁴ Given the lack of corroboration for Witness YAU's evidence, the Chamber finds that the Prosecution has not established that Kanyarukiga and Kayishema poured food intended for the Tutsi onto the ground. 320. Finally, Witness CBS testified that Father Seromba instructed the gendarmes at the parish to shoot anyone who ventured into the parish banana plantation.⁸¹⁵ Witness CBN corroborated Witness CBS's account, testifying that, on 14 April 1994, Father Seromba instructed gendarmes to shoot any Tutsi who tried to collect bananas from the parish plantation.⁸¹⁶ Witnesses CBS and CBN are both Tutsi survivors of the events at the Nyange Parish. The Chamber finds that these witnesses provided detailed, consistent and corroborative testimony regarding the Tutsi civilians' attempts to obtain food prior to the massacres on 15 and 16 April 1994. As discussed further in

paragraphs 456 to 458, the Chamber has found both witnesses credible. Thus, based on their evidence, the Chamber accepts that there were gendarmes at the Nyange Parish after 12 April 1994 and that Father Seromba instructed them to shoot any Tutsi who tried to take bananas from the parish banana plantation. Attacks on 13 and 14 April 1994 321. The Prosecution alleges that Hutu assailants attacked the Tutsi at the Nyange Parish on 13 and 14 April 1994.⁸¹⁷ The Defence submits that, by removing references to events on these dates

⁸¹¹ While the Chamber accepts that money may have been collected from the Tutsi for the alleged purpose of purchasing food, it finds that the evidence is inconclusive with respect to the date and persons involved. Indeed, the Chamber notes that, while Witness CBN testified that Father Kayiranga was involved in collecting money from the Tutsi on 14 April 1994, other evidence suggests that Father Kayiranga did not arrive at the parish until 15 April 1994. See, e.g., Witness YAU, T. 15 September 2009, p. 18; Witness KG15, T. 11 February 2010, pp. 16, 28, 37 (CS). See also Witness CBS, T. 17 September 2009, p. 37. ⁸¹² T. 15 September 2009, pp. 14, 42. The Chamber recalls that, on 15 January 2010, it denied a Defence request to exclude Witness YAU's testimony that Kanyarukiga poured food intended for the Tutsi at the parish onto the ground. Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010, para. 40. On 23 March 2010, the ICTR Appeals Chamber upheld the Trial Chamber's decision. Kanyarukiga, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence (AC), 23 March 2010, para. 11. ⁸¹³ T. 15 September 2009, pp. 14, 42-43. Witness YAU could not recall the date on which this incident occurred, nor could she place it chronologically in relation to other events. T. 15 September 2009, p. 42. The Chamber recalls that Witness YAU testified in the Seromba trial that Sister Jean brought the Tutsi food, but she did not say that Kayishema and Kanyarukiga threw it on the ground. T. 15 September 2009, pp. 42-43. ⁸¹⁴ T. 17 September 2009, p. 11. ⁸¹⁵ T. 16 September 2009, pp. 45-46. ⁸¹⁶ T. 1 September 2009, p. 60. ⁸¹⁷ T. 24 May 2010, p. 20. See also Witness CBN, T. 1 September 2009, pp. 54-55, 59; Witness CBK, T. 2 September 2009, p. 70; T. 3 September 2009, pp. 6-7; Witness CBY, T. 8 September 2009, p. 36; Witness CBR, T. 9 September 2009, p. 11; Witness YAU, T. 15 September 2009, pp. 15-16 (Witness YAU did not mention any dates during her testimony. However, based on her narration of the events, the Chamber is of the opinion that she most likely arrived at the Nyange Parish on 13 April 1994 and departed on 15 April 1994).

Page 80

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

77 from the Amended Indictment, the Prosecution gave clear notice that 13 and 14 April would not form part of the Prosecution's case.⁸¹⁸ 322. The Trial Chamber acknowledges that 13 and 14 April 1994 do not appear in the Amended Indictment and that references to these dates were withdrawn from the original indictment when it was amended.⁸¹⁹ The Chamber notes, however, that none of the paragraphs that were removed from the indictment described the attacks on 13

and 14 April 1994 as recounted by Prosecution witnesses. Accordingly, the Chamber is not convinced that the effect of removing of these paragraphs was necessarily prejudicial. Moreover, the Chamber is satisfied that 13 and 14 April 1994 fall within the timeframe set forth in paragraph 13 of the Amended Indictment, which alleges that armed attackers surrounded the Tutsi at the parish “from 12 April 1994.” 323. Notwithstanding that 13 and 14 April 1994 fall within the temporal scope of paragraph 13 of the Amended Indictment, the Chamber is not convinced that this paragraph put the Accused on notice that he was charged with attacks on these days. Thus, because an accused can only be convicted of crimes that are charged in the Indictment,⁸²⁰ the Chamber has disregarded the evidence of Witnesses CBY and YAU that Kanyarukiga was present during an attack on 14 April 1994. Moreover, the Chamber has only considered the evidence of the attacks themselves to the extent to which such evidence supports the general allegation that assailants surrounded the Tutsi at the parish from 12 April 1994. 324. The Chamber recalls that Prosecution Witnesses CBS, CBN, CBY and CBK all agreed that Hutu assailants attacked the Tutsi at the Nyange Parish on 13 April 1994 and that the Tutsi defended themselves by throwing stones at the attackers.⁸²¹ This evidence is consistent with the evidence given by Defence Witness KG15, who testified that he did not leave the presbytery on 13 April 1994 “because the situation was tense.”⁸²² 325. The Chamber has also considered the evidence of Defence Witness KG19, who denied that the parish was attacked on 13 April 1994.⁸²³ Witness KG19 testified that, from his vantage point at the Nyange Trading Centre, he could observe everything that happened at the Statue of the Virgin Mary and did not see any attackers in the vicinity of the statue on that day.⁸²⁴ The Chamber recalls that Witness KG19 did not go to the church on 13 April 1994.⁸²⁵ Although the witness testified that he could see everything that happened in the vicinity of the Statue of the Virgin Mary, he did not say that he could see the parish. The Chamber recalls from its site visit that the Nyange Parish could not be seen from either inside or immediately outside the shop where the witness said he was.⁸²⁶ The Chamber therefore does not consider Witness KG19’s testimony sufficient to cast doubt on the eye-witness testimony provided by Witnesses CBN, CBY, CBK and CBS.

⁸¹⁸ Defence Final Brief, para. 446. ⁸¹⁹ [Original] Indictment, paras. 11-13. Compare Amended Indictment. ⁸²⁰ See, e.g., Muvunyi, Judgement (AC), para. 18. ⁸²¹ Witness CBS, T. 17 September 2009, p. 10; Witness CBN, T. 1 September 2009, pp. 54-55, 58; Witness CBY, T. 8 September 2009, pp. 36, 39-40; Witness CBK, T. 2 September 2009, p. 70. ⁸²² T. 11 February 2010, p. 14 (CS). ⁸²³ T. 27 January 2010, p. 9. See also Defence Final Brief, para. 169. ⁸²⁴ T. 27 January 2010, pp. 9-10; T. 27 January 2010, p. 21 (CS). ⁸²⁵ T. 27 January 2010, p. 9. ⁸²⁶ See Registry Exhibit R1 (DVD Site Visit Day 1, 2, & 3), at Day 2, 1:07:36-1:09:15; Registry Exhibit R3(II) (T. 20 April 2010, pp. 43-45 (CS)). The Chamber notes that these observations were made from in front of Kanyarukiga’s pharmacy. However, the Chamber finds that its observations also apply to the shop where the witness says that he was. Depicted in Prosecution Exhibit P46 (Colour Photocopy of Photo (K027-1743) as marked by Witness CNJ). Compare Registry Exhibit R1 (DVD Site Visit Day 1, 2, & 3), at Day 2, 1:00:10-1:01:23 (illustrating that the Nyange Parish can be seen by someone standing in the road in front of the Nyange Trading Centre and the Statue of the Virgin Mary).

Page 81

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

78 326. Accordingly, the Chamber finds it established beyond reasonable doubt that Hutu assailants surrounded and attacked the Tutsi at the Nyange Parish on 13 April 1994. 327. The Chamber further recalls that it is undisputed that Hutu assailants attacked the Tutsi at the Nyange Parish on 14 April 1994 and that the Tutsi repelled the attacks by throwing stones at the assailants.⁸²⁷ Thus, based on the combined testimony of Prosecution and Defence witnesses, the Chamber finds it established beyond reasonable doubt that Hutu assailants surrounded and attacked the Tutsi at the Nyange Parish on 14 April 1994. Warning Assailants that the “inyenzi” were at Mushubati 328. Prosecution Witness CBR testified that, after the attacks on 14 April 1994, assailants met a red car in Cyambogo cellule, which was coming from the direction of Gitarama.⁸²⁸ The car pulled over to the side of the road and someone inside spoke to Ndungutse.⁸²⁹ Witness CBR was subsequently informed that the person in the car was Kanyarukiga and that Kanyarukiga had said that the inyenzi were at Mushubati and were coming to attack the Hutu and asked Ndungutse to look for reinforcements.⁸³⁰ 329. The Chamber notes that Witness CBR was the only witness to testify that Kanyarukiga spoke to assailants on the side of the road on 14 April 1994. Even though Witness CBR is an accomplice to the massacres at the Nyange Parish,⁸³¹ the Chamber has generally attached greater weight to Witness CBR’s evidence than to that of other accomplice witnesses. The Chamber, however, recalls that Witness CBR’s testimony about this particular event was based largely on uncorroborated hearsay. Therefore, the Chamber finds that, in this particular instance, Witness CBR’s evidence is insufficient to establish beyond reasonable doubt that the Accused met assailants on the side of the road on 14 April 1994 and asked Ndungutse to look for reinforcements because the inyenzi were at Mushubati. Removal of Hutu Women from the Nyange Church 330. Finally, the Prosecution alleges that participants in the joint criminal enterprise removed Hutu women from the church on 14 April 1994, demonstrating that they “had formed an intention that only Tutsis should be killed.”⁸³² Prosecution Witness CBS testified that, on the night of 14 April 1994, IPJ Kayishema and Brigadier Mbakirirehe came to the parish and removed Hutu women who had taken refuge with their Tutsi husbands.⁸³³

⁸²⁷ Witness CBR, T. 9 September 2009, pp. 11-12, 16, 54; Witness CBY, T. 8 September 2009, pp. 41, 43-45; Witness CBN, T. 1 September 2009, pp. 58-59; Witness YAU, T. 15 September 2009, pp. 15-17 (The Chamber recalls that Witness YAU did not provide dates, but based on her narration of the chronology of events, the Chamber believes that she is describing the attack on 14 April 1994.); Witness CBK, T. 3 September 2009, pp. 6-7; Witness KG45, T. 21 January 2010, p. 60 (CS); Witness KG19, T. 26 January 2010, p. 65 (CS); Witness Nayituriki, T. 8 February 2010, pp. 11, 15-17. The Chamber notes that, while Witness KG15 denied that there were killings on 14 April 1994, he did not deny that the parish was attacked. Witness KG15, T. 11 February 2010, p. 26 (CS). ⁸²⁸ T. 9 September 2009, pp. 12, 52-54. ⁸²⁹ T. 9 September 2009, p. 12. ⁸³⁰ T. 9 September 2009, pp. 12, 15. The Chamber recalls that, in its decision of 15 January 2010, the Chamber found that Witness

CBR's evidence that Kanyarukiga stopped by the roadside and informed those present about the whereabouts of the inyenzi did not constitute a new allegation or material fact, of which prior notice should have been given. Decision on Defence Motion for a Stay of Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010, para. 26. 831 T. 9 September 2009, pp. 11-12, 16, 25-28, 29-30, 33, 48-50. 832 Prosecutor's Final Trial Brief, paras. 129-130. 833 T. 16 September 2009, pp. 53-54.

Page 82

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

79 331. The Chamber recalls that it has the discretion to decide, in the circumstances of each case, whether to require corroboration or to rely on the evidence of a single, credible witness for the proof of a material fact.⁸³⁴ The Chamber has generally found Witness CBS credible. However, with respect to this particular event the Chamber is concerned that Witness CBS's testimony may have been influenced by information obtained from sources other than his own recollection. In his statement of 2 February 1996, Witness CBS said that Bourgmestre Ndahimana and Aloys Nishyirimbere were with Kayishema and Mbakirirehe when the latter came to remove the Hutu women from the church.⁸³⁵ The witness revised this statement in March 2003 to say that Nishyirimbere never came to the church.⁸³⁶ When asked about the 1996 statement at trial, Witness CBS denied ever having mentioned Nishyirimbere to investigators.⁸³⁷ Moreover, when asked why he did not remove the reference to Nishyirimbere until 2003, the witness stated that Nishyirimbere confessed to having committed offences at the communal office and that Witness CBS revised his statement based on information he obtained from Nishyirimbere's confession.⁸³⁸ 332. While the Chamber does not consider these irregularities to affect the witness's overall credibility, it finds that, without corroboration, Witness CBS's testimony is insufficient to establish beyond reasonable doubt that Kayishema and Mbakirirehe separated Hutu women from the Tutsi at the parish on the night of 14 April 1994. 4.4.

Conclusion

333. For the foregoing reasons, the Chamber is satisfied that the Prosecution has proven beyond reasonable doubt that, from 12 April 1994, armed attackers, including interahamwe militiamen and gendarmes,⁸³⁹ surrounded the Nyange Parish Church, where Tutsi civilians were confined. 334. The Chamber finds that it has been established beyond reasonable doubt that, on 13 April 1994, Hutu assailants attacked the Tutsi civilians who had taken refuge at the Nyange Church and that sticks and machetes were also confiscated from the Tutsi on that day. The Chamber finds that it has been established that, on 14 April 1994, Hutu assailants surrounded and attacked the Tutsi at the Nyange Parish, but the Tutsi were able to repel the attacks. Finally, it has been established beyond reasonable doubt that after 12 April 1994, gendarmes were posted at the Nyange Parish, and Father Seromba instructed them to shoot any Tutsi who tried to take bananas from the parish banana plantation. 335.

The Prosecution, however, has failed to establish beyond reasonable doubt that Kanyarukiga was involved in disarming the Tutsi at the Nyange Parish; that the Accused and Kayishema took money from the Tutsi for the alleged purpose of buying them food; that Kayishema and the Accused poured food intended for the Tutsi onto the ground or that the Accused met assailants on the side of the road on 14 April 1994 and asked Ndungutse to look for reinforcements because the

834 Karera, Judgement (AC), para. 45; Musema, Judgement (AC), paras. 37-38. 835 Defence Exhibit D48(B) (Statement of Witness CBS dated 2 February 1996). The Chamber notes that the English version of this statement includes certain hand written amendments, including those indicating that Nishyirimbere never came to the church. The witness confirmed during cross-examination that these amendments were made in 2003. T. 17 September 2009, pp. 22-23. See also Defence Exhibit D48(C) (Statement of Witness CBS dated 2 February 1996 - French) (excluding notations added to the English version). 836 Defence Exhibit D49(B) (Statement of Witness CBS dated 12 March 2003); T. 17 September 2009, pp. 22-24. 837 T. 17 September 2009, p. 22 (“I talked about Kayishema and Mbakirirehe. Those two people came to the church and left with Hutu women. I did not—I did not name Nishyirimbere.”). 838 T. 17 September 2009, pp. 23-24. 839 The Chamber notes that, while it has been established beyond reasonable doubt that gendarmes were posted at the parish and prevented the Tutsi from taking bananas from the parish banana plantation, it has not been established on the basis of the evidence presented here that the gendarmes were among the assailants who attacked the Tutsi on 13 and 14 April 1994.

Page 83

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

80 inyenzi were at Mushubati. The Prosecution has also failed to establish that IPJ Kayishema and Brigadier Mbakirirehe removed Hutu women from the Nyange Church on the night of 14 April 1994.

Page 84

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

81 5. Attacks at Nyange Parish on 15 April 1994 5.1.

Introduction

336. Paragraphs 14 and 15 of the Amended Indictment read as follows:

14. On the morning of 15 April 1994 at Nyange Parish Gaspard KANYARUKIGA, Fulgence KAYISHEMA, Téléphore NDUNGUTSE and Grégoire NDAHIMANA ordered and instigated the attackers to attack the Tutsi civilian refugees. The assailants attacked the Tutsi refugees with stones and traditional weapons but were initially repulsed by the refugees. An army reservist named Théophile Rukara then lobbed grenades at the Tutsi refugees, killing and wounding many.
15. The attackers were then joined by gendarmes and communal policemen who continued the assault on the Tutsi refugees with gunfire and dynamite, killing and wounding many more. During the attack[,] Gaspard KANYARUKIGA, Fulgence KAYISHEMA, Téléphore NDUNGUTSE and Grégoire NDAHIMANA were present, ordering, instigating and supervising the attackers, and aided and abetted the attackers by providing them with weapons and gasoline that was used in an attempt to burn the Tutsi refugees in the church.⁸⁴⁰ 337. The Prosecution refers to Witnesses CBN, CBK, CNJ, CBY, CBR, CDL, CBT, YAU, CDK and CBS in support of these allegations.⁸⁴¹ 338. The Defence disputes the credibility of these Prosecution witnesses and points to Defence Witnesses KG45, KG19, Mutume, Sibomana, Tugirumukiza and KG15.⁸⁴² The Defence also reiterates its alibi for events alleged to have occurred on 15 April 1994. 5.2. Evidence Prosecution Witness CBN 339. Witness CBN saw Kayishema, Christophe Mbakirirehe and the Accused outside the Accused's pharmacy on 15 April 1994.⁸⁴³ The witness understood "these people were assembling to hold meetings," and "at some point", they sent members of the population to attack those taking refuge in the church.⁸⁴⁴ 340. According to Witness CBN, the Hutu assailants launched many attacks against those taking refuge in the Nyange Church on 15 April 1994.⁸⁴⁵ The witness had the impression that all Hutu people had left their villages to attack those who had taken refuge at the church.⁸⁴⁶ Initially, between 9.00 a.m. and 10.00 a.m., a large number of Hutu assailants surrounded the Nyange Church and started throwing stones at those inside the church.⁸⁴⁷ The Tutsi in the church and the surrounding area repulsed this attack by throwing stones back at the assailants.⁸⁴⁸ Witness CBN recalled that as the assailants attacked them, they said "let us exterminate them" and "sang different

⁸⁴⁰ Amended Indictment, paras. 14 and 15. See also The Prosecutor's Pre-Trial Brief, paras. 40-43; Prosecutor's Final Trial Brief, paras. 131-160. ⁸⁴¹ Prosecutor's Final Trial Brief, paras. 131-160. ⁸⁴² Defence Final Trial Brief, paras. 204-253. ⁸⁴³ T. 1 September 2009, p. 61 ⁸⁴⁴ T. 1 September 2009, p. 61 ⁸⁴⁵ T. 1 September 2009, pp. 60-61; T. 2 September 2009, p. 24. ⁸⁴⁶ T. 1 September 2009, p. 60. ⁸⁴⁷ T. 1 September 2009, pp. 60-61; T. 2 September 2009, p. 23. ⁸⁴⁸ T. 1 September 2009, pp. 60, 61.

Page 85

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

82 slogans.”⁸⁴⁹ Witness CBN recalled that the assailants were armed with stones, clubs, machetes, spears and arrows. ⁸⁵⁰ When a group of assailants grew tired, other assailants replaced them.⁸⁵¹ At some point, the attackers overpowered the Tutsi by throwing grenades at them.⁸⁵² Witness CBN said that the “authorities” standing in front of the Statue of the Virgin Mary at that moment were Brigadier Mbakirirehe, Kayishema, a person named Abayisenga and Kanyarukiga.⁸⁵³ 341. Witness CBN left the church on 15 April 1994 between 1.00 p.m. and 2.00 p.m.⁸⁵⁴ He was able to leave the church when grenades were thrown.⁸⁵⁵ Witness CBN testified that one of the grenades thrown by the assailants did not explode, and Witness CBN and those with him picked it up.⁸⁵⁶ A second grenade exploded and killed many refugees. ⁸⁵⁷ The witness’s “colleagues” took the dead bodies from the grenade attack to the church.⁸⁵⁸ Witness CBN saw corpses of men, women, old people and children lying about in the courtyard and within the church, though he did not know the exact number of bodies.⁸⁵⁹ At this point, Tutsi were fleeing towards the banana plantation, and the witness was able to leave the church premises.⁸⁶⁰ It was Witness CBN’s testimony that he covered himself with banana leaves to look like the assailants who were also wearing banana leaves.⁸⁶¹ Witness CBN left his family at Nyange Parish and has not seen his wife, children or his extended family again.⁸⁶² 342. Witness CBN saw Kanyarukiga’s vehicle on 15 April 1994, not far from the communal office as he fled.⁸⁶³ Witness CBN said that the vehicle was transporting members of the population who were calling out to members of the population to arrest the inyenzi.⁸⁶⁴ Prosecution Witness CBK 343. Witness CBK testified that, on 15 April 1994, Hutu assailants from all regions and secteurs in Kivumu commune attacked the Tutsi inside the Nyange Church.⁸⁶⁵ According to Witness CBK, the Hutu assailants proceeded to shoot at the Tutsi in the church and thereafter attempted to burn the church.⁸⁶⁶ 344. According to Witness CBK, the leaders of the assailants on this day were the bourgmestre, Ndahimana, Father Seromba, Kayishema, Brigadier Christophe Mbakirirehe, Gaspard Kanyarukiga and other officials and businessmen from the region.⁸⁶⁷ Witness CBK said that Kanyarukiga and these authorities supervised the activities of the assailants.⁸⁶⁸

⁸⁴⁹ T. 1 September 2009, p. 60. ⁸⁵⁰ T. 1 September 2009, pp. 60-61 ⁸⁵¹ T. 1 September 2009, pp. 60, 61 ⁸⁵² T. 1 September 2009, p. 61 ⁸⁵³ T. 1 September 2009, p. 62. ⁸⁵⁴ T. 1 September 2009, p. 61. ⁸⁵⁵ T. 1 September 2009, p. 62. ⁸⁵⁶ T. 1 September 2009, p. 62. ⁸⁵⁷ T. 1 September 2009, p. 62. ⁸⁵⁸ T. 1 September 2009, p. 62. ⁸⁵⁹ T. 1 September 2009, p. 64. ⁸⁶⁰ T. 1 September 2009, pp. 62-63. ⁸⁶¹ T. 1 September 2009, p. 63. ⁸⁶² T. 1 September 2009, p. 66. ⁸⁶³ T. 1 September 2009, p. 67. Witness CBN said that he knew that one of Kanyarukiga’s vehicles was a red Toyota and explained that farmers would identify vehicles that looked a certain way as Toyotas. T. 1 September 2009, p. 66. ⁸⁶⁴ T. 1 September 2009, p. 67. ⁸⁶⁵ T. 3 September 2009, p. 7. ⁸⁶⁶ T. 3 September 2009, p. 7. ⁸⁶⁷ T. 3 September 2009, p. 7. ⁸⁶⁸ T. 3 September 2009, pp. 7, 8.

Page 86

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

83 345. Witness CBK recalled that on 15 April 1994, the leaders of the attacks, including Gaspard Kanyarukiga, Christophe Mbakirire, Grégoire Ndahimana, IPJ Kayishema, Anastase Rushema and others, arrived at the parish before midday and held a meeting.⁸⁶⁹ According to Witness CBK, this meeting was held in a room at the presbytery for approximately one and a half to two hours.⁸⁷⁰ Witness CBK stated that after this meeting, these authorities left the presbytery and went opposite the office of the secretariat of the parish where they talked to the Hutu assailants.⁸⁷¹ After these “authorities” conferred with the assailants, the assailants launched grenades at the Tutsi in the church and shot at the church.⁸⁷² Witness CBK saw Théophile Rukara on top of the Caritas building, throwing a grenade at the Tutsi.⁸⁷³ According to Witness CBK, some Tutsi died as a result of this attack.⁸⁷⁴ Among the assailants who fired shots at the church were policemen from Kivumu commune.⁸⁷⁵ The witness added further that Kanyarukiga had been carrying a firearm at that time.⁸⁷⁶ 346. Witness CBK stated that the assailants attempted to set the Nyange Church ablaze using petrol.⁸⁷⁷ According to Witness CBK, the assailants spilled petrol on the windows and the doors of the church.⁸⁷⁸ The witness that the authorities were present during this attempt,⁸⁷⁹ and he saw this event from where he had been standing at the entrance to the presbytery.⁸⁸⁰ Witness CBK testified that the church was burnt but did not collapse, and this was the reason why the “authorities” sought a machine or an engine to destroy the church.⁸⁸¹ 347. Witness CBK testified that, prior to the attempted burning of the Nyange Church, Kanyarukiga had gone to search for petrol at his pharmacy while Kayishema had gone to Kivumu for this same reason.⁸⁸² Witness CBK said that Kanyarukiga left with the assailants, handed the fuel to them and directed them as to where they had to throw fuel in order to burn the church.⁸⁸³ 348. Later on 15 April 1994, after the attempted burning of the Nyange Church, the authorities went back into the meeting room at the presbytery between 2.30 p.m. and 3.00 p.m.⁸⁸⁴ After this meeting, at 4.00 p.m., a “machine for grading roads” arrived at Nyange Church.⁸⁸⁵ Prosecution Witness CNJ 349. Witness CNJ said that on 15 April 1994, he went to Nyange Parish with a group of seven people from his village, and on their way they met other persons heading for Nyange Parish.⁸⁸⁶ The group was transported by a communal truck, which dropped them at the Nyange Trading Centre, opposite Kanyarukiga’s pharmacy.⁸⁸⁷ Witness CNJ was armed with a club and a sword and said that

⁸⁶⁹ T. 3 September 2009, pp. 8-9. ⁸⁷⁰ T. 3 September 2009, p. 9. ⁸⁷¹ T. 3 September 2009, p. 9. ⁸⁷² T. 3 September 2009, pp. 9, 18. ⁸⁷³ T. 3 September 2009, p. 18. ⁸⁷⁴ T. 3 September 2009, p. 18. ⁸⁷⁵ T. 3 September 2009, p. 18. ⁸⁷⁶ T. 3 September 2009, p. 18. ⁸⁷⁷ T. 3 September 2009, p. 18. ⁸⁷⁸ T. 3 September 2009, p. 18. ⁸⁷⁹ T. 3 September 2009, p. 19. ⁸⁸⁰ T. 3 September 2009, p. 19. ⁸⁸¹ T. 3 September 2009, p. 23. ⁸⁸² T. 3 September 2009, pp. 19, 21. ⁸⁸³ T. 3 September 2009, p. 21. ⁸⁸⁴ T. 3 September 2009, pp. 20, 21. ⁸⁸⁵ T. 3 September 2009, p. 21. ⁸⁸⁶ T. 7 September 2009, p. 11. ⁸⁸⁷ T. 7 September 2009, pp. 11-12, 56.

Page 87

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

84 all the other assailants were armed.⁸⁸⁸ Witness CNJ estimated that the number of assailants was approximately 4000 on 15 April 1994.⁸⁸⁹ 350. Witness CNJ said that they arrived between 11.00 a.m. and 1.00 p.m. and were received by Ndahimana, Kayishema, Ndungutse, Kiragi and Habiyaambere. These men congratulated them for coming as reinforcement.⁸⁹⁰ Ndahimana welcomed the assailants and requested that they cover their bodies with banana leaves so as to distinguish themselves from the Tutsi taking refuge in the church.⁸⁹¹ Witness CNJ further mentioned that Ndahimana assured him and the other assailants that if they were wounded, Kanyarukiga had given the assurance that they would be treated at his pharmacy free of charge.⁸⁹² When Ndahimana said this, Kanyarukiga was present and did not contradict what Ndahimana said.⁸⁹³ The witness took this silence to be support for Ndahimana's statement.⁸⁹⁴ Witness CNJ said that a person called Gatake and another called Sebera were treated at Kanyarukiga's pharmacy.⁸⁹⁵ 351. Following this, Witness CNJ recalled that Kayishema led the assailants to where they would attack the Tutsi at Nyange Parish and reinforce the attackers who were already present.⁸⁹⁶ The witness testified that the Tutsi were defending themselves with stones.⁸⁹⁷ The attackers were also supplied with stones.⁸⁹⁸ According to Witness CNJ, Kanyarukiga was among the attackers.⁸⁹⁹ Witness CNJ said that during the attacks, the assailants would chase Tutsi up to the Nyange Parish while those Tutsi taking refuge in the Nyange Church would repel the assailants to the main Gitarama – Kigali road.⁹⁰⁰ The witness recalled that he and other assailants tried to reinforce the attackers who were already engaged with the Tutsi, but were overpowered because the Tutsi were in a better position and, at this point, were stronger than the Hutu.⁹⁰¹ Kayishema then adopted the strategy of sending some people to throw grenades at the Tutsi.⁹⁰² At about 2.00 p.m., Théophile Rukara threw grenades from the rooftop of a building opposite the Caritas restaurant and close to the pharmacy.⁹⁰³ 352. Witness CNJ recalled that some Tutsi were killed as a result of this attack; the rest withdrew to the Nyange Parish, where they took refuge in the church and the presbytery, and the Hutu assailants followed.⁹⁰⁴ He recounted that those Tutsi who could not enter the church or presbytery were killed in the yard in front of the church.⁹⁰⁵ Witness CNJ said that Father Seromba prevented the assailants from forcibly entering the presbytery.⁹⁰⁶ After the attack, Habiyaambere, Kayishema, Ndungutse and Kanyarukiga were at the parish, but the bourgmestre had left because a member of his family had died.⁹⁰⁷ Witness CNJ said that after the Tutsi barricaded themselves in the church,

888 T. 7 September 2009, p. 15. 889 T. 7 September 2009, p. 15. 890 T. 7 September 2009, pp. 12, 13, 56. 891 T. 7 September 2009, p. 13. 892 T. 7 September 2009, p. 13. 893 T. 7 September 2009, p. 13. 894 T. 7 September 2009, pp. 13, 63-64. 895 T. 7 September 2009, p. 13. 896 T. 7 September 2009, p. 15. 897 T. 7 September 2009, p. 12. 898 T. 7 September 2009, p. 56. 899 T. 7 September 2009, p. 15. 900 T. 7 September 2009, p. 56. 901 T. 7 September 2009, p. 15. 902 T. 7 September 2009, pp. 15-16, 74-75. 903 T. 7 September 2009, pp. 16, 56, 75. 904 T. 7 September 2009, pp. 16, 17. 905 T. 7 September 2009, pp. 16, 17. 906 T. 7 September 2009, p. 19. 907 T. 7 September 2009, p. 17.

Page 88

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

85 policemen fired at the church, and the assailants tried to break down the doors of the church using a caterpillar and other equipment.⁹⁰⁸ He testified that the assailants were able to kill some people in the presbytery, but it was difficult to access those inside the church.⁹⁰⁹ The witness said that around 250 to 300 people were killed on 15 April 1994.⁹¹⁰ 353. Witness CNJ said that he and others were asked to remove bodies from the secretariat building.⁹¹¹ He said that Kanyarukiga and Kayishema left the church to look for Rushema at the trading centre.⁹¹² Witness CNJ knew Rushema as the deputy bourgmestre.⁹¹³ The bulldozer was first used to bury the bodies and was subsequently used to try and break down the doors of the Nyange Church. ⁹¹⁴ The witness went on to note that the bodies were buried in the woods behind Caritas restaurant where the bulldozer was used to widen a pit latrine. ⁹¹⁵ 354. After the grenade attacks, Witness CNJ said that an axe had been sought from Kimaramzara's place and was used to try and break the doors of the church.⁹¹⁶ The assailants also tried to use three pieces of dynamite to force open the main door, but these attempts were not successful.⁹¹⁷ 355. Witness CNJ stated that after that, Kiragi, Théodomir, Kayishema and Arnold Nibarere brought fuel, and the assailants subsequently doused the church with fuel.⁹¹⁸ Witness CNJ further stated that the assailants destroyed the louvers of a window of the church and spilled petrol.⁹¹⁹ According to the witness, the flames went right up to the roof of the bell tower, and the Tutsi inside the church tried to put out the fire to defend themselves.⁹²⁰ 356. The fire petered out, and it was decided that "operations" would resume the following day.⁹²¹ Witness CNJ said that Kanyarukiga, Kayishema, Ndungutse, Habiyaambere and a veterinarian known as Mudondore went and contacted Seromba.⁹²² He said that on this occasion it was decided that some people would guard the area to prevent the Tutsi who had not been killed from fleeing.⁹²³ According to the witness the objective of the assailants was to totally exterminate the Tutsi, and it was necessary to mount guard to ensure that none of the Tutsi escaped.⁹²⁴ Witness CNJ stated that Kayishema and Habiyaambere convinced some assailants to remain behind while others left.⁹²⁵ Witness CNJ said that when he was leaving, Kanyarukiga, who was armed with a pistol, Nishyirimbere and Rukara stopped the witness and others and asked them to go back to the church.⁹²⁶

⁹⁰⁸ T. 7 September 2009, p. 18. ⁹⁰⁹ T. 7 September 2009, p. 18. ⁹¹⁰ T. 7 September 2009, p. 28. ⁹¹¹ T. 7 September 2009, p. 19. ⁹¹² T. 7 September 2009, p. 19. ⁹¹³ T. 7 September 2009, p. 22. ⁹¹⁴ T. 7 September 2009, p. 19. ⁹¹⁵ T. 7 September 2009, p. 21. ⁹¹⁶ T. 7 September 2009, pp. 19-20, 31. ⁹¹⁷ T. 7 September 2009, pp. 20, 31. ⁹¹⁸ T. 7 September 2009, p. 20; T. 8 September 2009, pp. 2-3. ⁹¹⁹ T. 7 September 2009, pp. 30-31. ⁹²⁰ T. 7 September 2009, p. 31. ⁹²¹ T. 7 September 2009, p. 22. The witness did not specify who made this decision. ⁹²² T. 7 September 2009, p. 22. ⁹²³ T. 7 September 2009, pp. 22-23. ⁹²⁴ T. 7 September 2009, p. 23. ⁹²⁵ T. 7 September 2009, p. 23. ⁹²⁶ T. 7 September 2009, p. 23.

Page 89

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

86 357. Finally, Witness CNJ testified that, “[t]he person who could have prevented that action was the judicial police inspector, Kayishema, but these were the same people who were leading the operations.”⁹²⁷ Other influential people like Kanyarukiga did nothing to stop the assailants.⁹²⁸ Prosecution Witness CBY 358. Witness CBY testified that, on the morning of 15 April 1994, the “authorities” arrived and met with “the priest” for 60 minutes “upstairs”.⁹²⁹ These authorities were Kayishema, Ndungutse, Grégoire Ndahimana, Théodomir and Kanyarukiga.⁹³⁰ According to the witness, about two hours after their departure, a sizeable group of Hutu assailants came and had a major confrontation with the Tutsi at the parish.⁹³¹ 359. Witness CBY recalled that the attack on the Tutsi on 15 April 1994 started at about 11.00 a.m. and ended at about 2.00 p.m.⁹³² The Hutu threw stones at the Tutsi, but the Tutsi were able to push the Hutu attackers back towards the Nyange marketplace by throwing stones in self-defence.⁹³³ The witness testified that before 12.00 p.m., a former reservist soldier, who was named Théophile (nickname Rukara), climbed onto a building and threw a grenade at the Tutsi.⁹³⁴ According to the witness, Rukara threw the grenade from the roof of a building of the lower side of the parish, not far from the Caritas building, near the house of someone called Vincent.⁹³⁵ Witness CBY was outside the presbytery in the courtyard of the Nyange Church when the grenade was thrown.⁹³⁶ The witness recalled that some of the Tutsi died on the spot, others lost their limbs and those who were not killed were subsequently killed by the Hutu assailants using clubs and machetes.⁹³⁷ The Tutsi turned back and sought refuge in the church.⁹³⁸ Those Tutsi who could not enter the church were killed by the Hutu who were pursuing them.⁹³⁹ 360. When the Tutsi had entered the church, the Hutu assailants attempted to set the church on fire but were not successful.⁹⁴⁰ They then placed a ladder near a window of the church and sprayed the church with fuel, but they were unable to set the church on fire.⁹⁴¹ After attempting to set the church on fire, Kayishema and Kimaranza went to look for a bulldozer to demolish the church.⁹⁴² According to the witness, Kanyarukiga did not go with them and remained “there”.⁹⁴³ Once the bulldozer arrived at the church, it attempted to demolish the church but was not able to do so in one evening.⁹⁴⁴ The witness did not know who ordered the demolition of the church. 945 However, he

927 T. 7 September 2009, p. 22. 928 T. 7 September 2009, p. 22. 929 T. 8 September 2009, p. 45. It is noted that the English transcript refers to 14 April, but it is clear from the context that the witness is talking about the next day. In addition, the French transcript refers to 15 April. French Transcript, T. 8 September 2009, p. 52. 930 T. 8 September 2009, pp. 45-46. 931 T. 8 September 2009, p. 45. 932 T. 8 September 2009, p. 46. 933 T. 8 September 2009, p. 46. 934 T. 8 September 2009, p. 46; T. 14 September 2009, pp. 17, 19. 935 T. 14 September 2009, p. 17. Note that the English transcript says “Caratis”, whereas the French transcript says “Caritas”. French Transcript, T. 8 September 2009, p. 19. 936 T. 14 September 2009, p. 19. The witness noted that he was between 100 and 200 metres away. 937 T. 8 September 2009, p. 46. 938 T. 8 September 2009, p. 46. 939 T. 8 September 2009, p. 46. 940 T. 8 September 2009, p. 47. 941 T. 8 September 2009, p. 47. 942

T. 8 September 2009, p. 47; T. 14 September 2009, p. 20. 943 T. 14 September 2009, p. 20. 944 T. 8 September 2009, p. 47. 945 T. 8 September 2009, p. 47.

Page 90

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

87 testified that he met “Kayishema and Kanyarukiga who were saying that the assailants had to destroy or demolish the church.”⁹⁴⁶ The witness was two to three metres from the men at the time.⁹⁴⁷ Prosecution Witness CBR 361. Witness CBR stated that IPJ Kayishema returned to the witness’s cellule on Friday, 15 April 1994.⁹⁴⁸ Again, Kayishema drove through the streets in a vehicle outfitted with megaphones and called on the population to defend Nyange from the *inyenzi*.⁹⁴⁹ The witness recalled that Ndungutse assembled “us” as he had done in the days prior to 15 April 1994.⁹⁵⁰ Witness CBR and the other assailants were collected in three pick-up trucks, two of which belonged to a company called Astaldi, and were transported to the Nyange Parish.⁹⁵¹ Witness CBR estimated that they arrived at the Nyange Parish between 9.00 and 10.00 a.m.⁹⁵² The witness was armed with a club and noted that other assailants were armed with traditional weapons and were covered in banana leaves.⁹⁵³ 362. Witness CBR estimated that there were approximately ten times as many Hutu assailants in Nyange on 15 April 1994 as those who participated in the attack on the previous day.⁹⁵⁴ According to the witness, the assailants stretched from the parish compound to the marketplace and down the road to Kibuye.⁹⁵⁵ He testified that attackers had come from all secteurs in Kivumu commune as well as from neighbouring communes.⁹⁵⁶ 363. Witness CBR recalled that a number of “authorities,” including Bourgmestre Ndahimana, IPJ Kayishema, Gaspard Kanyarukiga, Assistant Bourgmestre Védaste Murangwabugabo, the Court President Habiyambere, the teacher Ndungutse and Staff Sergeant Habarugira, were gathered at the Statue of the Virgin Mary on 15 April 1994.⁹⁵⁷ Shortly after the witness arrived, these men headed towards the parish presbytery to see Father Seromba.⁹⁵⁸ The witness did not know what the men discussed at the presbytery.⁹⁵⁹ The “authorities” remained at the presbytery for approximately 45 minutes.⁹⁶⁰ From there, they walked to the local cooperative society building, which was also known as CODEKOKI.⁹⁶¹ Father Seromba did not attend the meeting at the cooperative.⁹⁶² 364. Witness CBR testified that the “authorities” spent approximately 30 minutes in the cooperative before returning to the Statue of the Virgin Mary at approximately 12.00 p.m.⁹⁶³

⁹⁴⁶ T. 8 September 2009, p. 47. ⁹⁴⁷ T. 8 September 2009, p. 47. ⁹⁴⁸ T. 9 September 2009, p. 16. ⁹⁴⁹ T. 9 September 2009, p. 16. ⁹⁵⁰ T. 9 September 2009, p. 16. ⁹⁵¹ T. 9 September 2009, p. 16. ⁹⁵² T. 9 September 2009, pp. 16, 58. ⁹⁵³ T. 10 September 2009, p. 3; T. 9 September 2009, p. 57. ⁹⁵⁴ T. 9 September 2009, p. 28. ⁹⁵⁵ T. 9 September 2009, p. 28. ⁹⁵⁶ T. 9 September 2009, p. 28. ⁹⁵⁷ T. 9 September 2009, p. 16. The witness testified elsewhere that Habarugira was a Chief Warrant Officer rather than a Staff Sergeant. T. 9 September 2009, p. 23. ⁹⁵⁸ T. 9 September 2009, p. 17. ⁹⁵⁹ T. 9 September 2009, p. 57. ⁹⁶⁰ T. 9 September 2009, p. 57. ⁹⁶¹ T. 9 September 2009, pp. 18, 19, 25, 64. ⁹⁶² T. 9 September 2009, p. 64. ⁹⁶³ T. 9 September 2009, pp. 18, 59.

Page 91

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

88 365. According to Witness CBR, there were no attacks before midday.⁹⁶⁴ The Hutu assailants attacked the Tutsi at the parish around midday, when Ndahimana instructed them to “begin work”.⁹⁶⁵ The assailants threw stones at the Tutsi at Nyange Parish, and the Tutsi also threw stones back. ⁹⁶⁶ The witness recalled that they were forced to withdraw because the Tutsi were too strong.⁹⁶⁷ 366. The assailants withdrew to the Statue of the Virgin Mary, where a reservist named Rukara, climbed onto the roof of a store in the Nyange Centre at around 1.00 p.m. and threw grenades.⁹⁶⁸ The grenades killed Tutsi in great numbers, and the rest of them retreated.⁹⁶⁹ Rukara continued to throw grenades at the Tutsi until they reached the church.⁹⁷⁰ Once the Tutsi reached the church, some entered and locked the church door behind them.⁹⁷¹ Others took refuge in the presbytery or fled to the nearby woods.⁹⁷² Witness CBR testified that he went towards the presbytery with a group of assailants led by Ndungutse and Kayishema.⁹⁷³ Father Seromba prevented them from entering the presbytery and asked them to clean the place from the dead bodies.⁹⁷⁴ 367. Witness CBR recalled that the road from the Statue of the Virgin Mary to the church was littered with corpses.⁹⁷⁵ The witness testified that Ndungutse and Kayishema went to find equipment to remove the bodies, which they referred to as “dirt,” from the church grounds.⁹⁷⁶ Witness CBR testified that two pieces of equipment and two lorries were brought to the parish from the Astaldi company at around 2.00 or 3.00 p.m.⁹⁷⁷ One bulldozer was used to dig a pit for the bodies while the other was used to load bodies onto the lorries.⁹⁷⁸ 368. Later in the day, after the bodies were removed by the bulldozers from the road leading to the Nyange Church, Witness CBR and other assailants headed towards the church.⁹⁷⁹ Communal police had arrived with firearms, and they began shooting at the Tutsi through the windows and doors of the church.⁹⁸⁰ As the police ran out of ammunition, IPJ Kayishema arrived in a vehicle driven by someone named Kiragi with a jerry can of petrol.⁹⁸¹ 369. Witness CBR recalled that the assailants sprayed fuel onto the windows and doors of the church and tried to light it on fire, but the Tutsi, who were inside the church, put the fire out with their blankets and dust.⁹⁸² Some of the assailants used a ladder to reach the higher windows on the

⁹⁶⁴ T. 9 September 2009, p. 59. ⁹⁶⁵ T. 9 September 2009, pp. 22-23, 25, 59. The witness did not leave the Statue of the Virgin Mary between the time that he arrived and the point at which the first attack was launched. T. 9 September 2009, p. 59. ⁹⁶⁶ T. 9 September 2009, p. 25. ⁹⁶⁷ T. 9 September 2009, pp. 25, 66. ⁹⁶⁸ T. 9 September 2009, pp. 25, 66. The witness recalled that Rukara had been a soldier in Habyarimana’s army and was a reservist at the time. ⁹⁶⁹ T. 9 September 2009, pp. 25, 66. ⁹⁷⁰ T. 9 September 2009, p. 25. ⁹⁷¹ T. 9 September 2009, p. 25. ⁹⁷² T. 9 September 2009, p. 25. ⁹⁷³ T. 9 September 2009, p. 25. ⁹⁷⁴ T. 9 September 2009, p. 25. ⁹⁷⁵ T. 9 September 2009, pp. 25, 26. “When we pursued the refugees, we walked on dead bodies. There were bodies everywhere right up to the church compound.” T. 9 September 2009, p. 26. ⁹⁷⁶ T. 9 September 2009, p. 26. ⁹⁷⁷ T. 9 September 2009, pp. 26, 66. ⁹⁷⁸ T. 9 September 2009, pp. 27, 67. ⁹⁷⁹ T. 9 September 2009, p. 27. ⁹⁸⁰ T. 9 September 2009, p. 27. ⁹⁸¹ T. 9 September 2009, pp. 27, 65. The

witness testified that Kiragi owned the vehicle. 982 T. 9 September 2009, pp. 27, 65.

Page 92

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

89 church.983 The assailants also tried to demolish the church with dynamite.984 None of these attempts were successful.985 According to Witness CBR, during these attempts, the assailants' purpose was to kill all the Tutsis at that location.986 370. In the meantime, other assailants arrived from Kibilira commune.987 These assailants were asked to guard the church while the witness and others returned home.988 Witness CBR testified that he returned to his house that evening.989 When he left the parish around 5.00 or 6.00 p.m., the bulldozers that had been brought to bury the bodies were already gone.990 According to the witness, the bulldozers were returned to the Astaldi Company without being used to demolish the church.991 Prosecution Witness CDL 371. Witness CDL arrived at the Statue of the Virgin Mary around 10.00 a.m. on 15 April 1994.992 It was difficult for him to go to the church premises because the Tutsi taking refuge there were outside the church and throwing stones and pieces of bricks at their attackers.993 The attackers were also throwing stones and pieces of bricks at the Tutsi.994 The assailants were on the side of the road leading to Kibuye, in the woods and in a banana plantation.995 The Tutsi were able to overpower the attackers and push the attackers back to the Statue of the Virgin Mary.996 According to Witness CDL, the distance between the church and the Statue of the Virgin Mary was about 200 metres.997 372. Later, the attackers threw grenades at the Tutsi and "a good number" of Tutsi were killed.998 Some Tutsi sought refuge in the church and others sought refuge in the presbytery.999 The grenades were thrown by communal policemen, gendarmes and later on by Théophile Mboneza, a reservist nicknamed Rukara.1000 These grenades "weakened or overpowered" the Tutsi.1001 Rukara threw the grenades from the roof of a building where business activities were carried out at the centre.1002 Witness CDL estimated that he saw about 30 bodies where Rukara threw the grenades.1003 The attackers also used "sharp weapons" against the Tutsi.1004 The witness recalled that about 200 people were killed.1005

983 T. 9 September 2009, p. 65. 984 T. 9 September 2009, p. 27. 985 T. 9 September 2009, p. 27. 986 T. 9 September 2009, p. 27. 987 T. 9 September 2009, p. 27. 988 T. 9 September 2009, pp. 27-28. 989 T. 9 September 2009, p. 28. 990 T. 9 September 2009, pp. 29, 67. 991 T. 9 September 2009, pp. 66, 67. 992 T. 11 September 2009, pp. 13, 17. 993 T. 10 September 2009, p. 32. 994 T. 10 September 2009, p. 32. 995 T. 10 September 2009, p. 32. 996 T. 10 September 2009, p. 32. 997 T. 10 September 2009, p. 45. 998 T. 10 September 2009, p. 32. 999 T. 10 September 2009, p. 32. 1000 T. 10 September 2009, p. 33. 1001 T. 10 September 2009, p. 33. 1002 T. 10 September 2009, p. 33. 1003 T. 10 September 2009, p. 33. 1004 T. 10 September 2009, pp. 33, 34. 1005 T. 10 September 2009, pp. 33, 34.

Page 93

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

90 373. The bodies of the Tutsi who were killed were buried in a mass grave.¹⁰⁰⁶ There were two bulldozers; one “picked up bodies and threw them” and another “collected the bodies that were thrown into the mass grave.”¹⁰⁰⁷ The bulldozers were driven by Mitima and Maurice who were both Zairean.¹⁰⁰⁸ A lorry was used to move the corpses and this was driven by Albert who was also Zairean.¹⁰⁰⁹ The bulldozers did not remain at the parish overnight, instead one was returned to where it had come from and the other was left at the commune office.¹⁰¹⁰ They had not been used to attack or destroy the church.¹⁰¹¹ 374. On the afternoon of 15 April 1994, Witness CDL saw Kanyarukiga at the Nyange Parish Church talking to the other “officials” present at the church “including the parish priests”.¹⁰¹² The “officials” who were present were “the parish priest”, Kayishema, Ndungutse, “some gendarmes”, Habiyaambere and Deputy Bourgmestre Kanani.¹⁰¹³ They talked about the killings that were going on in the commune.¹⁰¹⁴ According to the witness, the bourgmestre opened fire on the Tutsi on Friday, 15 April 1994.¹⁰¹⁵ Prosecution Witness CBT 375. Prosecution Witness CBT, a Hutu, was 26 years old in 1994.¹⁰¹⁶ Witness CBT participated in attacks at the Nyange Church on 15 April 1994 but said he did not kill anybody on that day.¹⁰¹⁷ Witness CBT served a sentence in the Kibuye Prison for crimes committed during the genocide.¹⁰¹⁸ 376. Witness CBT responded to a call from IPJ Kayishema, who used a “public address system” to ask all members of the population to go to the parish.¹⁰¹⁹ He passed the Statue of the Virgin Mary at around midday, where according to him, there were thousands of attackers.¹⁰²⁰ Witness CBT testified that if an authority wanted to address the members of the public, people would be quiet because they respected the authorities.¹⁰²¹ Witness CBT saw a red car parked outside the pharmacy, which he later heard belonged to Kanyarukiga.¹⁰²² He did not see any meetings being held at the Statue of the Virgin Mary or the CODEKOKI.¹⁰²³ 377. Upon arriving at the Nyange Church at approximately midday “with other people”, Witness CBT saw corpses of people who had been killed all over the courtyard in front of the Nyange

¹⁰⁰⁶ T. 10 September 2009, p. 33. ¹⁰⁰⁷ T. 10 September 2009, p. 33. The witness later said that one bulldozer dug the tomb or pit and the other one loaded corpses onto a lorry. T. 10 September 2009, p. 41. ¹⁰⁰⁸ T. 10 September 2009, p. 41. ¹⁰⁰⁹ T. 10 September 2009, pp. 41, 42. ¹⁰¹⁰ T. 11 September 2009, p. 15. ¹⁰¹¹ T. 11 September 2009, p. 15. ¹⁰¹² T. 10 September 2009, p. 31. Witness CDL later says that the parish priests were Father Seromba and Father Gasake. T. 10 September 2009, p. 33. ¹⁰¹³ T. 10 September 2009, p. 31. ¹⁰¹⁴ T. 10 September 2009, p. 31. ¹⁰¹⁵ T. 10 September 2009, p. 36. ¹⁰¹⁶ Prosecution Exhibit P57 (Personal Identification Sheet of Witness CBT). ¹⁰¹⁷ T. 14 September 2009, p. 69. ¹⁰¹⁸ T. 14 September 2009, pp. 49, 58, ¹⁰¹⁹ T. 14 September 2009, pp. 38, 48. Kayishema was in a pick-up vehicle. T. 14 September 2009, p. 38. Later in his testimony, Witness CBT testified that he was instructed by leaders who included the communal conseillers, the judicial police inspectors, the assistant bourgmestre and the communal police officers. T. 14 September 2009, p. 48. ¹⁰²⁰ T. 14 September 2009, pp. 71, 74. ¹⁰²¹

T. 14 September 2009, p. 74. 1022 T. 14 September 2009, p. 71. Witness CBT was asked whether he had seen a red pick-up truck, and the witness said he had not seen that kind of car. 1023 T. 14 September 2009, p. 72.

Page 94

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

91 Church.1024 Witness CBT described these bodies as belonging to Tutsi who had taken refuge in the church, those referred to as inyenzi.1025 The witness had been told that those Tutsi who had been killed by interahamwe who Kayishema had called earlier that day.1026 Shortly after he arrived, Witness CBT saw Kanyarukiga at the church grounds where the killings took place.1027 378. Witness CBT observed the use of traditional weapons like machetes, clubs and spears and other weapons like rifles, grenades and dynamite.1028 Grenades were used by a former soldier, Théophile Rukara.1029 Just after midday on 15 April 1994, the witness saw Rukara throw a grenade from the roof of a house at the Statue of the Virgin Mary belonging to Iyamuremyi.1030 The grenade was thrown as the Hutu were retreating and killed some of the Tutsi.1031 Rukara continued throwing grenades as the Tutsi retreated to the church.1032 Witness CBT did not see Kanyarukiga near where the grenade was thrown at the time.1033 He saw Kanyarukiga later as the Tutsi returned to the church.1034 379. Prior to the attempted burning of the Nyange Church on 15 April 1994, Witness CBT saw a number of “authorities” at the church including Kanyarukiga.1035 Witness CBT saw Kanyarukiga on 15 April 1994 in a group of “officials” and testified he was saying that all inyenzi who had sought refuge at the Nyange Church had to be killed.1036 The witness heard Kanyarukiga say “that we should not be concerned about the destruction of the Nyange [C]hurch because a new church was going to be constructed and this would create jobs for the youths in Nyange who were going to manufacture the bricks that were going to be used for the construction of the new church.”1037 At the time that Kanyarukiga was speaking, Witness CBT was approximately two metres from him.1038 380. After the young Hutu people heard that there was an intention to provide jobs for them, they started surrounding the church and policemen started firing.1039 Witness CBT stated that there were people around the church with petrol, and they started “spilling” it over the church; the witness was

1024 T. 14 September 2009, pp. 39, 71. 1025 T. 14 September 2009, p. 39. 1026 T. 14 September 2009, p. 39. 1027 T. 14 September 2009, p. 49. 1028 T. 14 September 2009, p. 48. 1029 T. 14 September 2009, p. 48. Although the English transcript says at first “Rukaka”, it is later spelled “Rukara”. In the French transcript the only spelling used is “Rukara”. French Transcript, T. 14 September 2009, p. 51. 1030 T. 14 September 2009, pp. 48, 72. 1031 T. 14 September 2009, p. 48. 1032 T. 14 September 2009, p. 48. 1033 T. 14 September 2009, p. 73. 1034 T. 14 September 2009, p. 73. 1035 T. 14 September 2009, pp. 40-41. Witness CBT also mentioned Habiyaambere (a presiding judge); IPJ Kayishema; Télesphore Ndungutse; conseillers of various secteurs; veterinary officers; communal police officers; Adrien Niyitegeka, a communal policeman; Appolinaire Rangira, a communal policeman; Kabaliza, a soldier; Arnold Nibarere, the secretary of the commune;

Anastase Rushema, the assistant to the bourgmestre; Kubwumukiza, who was a veterinary officer; Habarugira, he was the conseiller of Nyange; Gaspard Gatwaza, who was the Kivumu conseiller; Gatwaza, Nzabirinda who was a teacher at Rukoko; Alphonse Simpunga, who was a teacher at Rukoko; Nkaka Callixte who was a teacher in Kivumu and Conseiller Mathias Kazungu. The Defence questioned the witness about this 'list' of people that the witness provided, and Witness CBT added a number of names and maintained that he saw the Accused at the church. T. 14 September 2009, pp. 51-54. 1036 T. 14 September 2009, pp. 46, 49. 1037 T. 14 September 2009, p. 46; T. 15 September 2009, p. 1. 1038 T. 14 September 2009, pp. 46-47. People who were close to Kanyarukiga could hear what he was saying, however Witness CBT testified that Kanyarukiga was not using a megaphone and so people further away could not hear him. Witness CBT agreed that there was some noise at the church and there was firing at the time the Accused was speaking. T. 15 September 2009, p. 1. 1039 T. 14 September 2009, p. 47.

Page 95

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

92 near some of these people at the time they were putting petrol on the church.¹⁰⁴⁰ At this time, some of the Tutsi had died, but the majority were alive and still in the church.¹⁰⁴¹ Witness CBT recalled that the secretary of the commune, Arnold Nibarere used the petrol on the church, in an attempt to burn down the church.¹⁰⁴² He was assisted by Faustin Uworinaniye.¹⁰⁴³ Witness CBT saw only one bucket of petrol, which he was right next to, but he did not know where the petrol came from.¹⁰⁴⁴ However, the attempt was unsuccessful because those in the church were throwing dust on the flames.¹⁰⁴⁵ Kayishema asked people to cut grass and to construct a ladder to enable people to throw the fuel through the windows of the church.¹⁰⁴⁶ 381. Some Tutsi in the church attempted to flee at this time, but they were intercepted and killed with machetes, clubs or spears.¹⁰⁴⁷ Witness CBT noted that there were more Hutu assailants than Tutsi inside the church.¹⁰⁴⁸ Witness CBT cannot recall exactly at what time the burning of the church was attempted, but he said that there had been several attempts and one had taken place at around 3.00 p.m.¹⁰⁴⁹ 382. The bodies of those killed were buried in a "common grave" behind a house that was used as Caritas offices.¹⁰⁵⁰ A "Caterpillar" from Astaldi was used to pick up the bodies.¹⁰⁵¹ After this, fighting continued and anyone who attempted to leave the church was killed.¹⁰⁵² 383. Witness CBT left the church between 4.00 and 5.00 p.m. on the evening of 15 April 1994.¹⁰⁵³ He testified that Kayishema and Ndungutse asked some of the assailants to spend the night at the parish to ensure that no Tutsi escaped from the church, but the witness did everything possible to leave.¹⁰⁵⁴ As Witness CBT left the church square, he came across Kanyarukiga who was "going around the church to make sure that the people were doing their work efficiently."¹⁰⁵⁵ Prosecution Witness YAU 384. Witness YAU testified that assailants attacked the church on her third day there.¹⁰⁵⁶ Those who had sought refuge at the church responded to the attack by throwing stones at the assailants and repelled the attackers.¹⁰⁵⁷ 385. According to the witness, the Hutu assailants outnumbered the Tutsi civilians at the parish.¹⁰⁵⁸ "Father

Seromba instructed them to start with the intellectuals, and that is how the

1040 T. 14 September 2009, p. 47; T. 15 September 2009, p. 1. 1041 T. 14 September 2009, p. 47. 1042 T. 14 September 2009, pp. 47, 73 (The witness referred to Nibarere as both Arnold and Léonard in the English transcript.). In the French Transcript, however, Nibarere was consistently referred to as Arnold. French Transcript, T. 14 September 2009, pp. 44, 51. 1043 T. 14 September 2009, p. 47. 1044 T. 14 September 2009, pp. 73-74. 1045 T. 14 September 2009, pp. 47, 73. 1046 T. 14 September 2009, p. 47. 1047 T. 14 September 2009, pp. 47-48. 1048 T. 14 September 2009, p. 48. 1049 T. 14 September 2009, p. 73. 1050 T. 14 September 2009, pp. 48, 49. 1051 T. 14 September 2009, p. 49. 1052 T. 14 September 2009, p. 49. 1053 T. 15 September 2009, p. 2. 1054 T. 14 September 2009, p. 49. 1055 T. 14 September 2009, p. 49. 1056 T. 15 September 2009, pp. 18, 19, 44. 1057 T. 15 September 2009, p. 44.

Page 96

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

93 assailants called Gatare, who was a teacher in Nyange, and they killed him. Killings started thus. They even threw tear gas as well as other grenades at the refugees.”1059 When the attacks began, the witness was outside the church.1060 386. Witness YAU testified that a bus arrived from the direction of Kibuye with soldiers, interahamwe and Father Kayiranga who, on arrival spoke to Kanyarukiga, Kayishema and Seromba.1061 The witness could not recall when the bus arrived at the parish but estimated that it was between 11.00 a.m. and midday.1062 She testified that Father Kayiranga met with Father Seromba, Fulgence Kayishema, Kanyarukiga, Grégoire Ndahimana and a conseiller whose first name was Vianney.1063 She testified that Kanyarukiga, Kayishema, Seromba, Ndahimana and others were always together, and this group was leading the attacks.1064 387. When the attackers started throwing grenades, the witness fled towards the presbytery, which was where Father Seromba lived.1065 The witness sought refuge on the ground floor of a storage building.1066 She testified that the room was not locked, and she opened the door herself.1067 The witness was not alone in the room.1068 388. Witness YAU testified that, after she entered the room, a seminarian locked it with a key.1069 The witness testified that she heard Father Seromba ask the seminarian to open the room, but the seminarian refused, saying that if Father Seromba tried to open the door, he would be killed.1070 The witness clarified that, “[t]he person who would try to open the door would be killed by the seminarian.”1071 She testified that she could not see Father Seromba and the seminarian, but she could hear them and could clearly identify their respective voices.1072 389. Witness YAU stayed in the room for one day and left that night.1073 According to the witness, Father Kayiranga came to the room where she was hiding and told those inside that he was going to bless them before sending them out.1074 Father Kayiranga advised the witness and the

1058 T. 15 September 2009, p. 20. 1059 T. 15 September 2009, p. 19. According to the witness, Gatare was a Tutsi. T. 15 September 2009, p. 30. 1060 T. 15 September 2009, pp. 17, 20. 1061 T. 15 September 2009, p. 18. First the witness said that she could not tell the date on which it happened. Later she placed the attacks on the day of the arrival of the bus. According to her, the bus arrived on the third day. At another point, the witness testified that the bus carrying Father Kayiranga arrived on her second day at the parish. T. 15 September 2009, p. 16. 1062 T. 15 September 2009, p. 43. 1063 T. 15 September 2009, p. 19. Witness YAU explained that Father Kayiranga was a priest who was usually assigned to the Nyange Parish. When Father Kayiranga got off the bus, the Tutsi applauded because they thought Kayiranga had come to save them. The witness testified, however, that, “[w]hen he climbed back into the bus, we saw interahamwe and soldiers come out of the bus, and they were armed. And we immediately understood that he had not come to save us.” 1064 T. 15 September 2009, p. 44. 1065 T. 15 September 2009, pp. 20, 21. 1066 T. 15 September 2009, p. 20. 1067 T. 15 September 2009, p. 22. 1068 T. 15 September 2009, p. 23. There were other Tutsi hiding there as well. The witness testified that the following people were in the room with her: Blandene, Uzabakereho, a woman called Marcianne and a girl called Ntawudakeba. Witness YAU could not remember the names of the others who were there. T. 15 September 2009, p. 24. When asked on cross-examination about the contents of the room, the witness said she did not pay attention. T. 15 September 2009, p. 45. 1069 T. 15 September 2009, p. 23. 1070 T. 15 September 2009, p. 23. 1071 T. 15 September 2009, p. 23. 1072 T. 15 September 2009, p. 23 (“I could identify the voices because I used to pray at the parish.”). 1073 T. 15 September 2009, p. 46. 1074 T. 15 September 2009, p. 25.

Page 97

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

94 others to head towards a place where they could see the light of a torch.¹⁰⁷⁵ She stated, however, that she and the others understood that to be where the assailants were, so they decided to take a different road.¹⁰⁷⁶ 390. More than twenty-seven members of Witness YAU’s family fled to the Nyange Parish Church in April 1994.¹⁰⁷⁷ According to the witness, “[a]ll these people perished at Nyange [C]hurch.”¹⁰⁷⁸ Among those who died were the witness’s mother, father and three brothers.¹⁰⁷⁹ Prosecution Witness CDK 391. Witness CDK, a Hutu, was 31 years old in 1994.¹⁰⁸⁰ The witness was detained in Kibuye and Gitarama Prisons for crimes he participated in during the genocide.¹⁰⁸¹ Witness CDK took part in the killings at Nyange Parish in April 1994.¹⁰⁸² 392. Witness CDK went to the Nyange Parish church on 15 April 1994 for one day only because he had been asked to go there by Fulgence Kayishema, the IPJ.¹⁰⁸³ Kayishema had mounted a loudspeaker on a vehicle and drove around calling on members of the public to defend Nyange because it was being attacked by inyenzi.¹⁰⁸⁴ Between 11.00 and 11.30 a.m., Witness CDK arrived at the Nyange Parish with a machete and a small stick.¹⁰⁸⁵ When he arrived at the church, some people were wearing their ordinary clothes, others were wearing banana leaves and everyone had traditional weapons.¹⁰⁸⁶ 393. When Witness CDK arrived at the Nyange

Church, there was a confrontation between Hutu and Tutsi.¹⁰⁸⁷ He observed that there were more Hutu than Tutsi.¹⁰⁸⁸ Whilst Witness CDK was at the church, he saw Kayishema again, who was in the vehicle the witness had seen him in previously.¹⁰⁸⁹ Kayishema came to and from the church during that day.¹⁰⁹⁰ Witness CDK saw Grégoire Ndahimana, Kayishema, Téléphone Ndungutse and Kanyarukiga going towards the CODEKOKI office “where they held a meeting before the killings perpetrated against the Tutsis started at the church.”¹⁰⁹¹ 394. Witness CDK saw the same people come out of the CODEKOKI after the meeting on 15 April 1994.¹⁰⁹² After this meeting had ended, Kanyarukiga met with those people who had gathered in the square at the Statue of the Virgin Mary and talked with them.¹⁰⁹³ Kanyarukiga then

1075 T. 15 September 2009, p. 25. 1076 T. 15 September 2009, p. 25. 1077 T. 15 September 2009, p. 26. 1078 T. 15 September 2009, p. 26. 1079 T. 15 September 2009, p. 28 (CS). 1080 Prosecution Exhibit P60 (Personal Identification Sheet of Witness CDK). 1081 T. 16 September 2009, pp. 19-21. 1082 T. 16 September 2009, p. 37. 1083 T. 16 September 2009, p. 2. 1084 T. 16 September 2009, p. 2. The word *inyenzi* meant Tutsi to the witness. 1085 T. 16 September 2009, p. 3. 1086 T. 16 September 2009, p. 3. 1087 T. 16 September 2009, p. 3. Later, the Witness stated that at the time he arrived at the Statue of the Virgin Mary, assailants were waiting for officials who were holding a meeting to give instructions regarding the fighting. T. 16 September 2009, p. 25. 1088 T. 16 September 2009, p. 3. 1089 T. 16 September 2009, pp. 2, 3. According to the witness, the vehicle belonged to someone called Rwamasirabo. 1090 T. 16 September 2009, p. 3. 1091 T. 16 September 2009, p. 3. 1092 T. 16 September 2009, p. 6. 1093 T. 16 September 2009, p. 6.

Page 98

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

95 approached Witness CDK and those he was with (the witness used the word “us”) and asked them to prepare themselves and collect stones so they would be able to fight the Tutsi who had stones for the attack.¹⁰⁹⁴ In the meantime, Seromba, Ndahimana and the gendarmes went to the presbytery.¹⁰⁹⁵ 395. Witness CDK recounted that, during the time when stones were being thrown, he saw Kanyarukiga talking with Théophile Rukara.¹⁰⁹⁶ After that “encounter”, someone was sent to look for a ladder from Kanyarukiga’s pharmacy.¹⁰⁹⁷ A ladder was brought, and Rukara climbed up on the roof of a house and threw grenades.¹⁰⁹⁸ Witness CDK testified that the grenades were thrown at the group of Tutsi, and this was the point where killing of Tutsi began.¹⁰⁹⁹ 396. Witness CDK estimated that there were more than 800 attackers in the courtyard of the church at around 2.00 p.m.¹¹⁰⁰ The witness saw Kanyarukiga moving amongst the members of the population “giving them instructions” and in the company of Kayishema and Ndahimana.¹¹⁰¹ Kanyarukiga said that the witness and those he was with, had to fight the *inyenzi* and show that they were brave young people.¹¹⁰² Witness CDK testified that injured Hutu assailants were treated at Kanyarukiga’s pharmacy.¹¹⁰³ 397. Prior to the attempt to burn the Nyange Church, Witness CDK testified that he again saw Kanyarukiga in front of the secretariat of the Nyange Parish where Kanyarukiga was talking to Father Seromba.¹¹⁰⁴ At the time, Witness

CDK recounted that he was two metres away from Kanyarukiga when he heard Kanyarukiga telling Father Seromba that the church had to be demolished to kill the inyenzi.¹¹⁰⁵ Shortly after this, Kayishema arrived and agreed with Kanyarukiga's suggestion that the church be demolished.¹¹⁰⁶ After this exchange, the attacks continued and the communal policemen shot at those taking refuge in the Nyange Church.¹¹⁰⁷ Some attackers poured petrol on the church and others were throwing projectiles at those in the church.¹¹⁰⁸ The witness recalled that a certain "Arnold" used a "spray" to put petrol on the church.¹¹⁰⁹ According to Witness CDK, Arnold and another person, who had a matchbox, tried to destroy the church by setting it on fire.¹¹¹⁰ Witness CDK saw this attempt to destroy the church from about ten metres away.¹¹¹¹

1094 T. 16 September 2009, p. 6. 1095 T. 16 September 2009, pp. 6, 26-27, 28. The witness could not say at which time this happened because it was difficult for him to remember, and he did not wear a watch at that time. 1096 T. 16 September 2009, p. 6. 1097 T. 16 September 2009, p. 6. 1098 T. 16 September 2009, p. 6. 1099 T. 16 September 2009, pp. 6, 28-29. 1100 T. 16 September 2009, p. 32. 1101 T. 16 September 2009, pp. 6-7. 1102 T. 16 September 2009, p. 7. When Kanyarukiga was speaking Witness CDK was "right near him", and Witness CDL was not the only one who heard Kanyarukiga say these words. 1103 T. 16 September 2009, p. 7. During cross-examination, Defence Counsel suggested that the pharmacy was closed from 14 April 1994 and that Witness CDK's testimony was not true. Witness CDK responded that he did not agree with this. T. 16 September 2009, p. 40. 1104 T. 16 September 2009, p. 8. 1105 T. 16 September 2009, p. 8. 1106 T. 16 September 2009, p. 8. 1107 T. 16 September 2009, p. 8. 1108 T. 16 September 2009, p. 8. 1109 T. 16 September 2009, p. 8. 1110 T. 16 September 2009, p. 8. Witness CDK had forgotten his name but remembered that he gave the name in his testimony in the Seromba case. 1111 T. 16 September 2009, p. 35.

Page 99

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

96 398. Witness CDK testified that he saw Kanyarukiga board a vehicle with Kayishema and head towards Myungu.¹¹¹² Upon their return, 45 to 50 minutes later, they were accompanied by a bulldozer (or Caterpillar as the witness also referred to it), which was used to pick up the bodies of the Tutsi who had been killed. ¹¹¹³ These bodies were buried below the building that contained the Caritas office.¹¹¹⁴ 399. Witness CDK testified that more than 200 attackers from Kibilira arrived at the church at around 4.00 p.m.¹¹¹⁵ The witness left immediately after these assailants arrived.¹¹¹⁶ Prosecution Witness CBS 400. On the morning of 15 April 1994, Witness CBS recalled a large-scale attack that was launched on the Nyange Church by Hutu assailants.¹¹¹⁷ Before 9.00 a.m., there was panic at the church because the Tutsi saw people arriving from "everywhere", including the neighbouring hills, and these people were armed with machetes, clubs and other weapons.¹¹¹⁸ A group of assailants came from Kivumu and was led by Gaspard Gatwaza.¹¹¹⁹ Others came from Rukuko and other places; some assailants arrived at the church in vehicles that belonged to the Astaldi Company.¹¹²⁰ The witness asserted that the

“officials” ordered the vehicles to transport the assailants to the church.¹¹²¹ The attack started around 9.00 a.m., and the attackers covered themselves in banana leaves.¹¹²² The communal policemen and gendarmes were wearing their usual uniforms.¹¹²³ Witness CBS testified that the gendarmes said that the Tutsi would have to defend themselves.¹¹²⁴ Witness CBS stated that the attackers were armed with machetes and clubs.¹¹²⁵ The Tutsi did not have traditional weapons, so they fought back by throwing stones at the Hutu.¹¹²⁶ The assailants were shouting loudly, “[e]xterminate them all. Let no one escape.”¹¹²⁷ 401. The witness recalled that Grégoire Ndahimana, Kanyarukiga and IPJ Kayishema led the attackers.¹¹²⁸ In particular, Witness CBS saw IPJ Kayishema, Bourgmestre Ndahimana, Rushema and Kanyarukiga near the Statue of the Virgin Mary having a meeting in the morning.¹¹²⁹ Witness CBS testified that he believed Kanyarukiga was leading the attacks because Kanyarukiga was at the church with the “other officials” and was watching the events unfold but did nothing to stop the killings.¹¹³⁰ The witness said, “the bourgmestre in his commune had full powers to stop any reprehensible act.”¹¹³¹

1112 T. 16 September 2009, pp. 8, 36. 1113 T. 16 September 2009, pp. 8, 36. 1114 T. 16 September 2009, pp. 8-9. 1115 T. 16 September 2009, p. 36. 1116 T. 16 September 2009, p. 36. 1117 T. 16 September 2009, pp. 54-55; T. 17 September 2009, pp. 10-11. 1118 T. 17 September 2009, p. 13. 1119 T. 16 September 2009, p. 54. 1120 T. 16 September 2009, pp. 54-55, 56, 58. According to the witness, it was a German company called Astaldi. T. 16 September 2009, p. 58. 1121 T. 16 September 2009, p. 56. 1122 T. 16 September 2009, pp. 55, 57; T. 17. September 2009, pp. 13, 15. 1123 T. 16 September 2009, p. 57. 1124 T. 16 September 2009, p. 57; T. 17 September 2009, p. 13. 1125 T. 16 September 2009, p. 56. 1126 T. 16 September 2009, p. 57. 1127 T. 16 September 2009, p. 57. 1128 T. 16 September 2009, p. 56. 1129 T. 17 September 2009, pp. 12, 14. Witness CBS testified that he could see from the church grounds to the Statue of the Virgin Mary on that day. T. 17 September 2009, p. 15. 1130 T. 16 September 2009, pp. 56, 58. 1131 T. 16 September 2009, p. 56.

Page 100

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

97 402. Witness CBS testified that because the church was located at a high level, those taking refuge in the church were able to throw stones in order to resist the attackers.¹¹³² The attackers were able to overpower those in the church using grenades.¹¹³³ Witness CBS recounted that many people died during this event, and he “could not even count them.”¹¹³⁴ After the Tutsi were overpowered, they went back into the church.¹¹³⁵ Witness CBS, however, scaled a wall at about 12.30 p.m., went to the presbytery and then climbed onto the roof of the “poultry house” so that he could follow what happened.¹¹³⁶ Witness CBS stayed on the roof of this structure until around 9.00 p.m., when he headed to the river and then on to Gitarama and Kabgayi.¹¹³⁷ 403. On the evening of 15 April 1994, Witness CBS testified that Kanyarukiga was still at the Nyange Centre like the other “officials”.¹¹³⁸ 404. Apart from the vehicles that were transporting assailants to Nyange, Witness CBS saw two vehicles on 15 April 1994; a vehicle that Kayishema had “appropriated” from a Tutsi and a red vehicle belonging to Kanyarukiga.¹¹³⁹ Defence Witness

KG19 405. Witness KG19 arrived at the Nyange Trading Centre around 9.00 a.m. on 15 April 1994 and stayed for four or five hours. 1140 406. During the time the witness stood by the Statue of the Virgin Mary, he did not see Kanyarukiga, nor did he see the red-coloured vehicle that he believed belonged to Kanyarukiga.1141 Witness KG19 testified that there were no cars parked in front of Kanyarukiga's pharmacy or in the immediate vicinity of the pharmacy.1142 407. Witness KG19 testified there was an attack in the afternoon on 15 April 1994 that ended around 4.00 p.m.1143 He testified that there were many attackers who headed towards the Nyange Church and carried traditional weapons such as machetes, clubs and spears.1144 According to the witness, there was a lot of noise at the centre and people on the street were throwing stones.1145 The witness testified that he did not see any person throw a grenade on 15 April 1994.1146 408. Witness KG19 stated that he did not see any authority on 15 April 1994 as he stood at or near the Statue of the Virgin Mary.1147 He testified that on 15 April 1994, he thought he saw buses transporting people to the Nyange Church.1148

1132 T. 16 September 2009, p. 57; T. 17 September 2009, pp. 13, 16. 1133 T. 16 September 2009, pp. 56, 57; T. 17 September 2009, p. 16. 1134 T. 16 September 2009, p. 57. 1135 T. 16 September 2009, p. 57; T. September 2009, p. 16. 1136 T. 16 September 2009, p. 57; T. 17 September 2009, pp. 16, 18-19. 1137 T. 17 September 2009, p. 38. 1138 T. 16 September 2009, p. 57. 1139 T. 17 September 2009, pp. 15-16. 1140 T. 27 January 2010, p. 2; T. 27 January 2010, p. 5 (CS). The witness hid in a shop in the trading centre around 2.00 p.m. and stayed there for two hours. T. 27 January 2010, pp. 6, 15 (CS). 1141 T. 26 January 2010, p. 61 (CS); T. 27 January 2010, p. 7; T. 27 January 2010, p. 18 (CS). 1142 T. 27 January 2010, p. 7. 1143 T. 27 January 2010, p. 23; T. 27 January 2010, pp. 5-6 (CS). 1144 T. 27 January 2010, pp. 5, 12 (CS). 1145 T. 27 January 2010, pp. 5, 15-16 (CS). 1146 T. 27 January 2010, p. 23. 1147 T. 27 January 2010, p. 23. 1148 T. 27 January 2010, p. 23.

Page 101

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

98 Defence Witness Roger Mutume 409. Witness Roger Mutume, a Hutu, was 20 years old in April 1994 and was in the fourth year of secondary school at the Groupe Scolaire in Save.1149 He testified that Kanyarukiga was his neighbour in his native cellule.1150 410. Witness Mutume was present at the Statue of the Virgin Mary from around 9.00 a.m. to 2.30 p.m. on 15 April 1994.1151 During the time the witness was at the Statue of the Virgin Mary, he did not see Kanyarukiga or Kanyarukiga's car.1152 Witness Mutume believed that Kanyarukiga was at home on 15 April 1994 because he did not see Kanyarukiga outside.1153 He recalled that Kanyarukiga's pharmacy was closed on this day.1154 According to the witness, the doors of the CODEKOKI building were also closed.1155 The witness testified that the only people he saw on 15 and 16 April 1994 who he would regard as figures of authority were the communal inspector of judicial police and a teacher.1156 411. Witness Mutume testified that he saw a man nicknamed Rukara throw a grenade towards the Tutsi and heard the grenade explode.1157 Rukara climbed on the wall of one of the houses and threw the grenade towards a crowd of people coming down from the

church.¹¹⁵⁸ The crowd of people ran away, and the interahamwe and other attackers pursued the Tutsi, hacking them with machetes while they went back to the church.¹¹⁵⁹ Defence Witness François Sibomana ⁴¹². In April 1994, Witness Sibomana lived in Giko cellule, Ngobagoba secteur in Kivumu commune. He was a student at the Rwanda National University and was at his parents' house for the Easter holidays.¹¹⁶⁰ ⁴¹³. Witness Sibomana was present at the Statue of the Virgin Mary on 15 April 1994.¹¹⁶¹ He testified that he arrived at the Nyange Centre around 2.00. or 2.30 p.m.¹¹⁶² He stayed there for about one hour.¹¹⁶³ ⁴¹⁴. The witness testified that when he arrived, there was a crowd at the Statue of the Virgin Mary, and some people were on the road going towards the church.¹¹⁶⁴ Witness Sibomana testified that some of these people were carrying traditional weapons and "those of us members of the

¹¹⁴⁹ T. 27 January 2010, pp. 26, 34, 37. Witness Mutume testified that he lied about his age when he went into exile, so that he could continue to attend school. Since then, the witness has claimed to be two years younger than his actual age. T. 27 January 2010, p. 37. Witness Mutume was on vacation at his parents' house in Gaseke cellule, Ngobagoba secteur, Kivumu commune when the Rwandan President was killed on 6 April 1994. T. 27 January 2010, pp. 26-27. ¹¹⁵⁰ T. 27 January 2010, p. 27. ¹¹⁵¹ T. 27 January 2010, p. 31. ¹¹⁵² T. 27 January 2010, pp. 31, 32. ¹¹⁵³ T. 27 January 2010, p. 33. ¹¹⁵⁴ T. 27 January 2010, p. 31. ¹¹⁵⁵ T. 27 January 2010, p. 34. ¹¹⁵⁶ T. 27 January 2010, p. 47. ¹¹⁵⁷ T. 27 January 2010, pp. 47-48. ¹¹⁵⁸ T. 27 January 2010, pp. 47-48. ¹¹⁵⁹ T. 27 January 2010, p. 48. ¹¹⁶⁰ T. 1 February 2010, p. 25. ¹¹⁶¹ T. 1 February 2010, p. 28. ¹¹⁶² T. 1 February 2010, p. 29. He arrived at the centre coming from the burial of Dr. Juvénal Ntawurunga. T. 1 February 2010, p. 28. ¹¹⁶³ T. 1 February 2010, p. 31. ¹¹⁶⁴ T. 1 February 2010, p. 29.

Page 102

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

99 population were afraid.”¹¹⁶⁵ Some of the people wore banana leaves “to hide or mask their faces.”¹¹⁶⁶ ⁴¹⁵. According to the witness, from where he stood, he observed women and children watching what was happening.¹¹⁶⁷ The witness testified that, after he arrived at the centre he heard shouts, and some men went up to the church carrying spears and other traditional weapons.¹¹⁶⁸ Witness Sibomana testified that he saw hundreds of assailants on the road.¹¹⁶⁹ “[I]t was clear they were attacking the church.”¹¹⁷⁰ Stones were thrown from the bamboo plantation in front of the church and were falling on the road.¹¹⁷¹ The witness did not notice if there were any grenades being thrown but testified that the “situation was pure chaos.”¹¹⁷² ⁴¹⁶. The witness testified that people from Kibilira, especially intellectuals like the witness, understood the danger and decided to go back home.¹¹⁷³ ⁴¹⁷. Witness Sibomana estimated that 90 percent of the people who took refuge at the church were Tutsi.¹¹⁷⁴ ⁴¹⁸. The witness testified that there was a large crowd of people at the Ishusho Centre, but there was nothing in front of Kanyarukiga's pharmacy.¹¹⁷⁵ The witness did not see any vehicle in front of Kanyarukiga's pharmacy or in front of the shops at the centre since a large crowd of assailants carrying traditional weapons had assembled in front of the shops.¹¹⁷⁶ While the witness was in front of

the Statue of the Virgin Mary, he did not see Kanyarukiga and stated that Kanyarukiga was not present.¹¹⁷⁷ The witness testified that Kanyarukiga's pharmacy was closed, just like most of the shops at the centre that day.¹¹⁷⁸ 419. The witness he did not hear anyone say that Kanyarukiga was present on that day or the following days.¹¹⁷⁹ 420. Witness Sibomana then testified that, in light of the prevailing security situation, each person minded their own business, that the witness had no relationship with Kanyarukiga or the bourgmestre and that the bourgmestre was not the witness's neighbour.¹¹⁸⁰ The witness testified that he did not see any of the local authorities he knew at the Statue of the Virgin Mary.¹¹⁸¹

1165 T. 1 February 2010, p. 31. 1166 T. 1 February 2010, p. 29. Later, the witness testified that he did not know why people were dressed in banana leaves because he did not ask anyone. The witness added that many people from surrounding communes were walking around and he thought that maybe they wanted to identify one another. T. 1 February 2010, p. 47. 1167 T. 1 February 2010, p. 29. 1168 T. 1 February 2010, pp. 29, 41. 1169 T. 1 February 2010, p. 41. 1170 T. 1 February 2010, p. 29. 1171 T. 1 February 2010, p. 41. 1172 T. 1 February 2010, p. 41. 1173 T. 1 February 2010, p. 31. 1174 T. 1 February 2010, p. 41. 1175 T. 1 February 2010, p. 30. 1176 T. 1 February 2010, pp. 30, 31, 42. 1177 T. 1 February 2010, p. 31. The witness testified that he did not see Kayishema on 15 April 1994. T. 1 February 2010, p. 50. 1178 T. 1 February 2010, p. 30. 1179 T. 1 February 2010, p. 31. 1180 T. 1 February 2010, p. 44. 1181 T. 1 February 2010, p. 50.

Page 103

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

100 Defence Witness Fulgence Tugirumukiza 421. Witness Tugirumukiza went to Kanyarukiga's pharmacy to buy medicine on 15 April 1994.¹¹⁸² He arrived at the pharmacy around 10.00 a.m.¹¹⁸³ The witness saw a "huge crowd" at the Statue of the Virgin Mary when he arrived.¹¹⁸⁴ The witness recalled that some people were moving towards the church, but the witness went towards the pharmacy, which was closed.¹¹⁸⁵ There was nothing in front of the pharmacy, "save for passersby."¹¹⁸⁶ The witness did not see any vehicles in front of the pharmacy.¹¹⁸⁷ 422. Witness Tugirumukiza stayed at the Statue of the Virgin Mary for about an hour and then went home.¹¹⁸⁸ The witness did not see Kanyarukiga while he was at that location on 15 April 1994.¹¹⁸⁹ Witness Tugirumukiza said that, "[n]o one told [the witness] that he had seen him, and I heard no one say that he had seen him."¹¹⁹⁰ According to the witness, everybody knew when Kanyarukiga was present in the commune.¹¹⁹¹ 423. Witness Tugirumukiza saw a friend opposite the pharmacy, not far from the Statue of the Virgin Mary.¹¹⁹² The witness asked his friend, Habarurema, if the pharmacy assistant was around to open the pharmacy to serve him.¹¹⁹³ Habarurema told the witness that ever since he had arrived to the area, he had not seen the pharmacy open or the pharmacy assistant.¹¹⁹⁴ 424. Witness Tugirumukiza recalled that some of the attackers were covered with banana leaves.¹¹⁹⁵ There was fighting at the church, but the witness did not go there on 15 April 1994.¹¹⁹⁶ The witness could hear the moaning and shouting coming from the church.¹¹⁹⁷ Defence Witness KG15 425. Witness KG15 did not leave the

presbytery on Friday 15 April 1994 on account of the insecurity prevailing around the church.¹¹⁹⁸ According to the witness, the initial killings began on that day.¹¹⁹⁹ 426. Witness KG15 did not know Kanyarukiga in April 1994, nor had he ever heard anyone mention the name Kanyarukiga between 10 and 16 April 1994.¹²⁰⁰ 427. The witness testified that in the evening, whilst he and Fathers Seromba and others were in the courtyard of the presbytery, the bourgmestre and IPJ arrived.¹²⁰¹ The men conducted a 10 to 15

1182 T. 1 February 2010, pp. 54, 55. 1183 T. 1 February 2010, p. 55. 1184 T. 1 February 2010, p. 57. 1185 T. 1 February 2010, p. 57. 1186 T. 1 February 2010, p. 57. 1187 T. 1 February 2010, p. 57. 1188 T. 1 February 2010, pp. 58, 59. 1189 T. 1 February 2010, pp. 58, 64. 1190 T. 1 February 2010, p. 58. 1191 T. 1 February 2010, p. 65. 1192 T. 1 February 2010, pp. 57-58. 1193 T. 1 February 2010, p. 58. 1194 T. 1 February 2010, p. 58. 1195 T. 1 February 2010, p. 63. 1196 T. 1 February 2010, p. 64. 1197 T. 1 February 2010, p. 64. 1198 T. 11 February 2010, p. 16 (CS). 1199 T. 11 February 2010, p. 26 (CS). 1200 T. 11 February 2010, pp. 20, 21 (CS).

Page 104

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

101 minute meeting in the inner courtyard of the presbytery, under a tree in front of the living quarters, during which they discussed how to bury those who had been killed.¹²⁰² According to the witness, there was no discussion about the perpetrators of the killings.¹²⁰³ Witness KG15 did not see the bourgmestre or the IPJ go up to the bishop's room during this time, and there was no one else around.¹²⁰⁴ According to Witness KG15, the bourgmestre and the IPJ left together soon after the "small conversation".¹²⁰⁵ 428. Witness KG15 did not witness any other meeting of authorities on 15 April 1994,¹²⁰⁶ nor was he aware of anyone conducting a meeting. Defence Witness KG45 429. Witness KG45 testified that the Nyange Church was demolished on 16 April 1994.¹²⁰⁷ From this, she deduced that the pharmacy was closed on 14 April 1994 between 12.00 and 1.00 p.m.¹²⁰⁸ The witness did not go to the pharmacy on 15 April 1994 or 16 April 1994 because the security situation had deteriorated.¹²⁰⁹ Witness KG45 recalled that the pharmacy opened again four or five days after the Nyange Church was demolished, around 21 or 22 April 1994.¹²¹⁰ 5.3. Deliberations 430. Paragraphs 14 and 15 of the Amended Indictment place Kanyarukiga around Nyange Parish for the duration of the attacks on Nyange Church on 15 April 1994. The Defence "categorically denies" that the Accused was present at Nyange Parish on 15 April 1994.¹²¹¹ 431. The Chamber notes that it has found, in paragraphs 121 to 137, that the alibi for 15 April 1994 is not reasonably possibly true, for the reasons outlined in that section. 432. Notwithstanding that the alibi for 15 April 1994 is not reasonably possibly true, the Prosecution is still left with the burden to prove beyond reasonable doubt that the Accused was in Nyange on 15 April 1994 and that he was responsible for the attacks as outlined in paragraphs 14 and 15 of the Indictment. Attacks on Tutsi at Nyange Parish on the morning of 15 April 1994 433. Paragraph 14 of the Indictment alleges that there was an attack on Tutsi civilians at Nyange Parish on the morning of 15 April 1994, which was ordered and instigated by Kanyarukiga, Kayishema,

Ndungutse and Ndahimana. 434. It is not disputed that an attack occurred on the morning of 15 April 1994. Prosecution Witnesses CBY, CBN, CBR, CNJ, CBT, CBK, CDK, CDL, YAU and CBS each gave evidence to

1201 T. 11 February 2010, p. 16 (CS). 1202 T. 11 February 2010, pp. 17, 26 (CS). 1203 T. 11 February 2010, p. 26 (CS). 1204 T. 11 February 2010, p. 17 (CS). 1205 T. 11 February 2010, pp. 17, 26 (CS). 1206 T. 11 February 2010, p. 16 (CS). 1207 T. 21 January 2010, pp. 60, 61, 62 (CS). 1208 T. 21 January 2010, pp. 60, 70, 71 (CS). 1209 T. 21 January 2010, p. 61 (CS). 1210 T. 21 January 2010, p. 62 (CS). 1211 Defence Final Brief, para. 8.

Page 105

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

102 witnessing an attack at the Nyange Church on the morning of 15 April 1994.1212 Defence Witness Tugirumukiza also gave evidence as to an attack on the morning of 15 April 1994.1213 In addition, a number of Defence witnesses attested to witnessing some part of the attack in or around Nyange Parish on 15 April 1994.1214 Given these accounts largely corroborate each other concerning the attack itself and the time it took place and many of these witnesses were participants in the attacks or eyewitnesses to the attacks, the Chamber finds it established that an attack occurred on the morning of 15 April 1994 at Nyange Parish. 435. Paragraph 14 of the Amended Indictment goes on to allege that the assailants attacked the Tutsi with stones and traditional weapons, but the Tutsi repelled this attack. There does not appear to be any dispute that an attack, involving the use of stones and traditional weapons, occurred against the Tutsi taking refuge in the Nyange Church during the day of 15 April 1994.1215 Further, Prosecution Witnesses CBY, CBN, CBR, CNJ and CDL each gave evidence that the Tutsi repelled the assailants at this time.1216 436. Paragraph 14 alleges that a reservist named Rukara threw grenades, which killed and wounded many. The Chamber notes that all Prosecution witnesses provide evidence as to at least one grenade being thrown at the Tutsi, and a number of these witnesses attest to a person nicknamed Rukara,1217 throwing a grenade in the early afternoon.1218 A number of Prosecution

1212 Witness CBN stated that the throwing of stones began around 9.00 or 10.00 a.m. T. 1 September 2009, p. 60; T. 2 September 2009, p. 23. Witness CBK testified that after a meeting of the authorities at the parish around midday, grenades were thrown at the Tutsi. T. 3 September 2009, pp. 8-9, 18. Witness CNJ arrived at the church between 11.00 a.m. and 1.00 p.m., and the attacks were in motion. T. 7 September 2009, pp. 11-13. Witness CBY stated that the attacks began around 11.00 a.m. T. 8 September 2009, p. 46. Witness CBR testified that he arrived at the Statue of the Virgin Mary between 9.00 and 10.00 a.m. and recalled that the attacks began around midday. T. 9 September 2009, pp. 25, 58, 59. Witness CDL stated that he arrived in the area of Nyange Church at 11.00 a.m., and the attacks had already begun. T. 10 September 2009, p. 32; T. 11 September 2009, pp. 13, 17. Witness CBT arrived at the Nyange Church around midday and

people had already been killed at that time. T. 14 September 2009, p. 39. Witness YAU stated that a bus arrived around 11.00 a.m. or 12.00 p.m. which she believed brought attackers to the church. T. 15 September 2009, pp. 18, 43. Witness CDK arrived at the church between 11.00 and 11.30 a.m., and a confrontation was occurring at that time. T. 16 September 2009, p. 3. Witness CBS estimated that the attack began at 9.00 or 9.30 a.m. T. 16 September 2009, pp. 54, 57; T. 17 September 2009, p. 13. 1213 Witness Tugirumukiza was at the Statue of the Virgin Mary at 10.00 a.m. for an hour, and at that time there was a huge crowd. T. 1 February 2010, pp. 55, 57, 58. 1214 Witness Mutume, T. 27 January 2010, pp. 31, 44, 47-48; Witness Sibomana, T. 1 February 2010, p. 29 (“[I]t was clear that they were attacking the church.”). Witness KG19 testified that he believed the attack was in the afternoon. T. 27 January 2010, p. 5 (CS). He later said that the attack began in the afternoon and ended around 4.00 p.m. T. 27 January 2010, p. 23. Witness Tugirumukiza described fighting at the church, but he did not go to the church itself. T. 1 February 2010, p. 64. 1215 The Defence notes in its Final Brief that, “[t]he underlying events in the Prosecution’s case may or may not have unfolded generally as one or other of the Prosecution witnesses have described.” Defence Final Brief, para. 4. Prosecution witnesses testified as follows: Witness CBN, T. 1 September 2009, pp. 60-61; T. 2 September 2009, p. 23; Witness CNJ, T. 7 September 2009, pp. 56-57, 66; Witness CBY, T. 8 September 2009, p. 46; Witness CBR, T. 9 September 2009, p. 25; Witness CDK, T. 16 September 2009, pp. 3, 6; Witness CBS, T. 16 September 2009, pp. 54, 56-57; T. 17 September 2009, pp. 13, 15-16. Defence Witness KG19 corroborates evidence regarding the throwing of stones but did not indicate who threw the stones. He also corroborates the evidence that traditional weapons were used. T. 27 January 2010, pp. 5-6, 15 (CS). Witness Sibomana stated that attackers were carrying traditional weapons. T. 1 February 2010, pp. 29, 30, 31. 1216 Witness CBR, T. 9 September 2009, p. 25; Witness CNJ, T. 7 September 2009, p. 56; Witness CBY, T. 8 September 2009, p. 46; Witness CBN, T. 1 September 2009, pp. 60, 61; Witness CDL, T. 10 September 2009, p. 32. 1217 Prosecution Witnesses CBY, CBR, CNJ, CDL, CBT, CDK and CBK recalled that Rukara threw the grenade. Witness CBK, T. 3 September 2009, p. 18; Witness CNJ, T. 7 September 2009, pp. 16, 33, 74-75; Witness CDK, T. 16 September 2009, p. 6; Witness CBY, T. 8 September 2009, p. 46; T. 14 September 2009, pp. 17-19; Witness CBR, T. 9 September 2009, pp. 25, 66; Witness CDL said that communal police, gendarmes and a reservist named Rukara were all throwing grenades. T. 10 September 2009, pp. 32-33; Witness CBT, T. 14 September 2009, p. 48. Defence Witness Mutume personally witnessed the throwing of a grenade by Rukara on 15 April 1994. T. 27 January 2010, pp. 47-48.

Page 106

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

103 witnesses provided evidence that some Tutsi were killed as a result of these attacks. 1219 The Chamber further finds that the Tutsi taking refuge in the Nyange Church were targeted by Hutu assailants who threw stones and attacked them with traditional weapons. The Tutsi then repelled the Hutu attackers, which led to the throwing of at least one grenade by Rukara at the group of

Tutsi later in the afternoon and the death of many Tutsi civilians. 437. Along with several other Prosecution witnesses, Witness CBS testified that the assailants were shouting loudly “[e]xterminate them all. Let no one escape.”¹²²⁰ In addition, Witness CBN corroborates this fact as he testified that on 15 April, as the attacks began, the assailants said “[l]et us exterminate them.”¹²²¹ The witness recounted that others were shouting and that “[t]hey sang different slogans.”¹²²² As discussed below, the Chamber finds both Witnesses CBN and CBS credible.¹²²³ Further, given that Witnesses CBS and CBN were present at the church on this date and are survivors of the attacks, this gives further weight to their account of what was being said at the church by attackers on 15 April 1994. Thus, the Chamber finds it established beyond reasonable doubt, that the attackers were shouting loudly “[e]xterminate them all. Let no one escape.” 438. Evidence is provided by Prosecution Witnesses CBY, CBS (this witness took refuge in the presbytery), CBR and CNJ that those Tutsi who survived this attack took refuge in the Nyange Church and locked themselves inside.¹²²⁴ Again, because there is corroboration amongst the Prosecution witnesses on this fact, the Chamber finds it established that the Tutsi at Nyange Parish took refuge in the Nyange Church after being overpowered by the Hutu assailants. 439. The Chamber will now consider evidence relating to Fulgence Kayishema, Téléphore Ngundutse and Grégoire Ndahimana.

¹²¹⁸ The following witnesses gave evidence regarding the time the grenade were thrown. Witness CBN states that he left between 1.00 and 2.00 p.m., after grenades had begun to be thrown. T. 1 September 2009, p. 61. Witness CNJ, T. 7 September 2009, p. 56. Witness CBY said that Rukara threw the grenade before noon. T. 14 September 2009, p. 19. Witness CBR recalled the grenade was thrown around 1.00 p.m. T. 9 September 2009, pp. 25, 66. Witness CBS stated that the grenade was thrown during the course of the attacks. T. 16 September 2009, pp. 56-57; T. 17 September 2009,

- p. 16. Defence Witness KG19 testified that the attack finished around 4.00 p.m. T. 27 January 2010, p. 23. Witness YAU stated that grenades were thrown but not say by whom or when. T. 15 September 2009, p. 19. ¹²¹⁹ Witness CDK, T. 16 September 2009, pp. 6, 28-29; Witness CDL, T. 10 September 2009, pp. 33-34; Witness CBS, T. 16 September 2009, p. 57. Prosecution Witnesses CBY, CBS, CBN, CBR, CNJ, CDL, CBT and CDK all either witnessed the deaths of Tutsi at the Nyange Church or testified that they saw bodies at the Nyange Church in the afternoon of 15 April 1994. Witness CBT, T. 14 September 2009, pp. 39, 72; Witness CBN, T. 1 September 2009, pp. 61, 64; Witness CNJ, T. 7 September 2009, p. 19; Witness CBR, T. 9 September 2009, pp. 25-26; Witness CDL, T. 10 September 2009, p. 33. Witness CDK did not testify to seeing bodies directly but said bulldozers were used to move the bodies of Tutsi on 15 April 1994. T. 16 September 2009, pp. 8-9; Witness CBY, T. 8 September 2009, p. 46; Witness CBS, T. 16 September 2009, p. 57. ¹²²⁰ T. 16 September 2009, p. 57. In addition, witnesses who took part in the attacks at Nyange Parish recounted the following. Witness CNJ testified that, “we could not exterminate all the Tutsi” at the Nyange Church on 15 April 1994. T. 7 September 2009, p. 20. Witness CNJ further testified that, “[o]ur objective was to exterminate the Tutsis totally.” T. 7 September 2009, p. 23. Witness CBR testified in the context of the attacks on 16 April 1994 that, “[t]he objective at the level of the entire

commune was the extermination of the Tutsis who resided there.” T. 9 September 2009, p. 32. Witness CDK also testified that, in relation to the attempted destruction of the church, “[t]hose people were trying to destroy the church. So that the inyenzi who were inside the church should die”. T. 16 September 2009, p. 8. 1221 T. 1 September 2009, p. 60. 1222 T. 1 September 2009, p. 60. Witness YAU stated that the assailants’ intention was to kill the Tutsi refugees (but she did not say how she knew this). T. 15. September 2009, p. 16. Witness CNJ said simply, “we wanted to exterminate the Tutsis”. T. 8. September 2009, p. 4. 1223 See paragraphs 456-460. 1224 Witness CBY, T. 8 September 2009, p. 46; Witness CBS, T. 16 September 2009, p. 57, Witness CBR, T. 9 September 2009; p. 25; Witness CNJ, T. 7 September 2009, p. 16.

Page 107

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

104 440. Almost all Prosecution witnesses testify that they saw Fulgence Kayishema, Grégoire Ndahimana, Télesphore Ndungutse or Athanase Seromba (or all of them) prior to or during the attacks on the morning of 15 April. Witnesses CBS, CBR, CBT, CBK, CDL, YAU and CDK place at least one of Kayishema, Ndungutse or Ndahimana at Nyange Church prior to the attacks on the morning of 15 April.¹²²⁵ Each of Witnesses CBK, CBT, CDK and YAU are regarded with caution by the Chamber, particularly without corroboration. In that regard, the Chamber notes that Witnesses CBY, CBS and CBR consistently place all three of these people at the Nyange Church at some point prior to the attacks. These three witnesses, as discussed elsewhere in these deliberations, are regarded as credible by the Chamber.¹²²⁶ Further, Witnesses CNJ and CBR place at least one of Rushema, Kayishema, Ndahimana or Ndungutse around the Statue of the Virgin Mary prior to or during the attacks on the morning of 15 April.¹²²⁷ Accordingly, the Chamber finds it established that Fulgence Kayishema, Grégoire Ndahimana and Télesphore Ndungutse were at the Nyange Church and surrounds (including the Statue of the Virgin Mary) prior to the attacks on the morning of 15 April. 441. The Chamber notes that Witnesses CBT, CDK and CBR attest to being called to Nyange Church on 15 April 1994 by IPJ Kayishema, who was using a public address system or loudspeaker to call the members of the public to defend the Nyange Parish compound because it was being attacked by inyenzi.¹²²⁸ Witness CBS provides circumstantial evidence when he testified that a vehicle was being used to transport assailants.¹²²⁹ The Defence does not address this evidence. The Chamber recalls that both Witnesses CBT and CDK were accomplices to the attacks on Nyange Parish and therefore treats them with appropriate caution. The Chamber regards Witness CBR’s evidence as generally credible. Similarly, the Chamber regards the circumstantial support provided by Witness CBS as also credible. The Chamber therefore regards Witness CBR’s corroboration of Witnesses CBT and CDK, in addition to Witness CBS’s evidence, as sufficient to establish that Kayishema encouraged the Hutu population to attend the Nyange Church on 15 April 1994. 442. Witness CNJ stated that Ndahimana, Kayishema, Ndungutse, Habiyaambere and Kiragi welcomed the assailants when the

witness arrived at the Nyange Trading Centre, and Ndahimana requested that they cover their bodies with banana leaves so as to distinguish themselves from the Tutsi taking refuge in the church.¹²³⁰ Witness CNJ is a single accomplice witness who the Chamber

1225 Witness CBK placed Ndahimana, Kayishema, Rushema, Mbakirirehe and Kanyarukiga at a meeting at the presbytery around midday on 15 April, which was followed by grenades being thrown. T. 3 September 2009, pp. 8-9,

18. Witness CBS placed Kayishema, Ndahimana and Kanyarukiga at the Nyange Parish and/or the Nyange Trading Centre during the attacks. T. 16 September 2009, pp. 56, 57. Witness CBR recounted that Ndahimana, Kayishema, Habiyaambere, Ndungutse, Kanyarukiga and others moved from the Statue of the Virgin Mary to the Nyange Parish Presbytery on the morning of 15 April 1994. T. 9 September 2009, pp. 17-18. Witness CDL saw Seromba at the Nyange Parish on the morning of 15 April. T. 10 September 2009, p. 33. Witness YAU saw Seromba, Kayishema, Ndahimana and Kanyarukiga at the church prior to the morning attack with grenades. T. 15 September 2009, pp. 18, 19. Witness CBT lists Kayishema, Ndungutse, Habiyaambere and Kanyarukiga as authorities who were present during the killings. T. 14 September 2009, pp. 39-40. 1226 See paragraphs 455-458, 591-593. 1227 Witness CNJ testified that when he arrived outside Kanyarukiga's pharmacy (between 11.00 a.m. and 1.00 p.m.) Ndahimana, Kayishema, Ndungutse and Habiyaambere were also around that area. T. 7 September 2009, pp. 12, 13. This witness also noted that Kanyarukiga was standing with Ndahimana before the morning attacks and that Kayishema was present throughout the attacks. T. 7 September 2009, pp. 13, 16-17. Witness CBR testified that when he arrived at the Statue of the Virgin Mary between 9.00 and 10.00 a.m. he saw Ndahimana, Kayishema, Habiyaambere and Ndungutse around that area. T. 9 September 2009, p. 16. 1228 Witness CBT, T. 14 September 2009, pp. 38-39. Later in his testimony, Witness CBT testified that he was instructed by leaders who included the communal conseillers, the judicial police inspectors, the assistant bourgmestre and the communal police officers. T. 14 September 2009, p. 48. Witness CDK, T. 16 September 2009, p. 2; Witness CBR, T. 9 September 2009, p. 16. See also T. 9 September 2009, pp. 6, 11. 1229 T. 17 September 2009, p. 13. The witness stated that the assailants were being "led by leaders". 1230 T. 7 September 2009, pp. 11-12, 13.

Page 108

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

105 regards as unreliable without corroboration. Therefore, the Chamber does not find it established, based on Witness CNJ's evidence, that Ndahimana, Kayishema, Ndungutse and Habiyaambere welcomed assailants and that Ndahimana requested that they cover themselves with banana leaves. Similarly, although CNJ gave evidence that Kayishema ordered the grenade attack against the Tutsi,¹²³¹ the Chamber does not accord any weight to this evidence for the reasons discussed above. 443. Witness CBT also stated that Kayishema asked "people to go cut

grass, to construct a ladder that would enable or help people climb up and throw the fuel through the windows.”¹²³² The Chamber has not found Witness CBT to be reliable without corroboration, and as such, does not accord weight to Witness CBT’s evidence. Therefore, the Chamber does not find it established that Kayishema asked the attackers to cut grass and construct a ladder in order to throw fuel through the windows of the church. Kanyarukiga’s Role 444. The Chamber will now turn to the question of what role, if any, Kanyarukiga had in the attack on the morning of 15 April 1994. ⁴⁴⁵. The Prosecution has led evidence implicating the Accused in meetings at the Nyange Parish on 15 April 1994. The Chamber notes that the Amended Indictment does not include any express charge that the Accused took part in meetings on 15 April 1994. The Chamber further notes that the original indictment included a paragraph that mentioned a meeting on 15 April 1994 at Nyange Parish with Kanyarukiga, Seromba, Kayiranga and Kayishema among others.¹²³³ The Prosecution removed this paragraph from the Amended Indictment, which suggests that it did not intend to lead evidence regarding a meeting on 15 April 1994. Ordinarily, the Chamber should disregard such evidence.¹²³⁴ The Chamber notes, however, that the evidence provided by Prosecution witnesses regarding meetings on 15 April 1994 is not factually similar, in any way, to the allegation removed from the original indictment. ⁴⁴⁶. Prosecution Witness CBK testified to a meeting occurring on 15 April 1994 at the Nyange Parish before midday and to a subsequent meeting in the presbytery between 2.30 p.m. and 3.30 p.m.¹²³⁵ Witness CBK’s evidence regarding the first meeting is outlined in the witness summary annexed to the Prosecution’s Pre-Trial Brief, however, the afternoon meeting is not mentioned in this summary. Evidence regarding both meetings was discussed by the witness in a pre-trial statement.¹²³⁶ The Defence objected to this evidence on the basis that there was no notice.¹²³⁷ The

¹²³¹ T. 7 September 2009, pp. 15-16. ¹²³² T. 14 September 2009, p. 47. ¹²³³ [Original] Indictment, para. 13. The paragraph reads: “On or about 15 April 1994, a bus arrived at Nyange Parish, from KIBUYE préfecture, transporting armed [i]nterahamwe and a priest named KAYIRANGWA. Soon after, a meeting held among Gaspard KANYARUKIGA[,] [F]ather SEROMBA, priest [sic] KAYIRANGWA[,] Fulgence KAYISHEMA, and others unknown to the Prosecution.” ¹²³⁴ Setako, Judgement (TC), paras. 44, 46. ¹²³⁵ T. 3 September 2009, pp. 8-9, 21. Witness CBK testified that both meetings were attended by Gaspard Kanyarukiga, Christophe Mbakirirehe, Grégoire Ndahimana, Fulgence Kayishema, Anastase Rushema and others. ¹²³⁶ Both meetings, morning and afternoon, were mentioned by the witness in his statement of 2002 (Defence Exhibit D14(A) (Statement of Witness CBK dated 24 October and 19 & 20 November 2002)). This statement is not consistent with his oral testimony and the testimony of others about the progression of the destruction of the church. Witness CBK’s 2000 statement mentions the afternoon meeting also. Defence Exhibit D16(A) (Statement of Witness CBK dated 15 August 2000). ¹²³⁷ Defence Final Brief, paras. 207-208; T. 3 September 2009, p. 10. The Chamber has noted that the Defence objected to a leading question during the presentation of this evidence, however, aside from this did not object to the introduction of this evidence, either at trial or in its motion for exclusion of evidence. In the Defence’s closing brief it raises an objection to this evidence and cites a transcript reference. However, upon review of the transcript, the objection was not directly about the meeting.

Page 109

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

106 Chamber notes, however, that the location of the meetings and the attendees of the meetings reflect the people and location outlined in paragraphs 14 and 15 of the Amended Indictment, and the evidence of these meetings relates to events at the Nyange Parish. In this way, the meetings and the attacks at Nyange Parish form one event as outlined in the relevant paragraphs of the Amended Indictment. This piece of evidence relates to whether Kanyarukiga was present at the Nyange Parish on 15 April 1994, and the Chamber will treat it as such. Therefore, the Chamber will consider this evidence. 447. Similarly, Witness CBY provided evidence regarding a meeting on 15 April 1994 in the presbytery of the Nyange Church, the attendees being Kayishema, Ndungutse, Ndahimana, “Théodomir” and the Accused.¹²³⁸ For the reasons stated with regard to Witness CBK’s testimony above, the Chamber will consider this evidence in its deliberations. 448. The Chamber notes that Witness CBN testified to seeing Kanyarukiga opposite his pharmacy in the “company of several other members of the population” during the attacks on 15 April 1994.¹²³⁹ The witness alluded to a meeting that occurred during this time, which Kanyarukiga attended. Although the Chamber has considered that this evidence relates to Kanyarukiga being near the Statue of the Virgin Mary, not at the Nyange Parish, the area in which the attacks and events outlined in paragraphs 14 and 15 occurred, includes the area around the Statue of the Virgin Mary. Therefore, for the same reasons discussed above, the Chamber will consider this evidence in its deliberations. 449. The Chamber recalls that in its 15 January 2010 decision on the Defence motion for exclusion of evidence, the Trial Chamber reserved until the judgement its decision on whether to exclude Prosecution evidence of certain meetings allegedly attended by the Accused. In particular, the Chamber reserved its decision with regard to the evidence of Witnesses CBR and CDK regarding Kanyarukiga attending a meeting at the CODEKOKI on 15 April 1994.¹²⁴⁰ 450. Prosecution Witnesses CBR¹²⁴¹ and CDK’s ¹²⁴² testimony regarding meetings on 15 April 1994 can be distinguished from the meetings discussed above in that they do not relate at all to paragraphs 14 and 15 of the Indictment. These witnesses testified about a meeting at the CODEKOKI building, which is a more distinct geographical location to that location pleaded in the relevant Indictment paragraphs.¹²⁴³ Further, the evidence given by these witnesses describes a purposeful meeting where the participants go inside the CODEKOKI building to have a meeting. This can be distinguished from the evidence of Witnesses CBN, CBK and CBY above, which relate to gatherings of people around the Nyange Parish, presbytery and Statue of the Virgin Mary. The

¹²³⁸ T. 8 September 2009, pp. 45-46. See above footnote 929. ¹²³⁹ T. 1 September 2009, p. 61. ¹²⁴⁰ Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010, para. 17. ¹²⁴¹ There is no mention of this meeting in the summary of Witness CBR’s anticipated testimony in The Prosecutor’s Pre-Trial Brief. Witness CBR mentions a meeting in a building on 15 April 1994 in the statement he provided on 9 October 2001; however it is unclear what building the witness is referring to. Defence Exhibit

D27(B) (Statement of Witness CBR dated 9 October 2001), p. 3. The Defence objected to the introduction of this evidence at trial (T. 9 September 2009, p. 19), in its motion for exclusion of evidence (Motion for Stay of Proceedings, or Exclusion of Evidence Outside the Indictment, filed on 18 December 2009, p. 28) and in its closing brief (Defence Final Brief, paras. 204-206). The Chamber reserved its decision with regard to the Defence request to exclude this evidence in its decision of 15 January 2010. Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010, para. 17. 1242 The Defence objected to the introduction of this evidence at trial (T. 16 September 2009, p. 4), in its motion for exclusion of evidence (Motion for Stay of Proceedings, or Exclusion of Evidence Outside the Indictment, filed on 18 December 2009, p. 28) and in its closing brief (Defence Final Brief, paras. 204-206). 1243 T. 9 September 2009, p. 19; T. 16 September 2009, p. 3.

Page 110

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

107 Prosecution mentioned a meeting at the CODEKOKI building briefly in its Pre-Trial Brief.¹²⁴⁴ However, this meeting was not mentioned in either Witness CBR or Witness CDK's summary annexed to the Prosecutor's Pre-Trial Brief. The Chamber notes that the Defence objected to the introduction of this evidence on a number of occasions. The Chamber recalls that an accused may only be convicted of criminal conduct correctly pleaded in the indictment.¹²⁴⁵ The Chamber therefore will not consider this evidence in its deliberations on the basis that this is a new allegation of which the Accused has not been given sufficient notice. 451. Turning now to the evidence on its merits, Prosecution Witnesses CBR, 1246 CNJ,¹²⁴⁷ CBT¹²⁴⁸ and CDK¹²⁴⁹ each place the Accused at the Nyange Church on 15 April 1994 in the company of the local authorities. They each testify to seeing at least one of Kanyarukiga, Kayishema, Ndungutse and Ndahimana at the parish or the Statue of the Virgin Mary on 15 April 1994. 452. The Defence submits, both in cross-examination and in its closing brief, that not only were these four witnesses (in addition to Witness CDL) found guilty of perpetrating crimes at Nyange Parish by the Gacaca courts, but they were also incarcerated together in the Kibuye Prison and therefore should be treated with "maximum" caution.¹²⁵⁰ It has also been submitted by the Defence that Witnesses CBR, CNJ, CBT, CDK and CDL all took part in Gacaca sessions regarding the destruction of the Nyange Church in Kibuye Prison, which suggests collusion, and as a result, these witnesses should be treated with further caution.¹²⁵¹ It is noted that a number of these witnesses admitted to taking part in Gacaca sessions regarding the events at Nyange Parish.¹²⁵² Further, these five witnesses took part in a sensitisation program whilst in Kibuye Prison, which encouraged

1244 The Prosecutor's Pre-Trial Brief, para. 40. 1245 Muvunyi, Judgement (AC), para. 18, citing Nahimana et al., Judgement (AC), para. 326; Ntagerura et al., Judgement (AC), para. 28; Kvočka et al., Judgement (AC), para. 33. 1246 Witness CBR testified to seeing a number of "authorities," including Bourgmestre Ndahimana, IPJ Kayishema, businessman Gaspard Kanyarukiga, the President of the Court Habiyaambere and the teacher Ndungutse. T. 9 September 2009, p. 23. He

also testified to seeing Kanyarukiga at the Statue of the Virgin Mary early on the morning of 15 April 1994 and again around midday at the same place. T. 9 September 2009, pp. 16, 58. This witness identified the Accused in court. T. 9 September 2009, p. 31. 1247 Witness CNJ said that he arrived at Nyange Parish between 11.00 a.m. and 1.00 p.m. and was received by Ndahimana, Kayishema, Ndungutse, Kiragi and Habiyaambere and these men congratulated them for coming as reinforcement. T. 7 September 2009, pp. 13, 56. He also stated that after the grenade attack, Habiyaambere, Kayishema, Ndungutse and the Accused were present at the Statue of the Virgin Mary. T. 7 September 2009, pp. 16-17. This witness identified the Accused in court. T. 7 September 2009, p. 35. 1248 Witness CBT saw a number of “authorities” at the Nyange Parish, including Kanyarukiga, Habiyaambere, Gaca Butelezi (a presiding judge), IPJ Kayishema and Télesphore Ndungutse. T. 14 September 2009, p. 40. Witness CBT saw the Accused on 15 April 1994 in a group of “officials” saying to these people that all inyenzi who were seeking refuge at the Nyange Church had to be killed. T. 14 September 2009, pp. 46, 49. This witness identified the Accused in court. T. 14 September 2009, pp. 49-50. 1249 Witness CDK saw the Accused, Kayishema, and Ndahimana together with those people that were gathered in the square at the Statue of the Virgin Mary. Kanyarukiga met with the people who were at the square and he talked with them, prior to the attacks on the morning of 15 April 1994. Witness CDK also saw Kanyarukiga around the time that the grenade was thrown. T. 16 September 2009, pp. 6-7. This witness identified the Accused in court. T. 16 September 2009, p. 13. 1250 Defence Final Brief, paras. 326-329. 1251 The Defence submits that there is direct evidence of collusion between these witnesses and Witness CDL. Defence Final Brief, para. 328. The Chamber has not been provided with any direct evidence of collusion. 1252 Defence Final Brief, paras. 328-329; Witness CDL, T. 10 September 2009, pp. 73-74; Witness CNJ, T. 8 September 2009, pp. 10-12; Witness CDK, T. 16 September 2009, p. 21; Witness CNJ, T. 8 September 2009, pp. 10-11; Witness CBR, T. 9 September 2009, pp. 49-52. See also Defence Exhibit D28 (List of Protected Names shown to Witness CDL); Defence Exhibit D46 (List of Protected Names shown to Witness CDK); Defence Exhibit D18 (List of Protected Names shown to Witness CNJ); Defence Exhibit D25 (List of Protected Names shown to Witness CBR); Defence Exhibit D41 (List of Protected Names shown to Witness CBT). See also Personal Identification Sheets of Witnesses CDK, CNJ, CBR, CDL, CBT.

Page 111

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

108 prisoners to confess their crimes and provide details of others who took part in those crimes in order to reduce their sentences.¹²⁵³ 453. The Chamber recalls its discussion of the jurisprudence regarding accomplice evidence.¹²⁵⁴ The Chamber has concerns about the effect that the Gacaca sessions and sensitisation program may have on the testimony of these witnesses. Specifically, the Chamber regards Witnesses CBT, CDL and CNJ with greater caution than Witnesses CBR and CDK. There is evidence that Witness CDL was more involved in the attacks than he testified to, which the Chamber believes may influence the extent to which he

implicates the Accused in the attacks on 15 April 1994.¹²⁵⁵ The Chamber has discussed its concerns with regard to Witness CNJ and CBT in paragraphs 468 and 496, which are serious in the Chamber's view. With these concerns in mind, the Chamber is extremely cautious with regard to these two witnesses. However, while the Chamber is mindful of the witnesses' incarceration together and treats their evidence with caution, it does not believe that this fact alone invalidates their testimony. 454. Witness YAU corroborates that Kanyarukiga was at the church on the morning of 15 April 1994.¹²⁵⁶ Although this witness identified the Accused in court,¹²⁵⁷ the Chamber has serious reservations with regard to this witness and believes that she lends only corroborative value to the evidence that Kanyarukiga was present at Nyange Church on the morning of 15 April. The Chamber will look to more credible witnesses for corroboration of Kanyarukiga's presence. 455. The Chamber notes that Witnesses CBK, CBN, CBS, and CBY, who are not accomplices to the attacks in Nyange, also place Kanyarukiga at Nyange Parish on the morning of 15 April 1994. Witness CBK placed the Accused at the Nyange Parish on 15 April 1994¹²⁵⁸ along with Bourgmestre Ndahimana, IPJ Kayishema, Brigadier Christophe Mbakirirehe and Father Seromba who were all "heading" the assailants.¹²⁵⁹ In addition, Witness CBK provides evidence that Kanyarukiga, along with Grégoire Ndahimana, IPJ Kayishema, Brigadier Christophe Mbakirirehe and Anastase Rushema, met with the Hutu assailants prior to the attacks on 15 April 1994 in the Nyange Parish grounds and subsequent to this, the assailants launched grenades and shot at the church.¹²⁶⁰ Witness CBN gave evidence that Kanyarukiga was with the assailants opposite Kanyarukiga's pharmacy between 9.00 and 10.00 a.m. on 15 April 1994.¹²⁶¹ Witness CBS also saw the Accused at the Statue of the Virgin Mary in the company of Ndahimana and Rushema during

¹²⁵³ Witness CBR, T. 9 September 2009, pp. 48, 49; Witness CNJ, T. 7 September 2009, p. 55; Witness CBT, T. 14 September 2009, p. 49; Witness CDK, T. 16 September 2009, p. 20. Witness CDL is also an accomplice and admitted to this. T. 10 September 2009, pp. 71-72, 74. ¹²⁵⁴ See paragraph 49. ¹²⁵⁵ Witness CNJ, T. 7 September 2009, pp. 25-26; Witness CBT, T. 14 September 2009, p. 27 (CS); Witness CDK, T. 16 September 2009, p. 48. Witness CBR also gave evidence with regard to Witness CDL, however the Chamber does not reference it here for witness protection reasons. ¹²⁵⁶ T. 15 September 2009, pp. 18-19. The witness refers to Kanyarukiga being at the church on the morning of the "third day" as this witness does not give dates during her testimony. The Chamber has inferred that Witness YAU's account of the "third day" relates to 15 April 1994. ¹²⁵⁷ T. 15 September 2009, pp. 30-31. ¹²⁵⁸ T. 3 September 2009, pp. 7, 9. Witness CBK positively identified the Accused in court. T. 3 September 2009, pp. 37-38. ¹²⁵⁹ T. 3 September 2009, p. 7-8. ¹²⁶⁰ T. 3 September 2009, p. 9. ¹²⁶¹ T. 1 September 2009, pp. 61, 64. The Chamber notes that in his statement dated 2 February 1996, Witness CBN said that he saw Kanyarukiga every day the witness was at the Nyange Church. Defence Exhibit D4 (Statement of Witness CBN dated 2 February 1996), p. 4. Witness CBN also testified that he saw the Accused with Kayishema and Mbakirirehe opposite Kanyarukiga's pharmacy during the attacks on the morning of 15 April 1994, however, this witness then went on to say that he saw Kanyarukiga only once on 15 April. T. 1 September 2009, pp. 61, 64. The Chamber has considered this.

Page 112

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

109 the attack on the morning of 15 April 1994.¹²⁶² Witness CBY testified that on the morning of 15 April 1994, Kanyarukiga arrived at the parish along with Kayishema, Ndungutse, Grégoire Ndahimana and Théodomir (nicknamed Kiragi), and they met with “the Priest” for one hour.¹²⁶³ 456. The Defence submits that Witnesses CBK, CBN and CBS each have a motivation to falsely accuse Kanyarukiga given their connections with persons in Kivumu commune who have or have had interests in property that Kanyarukiga owned in 1994.¹²⁶⁴ The Defence submits that Witnesses CBK, CBS and CBN have business interests with these persons in Kivumu commune and were involved in appropriating or destroying certain pieces of Kanyarukiga’s property.¹²⁶⁵ Aside from Witnesses CBS and CBN admitting that they knew one of the people the Defence has made allegations about,¹²⁶⁶ these witnesses denied all allegations raised by the Defence.¹²⁶⁷ The Defence has not presented any evidence to rebut the denial of these witnesses. As such, the Chamber does not consider the allegations made by the Defence to cast doubt on the evidence of these witnesses. 457. Witness CBN is a Tutsi survivor of the attacks on 15 April and provides consistent evidence with regard to the Accused’s presence at Nyange Parish. The Chamber has considered the fact that Witness CBN participated in a class action for damages against Athanase Seromba, Grégoire Ndahimana and Fulgence Kayishema (among others), which applied for compensation for loss of Tutsi family members.¹²⁶⁸ The Defence pointed out that Kanyarukiga was not included in this civil action and questioned the witness as to why the Accused was excluded.¹²⁶⁹ The witness explained that the Accused was omitted because this action did not include business people.¹²⁷⁰ The Chamber accepts this explanation. Again, the Defence provided no further evidence to support their allegation. The Chamber therefore finds Witness CBN’s account to be credible. 458. Witness CBS, for his part, denied participating in this civil action for damages.¹²⁷¹ The Defence noted that, notwithstanding this denial, the witness’s name appeared on a document regarding this civil claim.¹²⁷² The Chamber has been provided with this document listing Witness CBS as one of those people bringing this claim, however, this document bears no physical signature of the witness.¹²⁷³ The Chamber does not find this to be sufficient to cast doubt on this witness’s testimony. Further, the Defence noted that Witness CBS denied giving oral evidence in front of the Specialized Chamber of the Kibuye Court of First Instance regarding proceedings against a number of “leaders” of the attacks at Nyange Parish.¹²⁷⁴ The Chamber notes that Witness CBS stated that he only gave a written statement to the Kibuye Court of First Instance,¹²⁷⁵ which is confirmed by the

¹²⁶² T. 17 September 2009, p. 12. Witness CBS testified that Kanyarukiga was leading the attacks along with “other officials” because they were at the church and were watching the events unfold but did not take any action to stop the killings and “the bourgmestre in his commune had full powers to stop any reprehensible act.” T. 16 September 2009, pp. 56, 58. ¹²⁶³ T. 8 September 2009, pp. 45-46. See footnote 929. ¹²⁶⁴ Defence Final Brief, paras. 331-333; Witness CBK, T. 3 September 2009, p. 60 (CS); Witness CBS, T. 17 September 2009, pp. 28-29 (CS); Witness CBN, T. 2 September

2009, pp. 8-10 (CS). 1265 Witness CBS, T. 17. September 2009, pp. 28-29 (CS); Witness CBN, T. 2 September 2009, pp. 6-9, 11-12 (CS). 1266 Witness CBS, T. 17 September 2009, p. 28 (CS); Witness CBN, T. 2 September 2009, p. 6 (CS). 1267 Witness CBK, T. 4 September 2009, pp. 32-33 (CS); T. 3 September 2009, p. 57; Witness CBS, T. 17. September 2009, pp. 29-30 (CS); Witness CBN, T. 2 September 2009, pp. 8-10, 12 (CS). The Chamber notes the contact listed in both Witnesses CBN and CBS's pre-trial statements Defence Exhibit D5 (Statement of Witness CBN dated 17 August 2000), p. 2; Defence Exhibit D49(B) (Statement of Witness CBS dated 12 March 2003), p. 2. 1268 T. 2 September 2009, pp. 39-40. 1269 Defence Final Brief, paras. 430-431. 1270 T. 2 September 2009, p. 40. The witness explained that the case concerned priests and local officials. 1271 T. 17 September 2009, p. i (extract); T. 17. September 2009, p. 33 (CS); Defence Final Brief, para. 431. 1272 T. 17 September 2009, p. 33 (CS); Defence Final Brief, para. 431. 1273 Defence Exhibit D47 (Document Urupapuro Rwa Mbere Rw'iburanisha dated 16 February 1998). 1274 Defence Final Brief, para. 422. 1275 T. 17 September 2009, p. 31.

Page 113

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

110 Defence exhibits that state that some witnesses were not heard before the Court or did not appear.¹²⁷⁶ The Defence has provided no evidence that Witness CBS was a witness that orally testified in this case, aside from the use of the word in the judgement stating that the witness "testified", which is inconclusive.¹²⁷⁷ The Chamber does not find the Defence suggestion that Witness CBS testified orally to be sufficient to cast doubt on this witness's testimony. 459. The Defence further submits that Kanyarukiga was not mentioned in these proceedings, notwithstanding that it concerned leaders of the attacks at Nyange Parish.¹²⁷⁸ The Chamber notes, however, that these proceedings were not brought against Grégoire Ndahimana or Téléphore Ndungutse either.¹²⁷⁹ Given that some Defence witnesses agree with Prosecution witnesses discussed above that Ndahimana and Ndungutse were at the Nyange Church during the attacks between 14 and 16 April 1994,¹²⁸⁰ the fact that Kanyarukiga was not mentioned in this proceeding, is inconclusive as to his presence at the church.¹²⁸¹ 460. The Chamber has considered that Witness CBS placed the Accused at Nyange Church on 15 April 1994 in his 1995 and 1996 statements, however, in his subsequent 2003 statement, he does not mention the Accused.¹²⁸² The Chamber notes that in his earlier statements, Witness CBS stated that the Accused was present during the attacks on Nyange Church. These statements were provided a year or two after the destruction of Nyange Church, and as such, the Chamber regards the earlier statements as the more reliable account, given the attacks would have been fresher in the witness's mind. Further, the Chamber notes that Witness CBS is a Tutsi survivor and is familiar with the Accused's family because he was the neighbour to some of Kanyarukiga's family. On balance, the Chamber finds that Witness CBS is a credible witness and his testimony regarding the presence of the Accused at Nyange Parish and surrounds on 15 April 1994 is reliable. 461. The Chamber therefore accepts the account of Witness CBK, as discussed above, given the credible

corroboration by Witnesses CBN and CBS.

1276 In the Court of First Instance decision notes that “some of the witnesses appeared on the day the trial resumed” and that there was “non-appearance of witnesses.” Defence Exhibit D10(A) (Judgement of the Specialized Chamber of the Kibuye Court of First Instance dated 17 April 1998), p. 12; Defence Exhibit D11(A) (Appeals Judgement, Ruhengeri Court of Appeal), p. 4. 1277 Defence Final Brief, para. 422. 1278 Defence Final Brief, paras. 417-419. 1279 The Chamber notes that the Ruhengeri Court of Appeal said that the cases of Seromba and Kayishema had to be separated because they were outside Rwanda. Defence Exhibit D11(A) (Appeals Judgement, Ruhengeri Court of Appeal), p. 4. This undermines the Defence argument. Defence Final Brief, para. 418. 1280 Witness KG15 said that on 15 April 1994, the priests asked the bourgmestre to arrange for the burial of those persons who had been killed at the parish. T. 11 February 2010, pp. 16-17, 18, 37 (CS). Witness KG15 refers to the bourgmestre being present on 16 April and sending the bulldozer that was eventually used to demolish the church to the parish. T. 11 February 2010, pp. 18-19, 37 (CS). Witness Sibomana testified that it was well known that Téléphore Ndungutse was involved in the killings at the Nyange Parish because Ndungutse was in charge of the interahamwe in Kivumu commune. T. 1 February 2010, p. 44. With regard to the attacks on 14 April 1994, Witness Nayituriki recognised some persons in the group, including Ndungutse, who was a teacher and a colleague of his older brother. T. 8 February 2010, pp. 10, 11. Witness Nayituriki testified that Ndungutse accompanied the witness and his companions to the Mutanoga Centre. T. 8 February 2010, p. 23. While they were drinking at the Mutanoga Centre, Ndungutse told the witness and his companions that “they” had attacked the persons taking refuge in the church, and those in the church had retaliated by throwing stones at the attackers. T. 8 February 2010, pp. 10-11, 23. 1281 The Chamber notes that the Defence has submitted this argument with respect to Witnesses YAU, CBN, CBY, CBS and CDL. Defence Final Brief, paras. 416-429. 1282 Witness CBS’s statement dated 2 February 1996 lists Kanyarukiga as one of the leaders of those who attacked the church on 15 April 1994, places Kanyarukiga at the church on 15 April 1994 and notes that the Accused brought the grenades. Defence Exhibit D48(B) (Statement of Witness CBS dated 2 February 1996), pp. 3, 4. The witness’s 2003 statement does not mention Kanyarukiga. Defence Exhibit D49(B) (Statement of Witness CBS dated 12 March 2003).

Page 114

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

111 462. Witness CBY testified that the Accused was present at the Nyange Parish on 15 April 1994 prior to 11.00 a.m. because the witness saw Kanyarukiga having a meeting with Kayishema, Ndungutse, Grégoire Ndahimana, “the priest” and Théodomir.¹²⁸³ Witness CBR similarly noted that he saw various “authorities”, including Kanyarukiga, going to the presbytery on the morning of 15 April.¹²⁸⁴ The evidence of Witnesses CBY and CBR specifically corroborates Witness CBK’s testimony regarding a meeting prior to the attacks, in addition to generally corroborating Prosecution Witnesses CNJ and CBK, who state that Kanyarukiga was at the parish prior to the

attacks. The Chamber notes that the Accused attending a specific meeting in the morning 15 April 1994 was not pled in the Indictment and as such, the Chamber finds that Witnesses CBK and CBY's evidence only establishes that the Accused was at the Nyange Church around 11.00 a.m. in the company of Kayishema and Ndahimana. When considering the totality of evidence presented regarding Kanyarukiga's presence, the Chamber is satisfied that all the Prosecution witnesses discussed here support Kanyarukiga's presence around Nyange Parish and Nyange Trading Centre (Statue of Virgin Mary) during the morning of 15 April. 463. The Chamber recalls the testimony of Defence Witnesses KG19, Mutume and Tugirumukiza, who were all present on the morning of 15 April 1994 at the Statue of the Virgin Mary and each did not see the Accused.¹²⁸⁵ Defence Witness KG15 was at the Nyange Parish Presbytery on the morning of 15 April 1994 and did not see Kanyarukiga at that time.¹²⁸⁶ Witnesses KG19 and KG15 noted that there was chaos at the Statue of the Virgin Mary and surrounds on the morning of 15 April 1994. This indicates that it is likely that there were people who did not see the Accused at the Statue of the Virgin Mary on that morning.¹²⁸⁷ Further, none of these witnesses gave evidence that they did not see Kanyarukiga at the Nyange Church. Therefore these witnesses do not cast doubt on the Prosecution evidence that Kanyarukiga was present in the areas of the Statue of the Virgin Mary and Nyange Church on the morning of 15 April. 464. The Chamber finds it therefore established, beyond reasonable doubt that Kanyarukiga was present at Nyange Parish prior to 11.00 a.m. on 15 April with Kayishema and Ndahimana. It is also established that Kanyarukiga was around the areas of the Statue of the Virgin Mary and Nyange Church on the morning of 15 April, prior to and during the attacks outlined in paragraph 14 of the Indictment. 465. The Chamber will now turn its attention to evidence that is specific to Kanyarukiga's role in the morning attack on 15 April. 466. Witness CBN provided evidence that Kanyarukiga's car was used to transport attackers to the church. Although the witness did not provide a clear date, it was discussed in the context of 15 April 1994.¹²⁸⁸ This allegation is not pled in either paragraph 14 or 15 of the Amended Indictment.

¹²⁸³ T. 8 September 2009, pp. 45-46. See footnote 929. ¹²⁸⁴ T. 9 September 2009, pp. 17-18. ¹²⁸⁵ Witness KG19 arrived at the Statue of the Virgin Mary at 9.00 a.m. on 15 April 1994 and remained there for about four or five hours. T. 27 January 2010, pp. 4, 5 (CS); T. 27 January 2010, p. 7. Witness Mutume arrived at the Statue of the Virgin Mary at around 9.00 a.m. on 15 April 1994 and left at around 2.30 p.m. T. 27 January 2010, pp. 32, 33. Witness Tugirumukiza arrived at the Statue of the Virgin Mary around 10.00 a.m. and stayed there for about one hour. T. 1 February 2010, pp. 55, 58, 59. ¹²⁸⁶ T. 11 February 2010, pp. 20, 21, 22 (CS). This witness noted that he did not know Kanyarukiga. T. 11 February 2010, p. 21 (CS). ¹²⁸⁷ Witness KG19, T. 27 January 2010, pp. 4-6, 17 (CS). Witness KG15 testified that he did not leave the presbytery all day on 15 April 1994. T. 11 February 2010, p. 16 (CS). ¹²⁸⁸ T. 1 September 2009, p. 67. The witness's testimony was as follows: "Kanyarukiga came on board that vehicle and parked it in front of the pharmacy. I saw that vehicle again on the 15th, as I fled. That vehicle was transporting members of the population who were shouting and calling out to members of the population to arrest the inyenzi who were all over. I saw that vehicle not far away from the communal office, as I fled."

Page 115

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

112 According to the jurisprudence, a vague paragraph in the indictment can be cured through timely, clear and consistent information in, for example, the Prosecutor's pre-trial brief or opening statement. Given this evidence is mentioned in the summary of Witness CBN's anticipated testimony in the Pre-Trial Brief, the Chamber finds that the Defence had sufficient notice of this evidence.¹²⁸⁹ Therefore, the Chamber will consider this evidence on its merits. 467. The Chamber treats this piece of evidence with caution as Witness CBN has identified the Accused's car to be a red pick-up, which is inconsistent with much of the other Prosecution witness testimony (and some Defence testimony), which suggests the Accused drove a red saloon car.¹²⁹⁰ Further, Witnesses CBR and CNJ appear to contradict Witness CBN's evidence given they testified that the only vehicle that they saw at the Statue of the Virgin Mary was Rwamasirabo's vehicle which Kayishema was said to be driving.¹²⁹¹ Given aspects of this witness's testimony are inconsistent with other Prosecution witnesses, the Chamber does not find it established, beyond reasonable doubt, that Kanyarukiga's car was used to transport attackers to the church. 468. Witness CNJ testified that Ndahimana told the witness and a group of assailants that Kanyarukiga had assured the attackers would be given free treatment at Kanyarukiga's pharmacy.¹²⁹² Witness CDK similarly testified that wounded Hutu attackers were treated at Kanyarukiga's pharmacy.¹²⁹³ There is no further evidence provided by the Prosecution as to the manner in which the pharmacy was accessed or, indeed, what time the attackers were treated. The Chamber recalls its discussion regarding the Prosecution witnesses who were incarcerated together at Kibuye Prison. The Chamber also recalls that it should be particularly mindful of any motives an accomplice witness may have to implicate an accused.¹²⁹⁴ Witness CNJ admitted to taking \$5,000 from a person in detention with him in order to change his testimony in the Seromba case.¹²⁹⁵ Although the witness admitted that he eventually changed his mind regarding the \$5,000,¹²⁹⁶ the Chamber has concerns about the veracity of Witness CNJ's evidence. Further, Witness CDK is still incarcerated in Gitarama Prison, which may make this witness more likely to implicate the Accused in order to reduce his sentence.¹²⁹⁷

¹²⁸⁹ The Prosecutor's Pre-Trial Brief, p. 30. Witness CBN's witness summary states that Kanyarukiga "is the one who sent some of the attackers to the church in his vehicle". ¹²⁹⁰ Witness CBR, T. 9 September 2009, p. 54; Witness CDL, T. 10 September 2009, p. 31; T. 11 September 2009, pp. 6-7; Witness CBT, T. 14 September 2009, p. 71; Witness YAU, T. 15 September 2009, p. 37; Witness CBS, T. 17 September 2009, p. 16; Witness KG19, T. 27 January 2010, p. 52; Witness Sibomana, T. 1 February 2010, p. 27; Witness Tugirumukiza, T. 1 February 2010, p. 53. Witness Twagirashema gives evidence with regard to 16 April 1994. T. 3 February 2010, p. 4. Witness Nayituriki also gives evidence with regard to 14 April 1994. T. 8 February 2010, pp. 6, 11. ¹²⁹¹ T. 9 September 2009, p. 59; T. 7 September 2009, p. 56. ¹²⁹² T. 7 September 2009, p. 13. ¹²⁹³ T. 16 September 2009, p. 7. During cross-examination, Defence Counsel suggested that the pharmacy was closed from 14 April 1994 and that Witness CDK's testimony was not true. Witness

CDK responded that he did not agree with this. T. 16 September 2009, p. 40. 1294 Nchamihigo, Judgement (AC), para. 42. See also discussion above at paragraph 453. 1295 T. 8 September 2009, pp. 7-10. 1296 This witness testified that he decided not to take this money during the Seromba case because, in his words: "I realised that would not help me. That is why I decided to violate the contract that I had entered into with him." T. 8 September 2009, p. 8. Another reason why he decided to incriminate Seromba was that the witness had not yet been placed in one of the criminal categories for his crimes during the genocide. Witness CNJ testified that the prosecutor for his case file in Rwanda told him that if he did not speak the truth, he ran the risk of being placed in the first (and most serious) category of perpetrators. T. 8 September 2009, p. 7. Witness CNJ admitted during the Seromba trial that he had lied because he feared that he would lose the money he had been promised. T. 8 September 2009, p. 9. 1297 Prosecution Exhibit P60 (Personal Identification Sheet of Witness CDK); T. 16. September 2009, pp. 10, 15 (CS); T. 16 September 2009, pp. 19-20.

Page 116

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

113 469. Defence Witnesses Mutume, Sibomana, KG45 and Tugirumukiza testified that they saw that Kanyarukiga's pharmacy was closed on 15 April 1994.¹²⁹⁸ Each of these witnesses testified that they knew who Kanyarukiga was.¹²⁹⁹ The Chamber notes that two of these witnesses were young and lived close to Kanyarukiga in April 1994, but aside from this fact, the Chamber sees no reason to discount the evidence of Witnesses Mutume, Sibomana, and Tugirumukiza with regard to the closure of Kanyarukiga's pharmacy. The Chamber note, however, it has found that Witness KG45 not credible in its discussion of alibi.¹³⁰⁰ 470. Thus, given Witnesses CDK and CNJ's evidence is uncorroborated and also partially contradicted by the Defence evidence, the Chamber finds that it has not been established beyond reasonable doubt that wounded assailants were treated at Kanyarukiga's pharmacy. 471. Witness CDK provided evidence that he heard the Accused say to the attackers at Nyange Church on 15 April 1994 that they had to fight the inyenzi, which the witness testified was a reference to the Tutsi in the church.¹³⁰¹ Witness CDK also gave evidence that Kanyarukiga approached the witness and those he was with and asked them to prepare and collect stones so they would be able to fight the Tutsi who had also gathered stones to attack.¹³⁰² The Chamber notes that Witness CDK also testified that during the day of 15 April 1994, he saw the Accused moving amongst the members of the population "giving them instructions" and in the company of Kayishema and Ndahimana.¹³⁰³ These pieces of evidence are not corroborated by any other witness. The Chamber recalls that Witness CDK is one of the five Prosecution witnesses who were incarcerated together, the credibility of whom the Chamber has considered earlier in its deliberations. Given the Chamber has found that it cannot rely on this witness without corroboration from other credible evidence, the Chamber does not find it established, beyond reasonable doubt that Kanyarukiga said to the attackers that they had to fight the inyenzi or that Kanyarukiga was giving instructions to the attackers. 472. Witness CBR

testified that Kanyarukiga was with Ndahimana when Ndahimana stated that the attackers were to “start working” and “begin work”, which was understood to mean “kill the Tutsi”.¹³⁰⁴ The Chamber notes its discussion of this witness and his credibility in paragraphs 591 to

595. Given the Chamber’s view that Witness CBR is generally credible, it finds it established that Kanyarukiga was with Ndahimana when he asked the attackers to “start working” or “begin work”.⁴⁷³ Witness CDK recounted that he saw Kanyarukiga speaking to Rukara prior to the grenade being thrown. After this discussion, a ladder was found and Rukara used this ladder to climb on top of Kanyarukiga’s pharmacy and subsequently Rukara threw a grenade, which resulted in Tutsi “losses”.¹³⁰⁵ The Chamber recalls that Witness CDK was an accomplice to the attacks on 15 April 1994 and has therefore treated his evidence with caution. The Chamber further notes that there is no direct corroboration of Witness CDK’s testimony. While Witness CNJ provided some support for Witness CDK’s evidence when he testified that he saw Kanyarukiga at the Statue of the

1298 Witness Mutume, T. 27 January 2010, p. 31; Witness Sibomana, T. 1 February 2010, p. 30; Witness Tugirumukiza, T. 1 February 2010, p. 57. Witness KG45 testified to Kanyarukiga’s pharmacy being closed from 14 April to 21 or 22 April 1994. T. 21 January 2010, pp. 60-62, 70, 71 (CS). 1299 Witness Mutume testified that he lived near Kanyarukiga in Gaseke cellule in Ngobagoba secteur and has known Kanyarukiga since he was young. T. 27 January 2010, p. 27. Witness Sibomana testified that he has known Kanyarukiga since he was young. T. 1 February 2010, p. 26. Witness Tugirumukiza also testified that he has known Kanyarukiga since the witness was young. T. 1 February 2010, p. 52. 1300 See discussion at paragraphs 126 to 129. 1301 T. 16 September 2009, p. 7. 1302 T. 16 September 2009, p. 6. 1303 T. 16 September 2009, pp. 6, 7-8. 1304 T. 9 September 2009, pp. 18-19, 22-23. 1305 T. 16 September 2009, p. 6.

Page 117

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

114 Virgin Mary when the grenade attacks occurred, the Chamber regards Witness CNJ with extreme caution.¹³⁰⁶ 474. While the Chamber recalls that Witness CBN, who the Chamber regards as credible, testified that he saw Kanyarukiga at the Statue of the Virgin Mary when the grenade was thrown,¹³⁰⁷ the Chamber has doubts with regard to this witness’s testimony in this particular instance. Firstly, the site visit illustrated to the Chamber that the distance from the Nyange Parish to the Statue of the Virgin Mary was not insignificant.¹³⁰⁸ Secondly, given the evidence provided by both Prosecution and Defence witnesses that there was chaos during the attacks on the morning of 15 April,¹³⁰⁹ as well as the evidence suggesting that the grenade was thrown between the parish and the statue,¹³¹⁰ the Chamber has doubts as to whether Witness CBN would have seen Kanyarukiga standing at the statue from the witness’s vantage point at the parish. Further, Witness CBT testified that he did not see Kanyarukiga at all when the grenade was thrown.¹³¹¹ Although the Chamber does not regard Witness CBT favourably, given Witness

CBT took part in the attacks on 15 April, this testimony adds to the Chamber's overall doubts. Therefore, while the Chamber accepts that it is possible, based on Witness CBN's evidence, that Kanyarukiga was present when the grenade was thrown, the Chamber is not satisfied that the Prosecution has proven beyond reasonable doubt that Kanyarukiga was present or that he was speaking to Rukara prior to the throwing of the grenade. Attacks on and attempted burning of Nyange Church later on 15 April 475. Paragraph 15 of the Indictment alleges that there was an attack on the church itself on 15 April, including an attempt to burn the Tutsi taking refuge in the church. This paragraph alleges that this attack was ordered, instigated, supervised and aided and abetted by Kanyarukiga, Kayishema, Ndungutse and Ndahimana. Prosecution Witnesses CBY, CBK, CBR, CNJ, CDK and CBT provide evidence that the Nyange Church was attacked again on 15 April 1994, when assailants unsuccessfully attempted to destroy the church by setting it alight with Tutsi having locked themselves inside.¹³¹² The Defence does not appear to dispute the occurrence of the further attacks on 15 April 1994; however the Defence does dispute the credibility of the Prosecution witnesses. Therefore, the Chamber finds that an attempt was made by assailants at the Nyange Church to destroy the Church by trying to set it alight. 476. Witnesses CBR and CDK attest to communal policemen shooting at the church after the Tutsi had locked themselves inside.¹³¹³ Witnesses CBT, CBR and CNJ provide evidence as to the use of dynamite as a means of attacking the Nyange Church itself, while the Tutsi were taking

1306 T. 7 September 2009, pp. 15-16. 1307 T. 1 September 2009, p. 62. 1308 T. 20 April 2010, pp. 35-38, Registry Exhibit R4 (Kanyarukiga Mission Report), p. 2. 1309 Witness Sibomana, T. 1 February 2010, p. 41. 1310 Witness CBK stated that the grenade was thrown from the building that housed the Caritas restaurant. T. 3 September 2009, p. 18. See also Witness CNJ, T. 7 September 2009, p. 16. Witness CBY notes that the grenade was thrown from the roof of a building of the lower side of the parish, which was not far from the Caritas building. T. 14 September 2009, p. 17. The Chamber notes that the English transcript says "Caratis" while the French transcript says "Caritas". French Transcript, T. 8 September 2009, p. 19. It is generally accepted that the Caritas building was part of the row of buildings in the Nyange Trading Centre. T. 20 April 2010, p. 38. See also the evidence provided by the aforementioned witnesses. 1311 T. 14 September 2009, p. 73. 1312 Witness CBY, T. 8 September 2009, p. 47; Witness CBK, T. 3 September 2009, pp. 7, 18, 23; Witness CBR, T. 9 September 2009, pp. 27, 65; Witness CNJ, T. 7 September 2009, pp. 19-20, 22, 31; T. 8 September 2009, pp. 4-5; Witness CDK, T. 16 September 2009, pp. 8, 35; Witness CBT, 14 September 2009, pp. 47-48, 73; T. 15 September 2009, p. 1. 1313 Witness CBR, T. 9 September 2009, p. 27; Witness CDK, T. 16 September 2009, p. 8. Witnesses CBK and CBT also mentioned that the church was shot or fired at. T. 3 September 2009, pp. 9, 18; T. 15 September 2009, p. 1.

Page 118

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

115 refuge inside.¹³¹⁴ This fact does not appear to be disputed by the Defence. As a result, the Chamber finds it established that communal policemen shot at the church and that dynamite was used as part of the attack on the Nyange Church. 477. With regard to gendarmes, a number of Prosecution witnesses recall seeing gendarmes at the Nyange Church, but none of them give evidence that the gendarmes were assaulting the Tutsi taking refuge in the church with gunfire or dynamite.¹³¹⁵ As a result, the Chamber finds that gendarmes were present at the church, but that it is not established, beyond reasonable doubt, that gendarmes shot at the church or used dynamite. 478. Witness CBN testified to seeing corpses of some people and that “very few” of the Tutsi who were at the church survived, but he could not estimate the number of people killed during 15 April.¹³¹⁶ Witness CBR recounted that the entire road to the Nyange Parish was littered with corpses,¹³¹⁷ while Witness CBS stated that “many people died” and he “could not even count them”.¹³¹⁸ Further, evidence provided by Witnesses CNJ, CBR, CDL and CDK shows that the bodies of those killed in this attack had to be moved by a bulldozer.¹³¹⁹ Witness KG15 recounted that there were killings on 15 April 1994 and that the priests discussed burying the bodies with the bourgmestre and the IPJ.¹³²⁰ This raft of evidence suggests that there were, at least, some Tutsi killed during this attack and that the number was large enough that a large piece of machinery, such as a bulldozer, was required to move them. The Chamber therefore finds it established, beyond reasonable doubt, that an attack on the Tutsi at the Nyange Church on 15 April 1994 resulted in the deaths of many Tutsi civilians. 479. With regard to the Hutu attackers themselves, a number of Prosecution witnesses indicate that there were many attackers present at both the Nyange Church and around the parish. Witness CNJ indicated that there were about 4000 attackers; Witness CBR stated that there were ten times more assailants around Nyange Parish on 15 April 1994 than on 14 April 1994; Witness CDK indicated that reinforcements arrived throughout the day.¹³²¹ Witness CBN noted that there were many assailants, and their number increased gradually.¹³²² Defence Witness KG19 also agreed that there were many attackers.¹³²³ Further, Witnesses CBR, CNJ, CBK, CDK and CBS provide evidence that a number of attackers arrived during the day from surrounding communes, and a

¹³¹⁴ Witness CBT, T. 14 September 2009, p. 48; Witness CBR, T. 9 September 2009, p. 27; Witness CNJ, T. 7 September 2009, pp. 20, 31. ¹³¹⁵ Witness CBR states that he saw gendarmes around the presbytery. T. 9 September 2009, p. 25. Witness CBS saw gendarmes on the morning of 15 April 1994 at the church. T. 16 September 2009, p. 57. Witness CDL testified that gendarmes threw grenades at the Tutsi. T. 10 September 2009, p. 33. Witness CDK recalled that he saw gendarmes with Ndahimana and Seromba at the presbytery on the morning of 15 April 1994. T. 16 September 2009, p. 6. ¹³¹⁶ T. 1 September 2009, pp. 62-64. ¹³¹⁷ T. 9 September 2009, pp. 25-26. The witness recalled: “[a]ll I can tell you is that there were many dead bodies. One could see the dead bodies from the [S]tatue of the Virgin Mary. You had dead bodies on the entire road which went up right to the church. When we pursued the refugees, we walked on dead bodies. There were bodies everywhere right up to the church compound.” ¹³¹⁸ T. 16 September 2009, p. 57. ¹³¹⁹ Witness CNJ, T. 7 September 2009, p. 19; Witness CBR, T. 9 September 2009, pp. 26-27; Witness CDL, T. 10 September 2009, p. 33; Witness CDK, T. 16 September 2009, pp. 8-9. ¹³²⁰ T. 11 February 2010, p. 26 (CS). ¹³²¹ Witness CNJ, T. 7 September 2009, p. 15; Witness CBR, T. 9 September 2009, p. 28.

Witness CBR testified that there were 800 to 1000 assailants on 14 April 1994, putting the total for 15 April 1994 between eight and ten thousand. T. 9 September 2009, p. 53. Witness CDK recounted that there were more than 800 attackers at the church and reinforcements arrived at 4.00 p.m. T. 16 September 2009, pp. 32, 36. 1322 T. 2 September 2009, pp. 23, 24. 1323 Witness KG19, T. 27 January 2010, p. 12 (CS).

Page 119

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

116 number of Defence witnesses support this evidence.¹³²⁴ This evidence is therefore undisputed. Furthermore, although there is no corroborated evidence of a particular number, the Chamber has no doubt that there were, at least, thousands of Hutu attackers present at the Nyange Church and surrounds on 15 April 1994 and a number of these attackers arrived from surrounding communes. 480. Finally, with regard to the assailants, many of the Prosecution witnesses testified to either wearing banana leaves on 15 April themselves, either because they were assailants or because they wanted to blend into the crowd of assailants, or observing the attackers wearing banana leaves on that day.¹³²⁵ Given the raft of evidence with regard to this fact, and that Witnesses CBY and CBN, who the Chamber largely regard as credible, are amongst the Prosecution witnesses who attest to this fact, the Chamber finds it established that the assailants wore banana leaves on their bodies on 15 April 1994. 481. The Chamber will now turn its attention to Kayishema, Ndungutse and Ndahimana. 482. Witness CNJ testified that Kayishema was at the Nyange Parish prior to and during the attempted burning of the church.¹³²⁶ This witness also stated that Kayishema was present prior to and during the attempted burning of the church and that after the attempt was unsuccessful the following people were at Nyange Parish: Kayishema, Ndungutse, Habiyaambere and Seromba.¹³²⁷ Witness CBK testified that the “whole group” of authorities was at Nyange Church prior to and during its attempted burning.¹³²⁸ Witness CBY implied that Kayishema was at Nyange Parish prior to the attempted burning of the church.¹³²⁹ Witness CBR recalled that, prior to the attempted burning of the church, Kayishema and Ndungutse left the parish and returned not long after.¹³³⁰ This witness noted, however, that Ndahimana had left the parish prior to these attacks, “for another place”,¹³³¹ which is supported by Witness CNJ.¹³³² Witness CBT also placed Kayishema and Ndungutse at “the church” but only after the attacks on 15 April had ceased.¹³³³ Witness YAU places Seromba in the Nyange Parish Presbytery after the attacks had finished.¹³³⁴

¹³²⁴ Witness CBS notes that a group of attackers arrived from Rukuko and another group arrived from Kivumu. T. 16 September 2009, pp. 54, 55. Witness CDK recalled that 200 attackers from Kibilira arrived at the church at around 4.00 p.m. T. 16 September 2009, p. 36. Witness CBR, T. 9 September 2009, pp. 27-28; Witness CNJ, T. 7 September 2009,

p. 22; Witness CBK, T. 3 September 2009, p. 7. Witness Mutume said that assailants came from “far-off communes” in reference to 15 and 16 April 1994. T. 27 January 2010, p. 43. Witness Sibomana mentioned assailants from “surrounding communes”. T. 1 February 2010, p. 47. 1325 Witness CBN, T. 1 September 2009, p. 63; Witness CBK, T. 3 September 2009, p. 28; T. 3 September 2009, p. 67 (CS); Witness CNJ, T. 7 September 2009, pp. 13, 15, 55. Witness CBY stated that he wore banana leaves “whenever [he] went out”. T. 14 September 2009, p. 20. Witness CBR, T. 9 September 2009, p. 57; Witness CDL, T. 10 September 2009, p. 55 (CS); Witness CDK, T. 16 September 2009, p. 3; Witness CBS, T. 16 September 2009, pp. 55, 57; T. 17 September 2009, pp. 15, 18. 1326 T. 7 September 2009, pp. 19, 22. This witness’s evidence suggests that Kayishema left to find Rushema and then returned to the parish. 1327 T. 7 September 2009, p. 22. 1328 T. 3 September 2009, pp. 18-19. Earlier in his testimony, the witness had listed the group to include: Ndahimana, Kayishema, Rushema and Mbakirirehe. T. 3 September 2009, p. 9. This witness also testified to a meeting between 2.30 and 3.00 p.m. on 15 April 1994. However, the witness did not list exactly who was there. T. 3 September 2009, p. 21. 1329 T. 8 September 2009, p. 47. Witness CBY also saw Kayishema and Kanyarukiga together at Nyange Parish on 15 April, but it is unclear when he saw them. T. 8 September 2009, p. 47. 1330 T. 9 September 2009, pp. 26-27. 1331 T. 9 September 2009, p. 27. 1332 Witness CNJ stated that Ndahimana left the church before the attacks later in the day on 15 April. T. 7 September 2009, p. 17. 1333 T. 14 September 2009, p. 49. The witness recounted that he saw these people when he left the church which was between 4.00 and 5.00 p.m. on 15 April. T. 14 September 2009, p. 49; T. 15 September 2009, p. 2. Witness CBT also saw Habiyaambere, Kayishema, Ndungutse and Ndahimana at Nyange Church but was not clear as to when he saw them on 15 April. T. 14 September 2009, pp. 40-41. 1334 T. 15 September 2009, p. 23.

Page 120

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

117 483. The Chamber notes that, amongst the Prosecution witnesses who give evidence about the presence of those people outlined in paragraph 15 of the Indictment, the Chamber regards Witnesses CBY and CBR as more credible than Witnesses CNJ, CBK and YAU. Witnesses CNJ and CBK both place Kayishema and Ndungutse at the parish prior to and during the attempted burning of the church. This account is corroborated by Witnesses CBY and CBR, who placed Kayishema at the Nyange Parish prior to the attempted burning of the church. In addition, Witness CBR also places Kayishema and Ndungutse at the parish before and during the attacks (aside from a brief time where Kayishema had left and subsequently returned to the parish). The Chamber therefore finds it established that Kayishema and Ndungutse were present at the Nyange Parish prior to and during the attacks outlined in paragraph 15 of the Amended Indictment. 484. The Chamber notes Witness CNJ’s testimony that the attackers were following Kayishema on 15 April 1994 and that Kayishema led the assailants to the place where the attacks

were to be carried out.¹³³⁵ This evidence was provided by a witness who the Chamber has previously found to be largely unreliable and whose account is uncorroborated. As such, the Chamber does not find that this fact is established beyond reasonable doubt. ⁴⁸⁵ Finally, Witness CBR testified that Ndungutse and Kayishema went to find equipment to remove the bodies from the church grounds.¹³³⁶ He further testified that two “pieces of equipment” and two lorries were brought to the parish.¹³³⁷ Given that the Chamber has found Witness CBR to be generally credible, the Chamber therefore has no doubt that Kayishema and Ndungutse went to look for equipment and subsequently, this equipment was brought and used to move bodies.¹³³⁸ Kanyarukiga’s Role ⁴⁸⁶. The Chamber will now turn to Kanyarukiga’s role, if any, in the later attacks on 15 April and the attempted burning of Nyange Church. ⁴⁸⁷ Prosecution Witnesses CBK, CBT, CDK and CDL provided evidence that they saw Kanyarukiga at the Nyange Church prior to or during the later attacks on and attempted burning of Nyange Church.¹³³⁹ The Chamber treats each of these pieces of evidence with caution. In particular, the Chamber regards evidence given by Witness CBK with regard to the Accused as credible only if corroborated by a credible witness. In addition, the Chamber recalls its discussion regarding accomplice Witnesses CDL and CBT and that the Chamber is extremely cautious with regard to the testimony of these witnesses when uncorroborated by a credible witness. The Chamber, therefore, does not regard these witnesses as sufficiently credible to establish this fact beyond reasonable doubt. Thus, the Chamber does not find it proven, beyond reasonable doubt, that Kanyarukiga was present at Nyange Church or Parish prior to and during the events described in paragraph 15 of the Amended Indictment.

¹³³⁵ T. 7 September 2009, p. 15. ¹³³⁶ T. 9 September 2009, p. 26. ¹³³⁷ T. 9 September 2009, pp. 26, 66. ¹³³⁸ The Chamber notes that it has considered other Prosecution evidence on this point, however has not explicitly discussed it here for witness protection reasons. ¹³³⁹ Prosecution Witness CBK testified that the “authorities”, including Kanyarukiga, went to presbytery between 2.30 and 3.00 p.m. on 15 April 1994 and were present throughout the attempted burning of the church. T. 3 September 2009, pp. 19, 20, 21. Witness CBT also saw Kanyarukiga at Nyange Church prior to and during the attempted burning of the church. T. 14 September 2009, pp. 46-47. Witness CBT saw Kanyarukiga as he was leaving the church on the evening of 15 April. T. 14 September 2009, p. 49. Witness CDK saw Kanyarukiga in front of the secretariat of the parish prior to the attempted burning of the church. T. 16 September 2009, p. 8. Witness CDL noted that he saw Kanyarukiga at the church on the afternoon of 15 April 1994, in addition to seeing Kayishema and Ndungutse and Habiambere. T. 10 September 2009, p. 31.

Page 121

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

¹¹⁸ ⁴⁸⁸. Both Witnesses CNJ and CBT saw Kanyarukiga at Nyange Parish on the evening of 15 April 1994, after the attacks.¹³⁴⁰ The Chamber notes that these witnesses were accomplices to the attacks on 15 April, and the Chamber has a number of further concerns about both

witnesses.¹³⁴¹ However, Witness CBY (who the Chamber regards as credible) corroborates Witness CNJ's account. Witness CBY testified that he saw Kanyarukiga with Kayishema on the night of 15 April in the vicinity of the presbytery.¹³⁴² Both witnesses place Kanyarukiga within the area of Nyange Church and Presbytery on the evening of 15 April. These accounts are bolstered by Witness CBS, who testified that Kanyarukiga was still at Nyange Parish on the evening of 15 April 1994 "like the other officials".¹³⁴³ The Chamber also regards Witness CBS as credible.¹³⁴⁴ Given Witness CNJ's testimony is corroborated by Witnesses CBY and CBS, the Chamber therefore finds it established, beyond reasonable doubt, that Kanyarukiga was present at Nyange Church, in the company of Kayishema, after the attacks outlined in paragraph 15 of the Indictment. 489. The Chamber recalls that Defence Witnesses Sibomana and KG15 each testify that they did not see the Accused at the Statue of the Virgin Mary or the Nyange Parish Presbytery in the latter part of 15 April 1994.¹³⁴⁵ Given that Witness Sibomana noted that there was chaos at the Statue of the Virgin Mary on 15 April 1994 and that these witnesses simply did not see Kanyarukiga at this time, in the Chamber's view, this does not cast doubt on the Prosecution evidence.¹³⁴⁶ Further, given that the Prosecution evidence shows that Kanyarukiga was around the Nyange Church during the latter part of 15 April 1994, the evidence provided by these Defence witnesses does not cast doubt on the Prosecution evidence. 490. The Chamber recalls that in January 2010, it excluded Witness CNJ's evidence regarding the accused accompanying an interahamwe to get a Caterpillar on 15 April 1994.¹³⁴⁷ 491. Witness CBK stated that prior to the attempted burning of Nyange Church, Kanyarukiga had gone to search for petrol at his pharmacy and then directed the assailants as to where to put the fuel on the church.¹³⁴⁸ The Chamber has misgivings about Witness CBK's evidence. The Chamber suspects that Witness CBK, a Hutu who was around the same age as many of the assailants, may have participated in the killings committed at the Nyange Parish in April 1994.¹³⁴⁹ Indeed, the Chamber recalls that Witness CBK admitted to wearing banana leaves like the Hutu assailants on 15 and 16 April 1994.¹³⁵⁰ Furthermore, due to his youth in April 1994 and having made multiple public statements in a variety of fora related to the events at the Nyange Church,¹³⁵¹ the Chamber is

1340 T. 7 September 2009, p. 23; T. 14 September 2009, p. 49. 1341 See paragraphs 49, 452 to 453. 1342 T. 8 September 2009, p. 47. This piece of evidence is discussed in more detail in paragraph 498. 1343 T. 16 September 2009, p. 57. By the evening of 15 April 1994, Witness CBS was lying on top of a poultry shed near the presbytery, which makes it unclear the extent to which this witness may have been able to see the Accused. 1344 See paragraphs 456 and 458. 1345 Witness Sibomana arrived at the Statue of the Virgin Mary at around 2.00 or 2.30 p.m., and he spent about an hour there. T. 1 February 2010, pp. 29, 31. Witness KG15 was at the presbytery on 15 April 1994. T. 11 February 2010, pp. 20, 21, 22 (CS). This witness noted that he did not know Kanyarukiga. T. 11 February 2010, p. 20 (CS). 1346 Witness KG15 testified that he did not leave the presbytery all day on 15 April 1994. T. 11 February 2010, p. 16 (CS). Witness Sibomana, T. 1 February 2010, p. 41. 1347 Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010, paras. 29-30 and Disposition point (b). 1348 T. 3 September 2009, pp. 19, 21. 1349 The Chamber notes that Witness CBK denied participating in the attacks when he was asked at trial. T. 3 September 2009, p. 66 (CS). 1350 T. 3 September 2009, p. 67

(CS). 1351 T. 3 September 2009, pp. 49-50; T. 3 September 2009, p. i (extract); T. 3 September 2009, pp. 69-73 (CS).

Page 122

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

119 concerned that Witness CBK may be prone to embellishing the truth.¹³⁵² The Chamber has therefore treated his evidence with extreme caution. 492. Further, this witness's account is inconsistent with Witness CBR, who stated that it was Kayishema who provided the fuel that was used in the attempt to burn down the church.¹³⁵³ There is also no corroboration with regard to Witness CBK's evidence of Kanyarukiga directing where the fuel should be used. This causes the Chamber to have further reservations about the accuracy of this witness's testimony, and thus, the Chamber cannot accept Witness CBK's testimony. The Chamber therefore finds that it has not been established that the Accused went to search for petrol at his pharmacy in order to assist the destruction of the church on 15 April 1994. 493. The Chamber notes that a number of Prosecution witnesses gave evidence that fuel was brought to Nyange Church and this was then used in an attempt to burn down the church. ¹³⁵⁴ This fact is not disputed, and therefore, the Chamber finds it established beyond reasonable doubt that fuel was brought and used at Nyange Church in an attempt to burn it down. Witnesses CBR, CNJ and CBK gave evidence that Kayishema brought fuel to Nyange Church. Given the Chamber's view that Witness CBR is generally credible, the Chamber finds this witness sufficient to corroborate the accounts of Witnesses CNJ and CBK. Therefore, the Chamber finds it established, beyond reasonable doubt, that Fulgence Kayishema brought fuel to Nyange Church, however, does not find that Kanyarukiga brought fuel. 494. Witness CNJ testified that when he was leaving, Kanyarukiga armed with a pistol and in the company of Nishyirimbere and Rukara, stopped him and asked him to go back to the church.¹³⁵⁵ Again, Witness CNJ is an accomplice, so the Chamber is mindful of this and treats his evidence with caution. Witness CBK, who the Chamber has previously found not to be credible on his own, also noted in his evidence that he saw the Accused carrying a firearm on 15 April 1994. As these witnesses are not corroborated by credible evidence, the Chamber finds that the Prosecution has failed to establish that the Accused was carrying a pistol and used it to threaten assailants into staying at the Nyange Church.

¹³⁵² See following for examples of Witness CBK's tendency to exaggerate during his testimony: T. 3 September 2009,

- p. 68 (CS) (saying that he saw much of what happened on that day and that "I moved about everywhere and I could see what was happening. I was always present. I think you cannot have another witness who can testify to these events better than I am doing."); T. 3 September 2009, pp. 21-22; T. 4 September 2009, pp. 23-24 (CS) (giving details about the weapons used, methods of killing and Kanyarukiga's statements calling for the Tutsis to be killed with traditional weapons); T. 3 September 2009, p. 29 (alleging that Seromba,

Kayishema, Ndahimana, Kanyarukiga and others celebrated after the demolition of the church by drinking beer and wine); T. 3 September 2009, pp. 65-66, 68 (CS) (testifying that he saw Kanyarukiga and others hold seven meetings in the bishop's room at the Nyange Parish between 11 and 16 April 1994 and that he saw them every time they came for a meeting); T. 3 September 2009, p. 71 (CS) (claiming that an organisation to which the witness made a statement "collects testimonies and re-works them all - works with them in order to be able to sell its support to its clients."). 1353 T. 9 September 2009, p. 27. 1354 As mentioned, Witness CBR provided evidence that Kayishema arrived at the parish with a jerry can of fuel which was used in an attempt to burn the Nyange Church and those inside it. T. 9 September 2009, p. 27. Witness CNJ stated that Kiragi, Théodomir, Kayishema and Arnold Nibarere brought fuel, and the assailants subsequently doused the church with fuel. T. 7 September 2009, p. 20. Witness CNJ further stated that the assailants destroyed the louvers of a window of the church and spilled petrol. T. 7 September 2009, p. 31. Witness CBT recalled that the secretary of the commune, Arnold Nibarere used the petrol on the church, in an attempt to burn down the church. T. 14 September 2009,

- p. 47. Witness CBT saw only one bucket of petrol and he was right next to it. T. 14 September 2009, pp. 73-74. Witness CDK stated that Arnold had a spray, which he was using to put petrol on the church, and there was another person who had a matchbox and they were trying to destroy the church so that those inside the church would be killed. T. 16 September 2009, p. 8. 1355 T. 7 September 2009, p. 23.

Page 123

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

120 495. Witness CBT testified that Kanyarukiga, in a group of "officials", stated that all the Tutsi taking refuge in the church had to be killed and that the attackers should not worry about the destruction of the church because a new church would be constructed.¹³⁵⁶ The witness went on to testify that Kanyarukiga said this would "create jobs for the youths in Nyange who were going to manufacture the bricks that were going to be used for the construction of the new church."¹³⁵⁷ Witness CBT was an accomplice to the attacks at Nyange Parish, whose testimony the Chamber has treated with caution. 496. The Chamber has further concerns about this witness. In particular, the Chamber is concerned the witness did not mention the Accused in a letter he sent to the Public Prosecutor in Kibuye in 2000 regarding those who were involved in the attacks at Nyange Church. This letter, however, mentioned that others such as Kayishema, Ndungutse, Ndahimana and Seromba were at Nyange Church.¹³⁵⁸ The Defence pointed that Witness CBT also wrote a second letter dated 18 January 2001 to the Prosecutor of the Republic in Kibuye regarding the events at Nyange Church and did not mention Kanyarukiga, which the witness explained was also for safety reasons.¹³⁵⁹ The Chamber is not convinced that the witness did not mention Kanyarukiga for safety reasons. This is particularly the case given Witness CBT did mention Kanyarukiga in statements he gave to ICTR investigators in 2000 and

2001.1360 The Chamber notes that these statements were given around the time the witness became involved in the sensitisation process. Thus, the Chamber does not find it established, beyond reasonable doubt, that Kanyarukiga made the following statements: that the Tutsi in the Nyange Church had to be killed in the company of officials and that the Nyange Church would be rebuilt to create jobs. 497. Witness CDK testified that he saw Kanyarukiga again in front of the secretariat of the Nyange Parish where Kanyarukiga was talking to Father Seromba.1361 At the time, Witness CDK recounted that he was two metres away from Kanyarukiga and heard Kanyarukiga telling Father Seromba that in order to kill all the Inyenzi, the church had to be demolished.1362 Shortly after this, Kayishema arrived and agreed with Kanyarukiga's suggestion that the church be demolished.1363 Witness CDK places this conversation prior to the attempted burning of the church.1364 This witness is one of the five accomplices to these attacks who the Chamber has discussed previously. The Chamber recalls its discussion regarding this witness and his involvement in both a sensitisation program and Gacaca sessions. This causes the Chamber to treat this witness with caution.1365 498. Finally, Witness CBY gave evidence that, towards the end of the day on 15 April 1994, he heard Kayishema and Kanyarukiga saying that the assailants had to demolish the Nyange Church. The witness said that he was two or three metres from these men when he heard this discussion.1366

1356 T. 14 September 2009, p. 46; T. 15 September 2009, p. 1. 1357 T. 14 September 2009, p. 46; T. 15 September 2009, p. 1. 1358 T. 14 September 2009, pp. 58, 60-62, 65; Defence Exhibit D37(B) (Letter from Witness CBT dated 30 August 2000). The witness noted that he did not mention Kanyarukiga for safety reasons. 1359 T. 14 September 2009, p. 65; Defence Exhibit D38(A) (Letter from Witness CBT dated 18 January 2001). 1360 Defence Exhibit D42(B) (Statement of Witness CBT dated 14 and 16 August 2000), p. 4; Defence Exhibit D43(B) (Statement of Witness CBT dated 10 October 2001). 1361 T. 16 September 2009, p. 8. 1362 T. 16 September 2009, p. 8. 1363 T. 16 September 2009, p. 8. 1364 T. 16 September 2009, p. 8. 1365 See paragraph 452. 1366 T. 8 September 2009, p. 47. Witness CBY's evidence suggests that this conversation followed the attempted burning of the Nyange Church. The testimony reads: "Q. Did the attack of the 15th of April continue in the evening? A. When the refugees entered the church, the assailants tried to set the church on fire. They did not succeed. Subsequently, they brought a ladder, which they placed near a window. And they sprayed the church with

Page 124

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

121 The Chamber finds that, as a Hutu who was at the Nyange Parish on 15 April 1994, Witness CBY was in a position to observe certain events that the Tutsi civilians at the parish or assailants outside the presbytery could not. The Chamber further notes that Witness CBY was tried in Rwanda in connection with the events at the Nyange Parish and was acquitted of any wrongdoing in November 2007.1367 Having already been acquitted of the charges against him, the Chamber is of the opinion that Witness CBY lacks certain personal motivations, such as a desire for

leniency, which could inspire other witnesses to testify against the Accused. Witness CBY also identified Kanyarukiga in court and testified that he had known the Accused for eight years prior to “the war.”¹³⁶⁸ Finally, while the Chamber is aware that there were certain minor inconsistencies between Witness CBY’s testimony and his prior statements, particularly with regard to dates, the Chamber does not consider these discrepancies to affect the witness’s overall credibility.¹³⁶⁹ Further, Witness CBY said in his 1996 statement, that Kanyarukiga indicated that the Nyange Church was to be destroyed on the day that the attackers failed in its destruction.¹³⁷⁰ To this end, this witness has provided largely consistent evidence. Thus, the Chamber finds that Witness CBY provided a generally credible and reliable account of the events he witnessed at the Nyange Parish. Given Witness CDK’s testimony is corroborated by Witness CBY, the Chamber finds it established, beyond reasonable doubt, that Kanyarukiga conversed with Kayishema that the Nyange Church was to be demolished. 5.4.

Conclusion

499. In conclusion, the Chamber finds it established, beyond reasonable doubt, that an attack occurred on the morning of 15 April 1994 at Nyange Church. The Chamber further finds that the Tutsi taking refuge in the Nyange Church were targeted by Hutu assailants who threw stones and attacked them with traditional weapons. The Tutsi then repelled the Hutu attackers, which led to the throwing of at least one grenade by Rukara. The Chamber has no doubt that Fulgence Kayishema, Téléphore Ndungutse and Grégoire Ndahimana were present at Nyange Parish, on the morning of 15 April 1994, prior to these attacks. Further, the Chamber finds it established, beyond reasonable

fuel. Later on they tried to set the church on fire, but they did not succeed. That is how Kayishema went to look for a bulldozer so as to be able to demolish the church. Q. And once the bulldozer arrived at the location of the church, what did it do? A. The bulldozer demolished the church. Q. Who gave the order for the church to be destroyed? A. I do not know the name of the person who ordered that the church be destroyed. But I met Kayishema and Kanyarukiga who were saying that the assailants had to destroy or demolish the church. Q. Whilst they were saying that, where were you? A. ... I was coming out of the presbytery. Q. What was the distance between you and them? A. 2 to 3 metres.” ¹³⁶⁷ T. 8 September 2009, pp. 50, 57-59, 61, 63, 67. ¹³⁶⁸ T. 8 September 2009, pp. 49, 54. The witness did not specify whether “the war” referred to 1994 or the start of the civil war. ¹³⁶⁹ For example, while Witness CBY testified that the large-scale attacks began on 15 April 1994 and the church was destroyed on 16 April 1994, he gave two different dates for the start of the large-scale attacks and the demolition of the church in his prior statements. Defence Exhibit D33(B) (Statement of Witness CBY dated 2 February 1996) (saying that the large-scale attacks began on 14 April 1994 and that the church was destroyed on 15 April 1994); Defence Exhibit D34(B) (Statement of Witness CBY dated 4 October 2000) (saying that the major attacks, including the use of grenades, began on 13 April 1994 and that the church was destroyed on 14 April 1994). The Chamber notes that, while it does not consider the inconsistencies between the witness’s testimony and prior statements to affect his overall credibility, it has considered specific inconsistencies on a case-by-case basis to determine whether they affect the reliability of

particular pieces of evidence. 1370 Defence Exhibit D33(B) (Statement of Witness CBY dated 2 February 1996), p. 2. The witness recounted in this statement that Kanyarukiga and Ndungutse ordered the church be demolished. It is noted that while the witness noted a discussion with Kayishema in his oral testimony, the witness was consistent as to Kanyarukiga. Further, this witness has implicated Kanyarukiga less in his oral testimony than in his written statement, which suggests to the Chamber that this witness's account is credible.

Page 125

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

122 doubt that Kanyarukiga was present at Nyange Parish prior to 11.00 a.m. on 15 April with Kayishema and Ndahimana. In addition, the Chamber has no doubt that Kanyarukiga was around the areas of the Statue of the Virgin Mary and Nyange Church on the morning of 15 April, prior to and during the attacks outlined in paragraph 14 of the Indictment. 500. With regard to Paragraph 15 of the Indictment, the Chamber finds it established that the Tutsi took refuge in the Nyange Church after being overpowered by the Hutu assailants and that communal policemen joined the attacks and shot at the church. The Prosecution failed to establish that gendarmes joined the attacks at this point, if at all, and that dynamite was used by communal policemen or gendarmes. It is established, however, that fuel was brought by Kayishema and was used in an attempt to burn down the Nyange Church, during which Kayishema and Ndungutse were present. The Prosecution has failed to establish that Ndahimana was present during the attempted burning of the Nyange Church. Conversely, the Chamber has no doubt that Kayishema, Ndungutse went to find a bulldozer to move bodies. The Chamber finds it established that there were many Hutu assailants present at Nyange Parish and surrounds on 15 April, and that many Tutsi civilians were killed as a result of the attacks on that day. Finally, the Chamber finds it established beyond reasonable doubt, that on 15 April the attackers at Nyange Church were shouting loudly, "[e]xterminate them all. Let no one escape." 501. With regard to the Accused, the Prosecution has failed to establish that Kanyarukiga was present during the attacks outlined in paragraph 15. However, the Chamber finds it established, beyond reasonable doubt, that Kanyarukiga was present at Nyange Church, in the company of Kayishema, after the attacks outlined in paragraph 15 of the Indictment. In addition, the Chamber has no doubt that Kanyarukiga conversed with Kayishema on the evening of 15 April and that the conversation affirmed that the Nyange Church was to be demolished. 502. The Chamber will discuss whether Gaspard Kanyarukiga ordered, instigated or aided and abetted the attacks on the 15 April 1994 in the section of the judgement discussing the Chamber's legal findings.

Page 126

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

123 6. Destruction of Nyange Parish Church on 16 April 1994 6.1.

Introduction

503. Paragraphs 16, 17 and 18 of the Amended Indictment read as follows:

16. On the morning of 16 April 1994[,] Gaspard KANYARUKIGA, Fulgence KAYISHEMA, Téléphore NDUNGUTSE, Judge HABYAMBERE, Francois GASHUGU, Védaste MUPENDE, Grégoire NDAHIMANA and others held a meeting at [the] CODEKOKI[,] at which they mutually agreed and planned to kill all the Tutsi refugees in the church by destroying it.
17. Subsequent to this meeting, Gaspard KANYARUKIGA[,] with the others[,] met Father Anastase SEROMBA at Nyange Parish and informed him of their decision to demolish the church in order to kill all the Tutsi refugees. Gaspard KANYARUKIGA instigated the demolition of the church[,] suggesting that another one would be built.
18. On 16 April 1994[,] at the instigation of Gaspard KANYARUKIGA, Fulgence KAYISHEMA, Védaste MUPENDE, Grégoire NDAHIMANA and Anastase SEROMBA[,] Nyange Church was destroyed using a bulldozer, killing about 2000 Tutsi refugees who had barricaded themselves inside the church. Gaspard KANYARUKIGA was present during the demolition of the church and was instigating the attackers to kill all the Tutsi refugees. By reason of the facts alleged in paragraphs 14 through 18 herein[,] Gaspard KANYARUKIGA is individually responsible for planning, ordering, instigating, committing or otherwise aiding and abetting the killing of Tutsi civilians at Nyange Parish on 15 and 16 April 1994 in furtherance of the joint criminal enterprise. 504. The Prosecution relies on the evidence of Witnesses CBR, CDL, CNJ, CBY and CBK to support these allegations. The Defence argues that the Prosecution witnesses are not credible and points both to the evidence of the Accused's alibi, as well as the testimony of Defence Witnesses Mutume, Seminega, Twagirashema and KG15.1371 The Chamber notes that Witness Sibomana also testified about the events of 16 April 1994. 6.2. Evidence Prosecution Witness CBR 505. Witness CBR arrived at the Nyange Parish around 6.00 or 7.00 a.m. on 16 April 1994.1372 A number of assailants were already at the parish when the witness arrived.1373 The attackers carried traditional weapons and were covered in various types of leaves, depending upon their place of origin.1374 Witness CBR denied that there were any bulldozers at the parish when he arrived on 16 April 1994.1375

1371 Defence Final Brief, paras. 261-282. 1372 T. 9 September 2009, p. 29; T. 10 September 2009, p. 8. Witness CBR testified that Kayishema returned to the witness's locality on 16 April 1994 and asked for reinforcements to come to Nyange. Witness CBR, however, was already in Nyange. He testified that he walked to the parish, but others from his cellule were transported in an Astaldi truck. According to the witness, the distance between his cellule and the Nyange Parish was approximately three kilometres and could be covered on foot in approximately 40 to 45 minutes. T. 9 September 2009, p. 29. 1373 T. 10 September 2009, p. 8. 1374 T. 10 September 2009, p. 8. The witness testified that he personally was covered in eucalyptus leaves, but others wore banana

leaves. The “authorities” did not have to wear leaves because they were well-known. 1375 T. 10 September 2009, p. 8.

Page 127

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

124 506. Witness CBR saw Grégoire Ndahimana, IPJ Kayishema, Gaspard Kanyarukiga, Téléphore Ndungutse, Judge Joseph Habiyambere, Deputy Bourgmestre Védaste Murangwabugabo, Warrant Officer Habarugira and Father Athanase Seromba standing in front of Father Seromba’s office.¹³⁷⁶ The witness was approximately ten metres from the men at the time and did not hear their conversation.¹³⁷⁷ 507. After the discussion with Father Seromba, the authorities approached the church.¹³⁷⁸ “On that day those people did not give us any message. To the contrary, they approached the church and we started firing towards the church.”¹³⁷⁹ According to the witness, Bourgmestre Ndahimana fired shots into the church at approximately 8.00 a.m. while Kayishema, Kanyarukiga, Ndungutse, Habiyambere, Védaste Murangwabugabo and Habarugira stood nearby.¹³⁸⁰ Witness CBR testified that Ndahimana’s “objective” was not attained.¹³⁸¹ According to the witness, Ndahimana’s objective was well-known: it was to exterminate the Tutsi.¹³⁸² 508. “[W]hen they realised that the objective had not been attained,” these men returned to where Father Seromba was standing in front of his office.¹³⁸³ Once again, Ndahimana, Kayishema, Kanyarukiga, Ndungutse, Habiyambere, Védaste Murangwabugabo and Habarugira spoke with Father Seromba.¹³⁸⁴ The witness “did not know what they talked about at that time”, but they decided to demolish the church.¹³⁸⁵ 509. “Later on,” between 9.00 and 10.00 a.m., the witness overheard Kanyarukiga tell his fellow officials that, “[t]his church has to be demolished. I would reconstruct it. I would make it my responsibility to reconstruct it in three days.”¹³⁸⁶ After those words, Kayishema and Ndungutse went to look for a bulldozer.¹³⁸⁷ 510. Witness CBR testified that a bulldozer and a truck were brought to the parish around 10.00 or 11.00 a.m. and started demolishing the church almost immediately.¹³⁸⁸ The witness saw the equipment arrive and saw it demolishing the church but denied seeing any sort of meeting or talks around the equipment.¹³⁸⁹ “[W]hen the equipment was brought, we were ready for action, the action desired. Even those who were ... operating the equipment knew why they had come.”¹³⁹⁰ 511. The bulldozers were driven by three Zairean nationals called Albert, Mitima and Maurice, and a Rwandan named Anasthase Nkinamubanzi.¹³⁹¹ The other assailants surrounded the church and prevented the Tutsi from escaping.¹³⁹² Witness CBR did not see Kanyarukiga after the

¹³⁷⁶ T. 9 September 2009, p. 30. During cross-examination, Witness CBR clarified that, “[o]n that day[, I] did not see the officials go to the presbytery. I saw them with the priest in front of his office. I never saw them go up to his office on the 16th.” T. 10 September 2009, p. 9. ¹³⁷⁷ T. 9 September 2009, p. 31. ¹³⁷⁸ T. 9 September 2009, p. 32. ¹³⁷⁹ T. 10 September 2009, p. 9. ¹³⁸⁰ T. 9 September 2009, p. 32; T. 10 September 2009, pp. 9, 11. ¹³⁸¹ T. 9 September 2009, p. 32; ¹³⁸² T. 9 September 2009, p. 32. ¹³⁸³ T. 9 September 2009, p. 32. ¹³⁸⁴ T. 9 September 2009, p. 32. ¹³⁸⁵ T. 9

September 2009, p. 32. 1386 T. 9 September 2009, p. 32; T. 10 September 2009, p. 9. 1387 T. 9 September 2009, p. 32. 1388 T. 9 September 2009, p. 32; T. 10 September 2009, p. 10. 1389 T. 10 September 2009, p. 11. 1390 T. 10 September 2009, p. 10. 1391 T. 9 September 2009, p. 34. 1392 T. 10 September 2009, p. 12.

Page 128

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

125 equipment was brought to demolish the church.¹³⁹³ The witness left the parish grounds at approximately 6.00 p.m., after the church was demolished.¹³⁹⁴ Prosecution Witness CNJ 512. Witness CNJ testified that most of the assailants who were at the parish on 15 April 1994 spent the night there, “but some, including myself, left the place and came back the next day.”¹³⁹⁵ Witness CNJ estimated that he arrived at the Nyange Church between 8.00 and 9.00 a.m. on 16 April 1994.¹³⁹⁶ Upon arriving, the witness “saw the same assailants, and the number of assailants was the same as the number I had seen the day before.”¹³⁹⁷ 513. Witness CNJ also saw a bulldozer on the left side of the church near one of the doors, not far from the altar.¹³⁹⁸ The bulldozer was parked, but the driver was onboard ready to demolish the church.¹³⁹⁹ Kanyarukiga, Rushema, Théodomir Kiragi, IPJ Kayishema, Ndungutse and Habiyaambere were having a conversation around the bulldozer.¹⁴⁰⁰ Witness CNJ testified that he was not far from where these officials were standing.¹⁴⁰¹ “Most of the assailants were standing around the church[,] and it appeared that instructions had been given for them to do that.”¹⁴⁰² 514. According to Witness CNJ, Védaste Murangwabugabo suggested that a hole be bored through the wall of the church in order to give the assailants access to the Tutsi inside and to minimise any losses on the side of the assailants.¹⁴⁰³ The bourgmestre said that, “if some people could go inside, they could be killed by the Tutsis and our objective would not be obtained.”¹⁴⁰⁴ 515. Witness CNJ testified that, at some point, IPJ Kayishema went to see Father Seromba.¹⁴⁰⁵ Five minutes later, Kayishema returned with Seromba, who greeted the officials.¹⁴⁰⁶ Shortly thereafter, the bourgmestre said, “[n]ow we can start”, and Kayishema instructed the driver to start the demolition.¹⁴⁰⁷ The driver was known as “Two Thousand,” but his real name was Anastase Nkinamubanzi.¹⁴⁰⁸ 516. Witness CNJ estimated that the demolition began approximately 30 minutes after his arrival at the parish.¹⁴⁰⁹ Witness CNJ testified that the destruction began around 9.00 or 10.00 a.m., with a door on the left side of the church, which was not far from the altar. The destruction ended at around 4.00 p.m. with the destruction of the bell tower.¹⁴¹⁰ The Tutsi were inside the church when

1393 T. 10 September 2009, p. 11. 1394 T. 10 September 2009, p. 11. 1395 T. 7 September 2009, p. 23. 1396 T. 7 September 2009, pp. 23-24. 1397 T. 7 September 2009, p. 25; T. 7 September 2009, p. 15 (Witness CNJ testified that he saw the same number of assailants at the parish on 16 April 1994 as he had seen on 15 April 1994. The Chamber recalls that he estimated that there were 4000 Hutu assailants at the parish on 15 April 1994.). 1398 T. 7 September 2009, pp. 25, 27, 31. 1399 T. 7 September 2009, p. 26. 1400 T. 7 September 2009, pp. 25-26. 1401 T. 7 September 2009, p. 26 (“I felt

that after our victory, I, as a student, had to be seen by these officials. I felt that I might need these officials afterwards.”). 1402 T. 7 September 2009, p. 25. 1403 T. 7 September 2009, pp. 25-26. 1404 T. 7 September 2009, p. 26. 1405 T. 7 September 2009, p. 26. 1406 T. 7 September 2009, p. 26 (“They exchanged a few words, but I do not recall what they talked about.”). 1407 T. 7 September 2009, pp. 26-27. 1408 T. 7 September 2009, p. 26. 1409 T. 7 September 2009, p. 69. 1410 T. 7 September 2009, p. 27.

Page 129

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

126 the demolition began, and the last Tutsi were killed when the tower fell.1411 Witness CNJ testified that he “was amongst the assailants who were killing the Tutsis. Later on, we had to make sure that the Tutsis did not escape. That was our objective.”1412 He further testified that, while the assailants were “finishing off” the wounded, another bulldozer was digging tombs below the church.1413 Kanyarukiga and the other authorities were present during the demolition of the church.1414 517. Finally, Witness CNJ testified that, when the destruction was complete, the authorities remained on the scene while the assailants were transported in trucks belonging to the Astaldi Company.1415 Witness CNJ estimated that around 2000 Tutsi were killed on 16 April 1994.1416 Prosecution Witness CDL 518. Witness CDL testified that he arrived at the Nyange Church with Bourgmestre Ndahimana at 7.00 or 8.00 a.m. on 16 April 1994.1417 There were already a number of people at the parish when Witness CDL arrived, including those who had spent the night at the church to ensure that the Tutsi did not escape.1418 The bourgmestre, Father Seromba, police officers, gendarmes and reservists were also present.1419 Witness CDL testified that he spoke to these various people.1420 There were no bulldozers at the parish when the witness arrived.1421 519. The attacks were initiated by Bourgmestre Ndahimana, who shot at the “people who were above the church”.1422 Following this, policemen and other people who had firearms also started shooting into the church.1423 According to Witness CDL, the following people were leading or supervising the attacks on 16 April 1994: Kanyarukiga, the bourgmestre, Father Seromba, Télesphore Ndungutse, Fulgence Kayishema, Habiyambere, gendarmes and “the rest of us all, the Hutus.”1424 Witness CDL could not “confirm or deny the presence of Kanyarukiga” during the gathering in the morning or when Ndahimana shot at the church but testified that the first time he saw Kanyarukiga at the church was at 10.00 a.m.1425 520. Witness CDL testified that before the bulldozers arrived, some small meetings were held to “agree on the resources to be used.”1426 The witness explained that, “[t]he various authorities I have mentioned met in front of Kanyarukiga’s pharmacy, and they had discussions in the presence of Kanyarukiga.”1427 The witness attended the meeting in front of the pharmacy along with Kanyarukiga, Ndahimana, Kayishema, Habiyambere, gendarmes, Ndungutse, Kanani and others who were in the vicinity.1428 Kanyarukiga, Habiyambere, Kayishema, Kanani and Emmanuel Segayo, an official from the Astaldi Company, were already at the pharmacy when Witness CDL

1411 T. 7 September 2009, pp. 27, 31. 1412 T. 7 September 2009, p. 27. 1413 T. 7 September 2009, pp. 27-28. 1414 T. 7 September 2009, p. 27. 1415 T. 7 September 2009, p. 28. 1416 T. 7 September 2009, p. 28. 1417 T. 10 September 2009, pp. 35, 38. 1418 T. 10 September 2009, p. 35; T. 11 September 2009, p. 16. 1419 T. 10 September 2009, p. 35. 1420 T. 10 September 2009, p. 35. 1421 T. 11 September 2009, p. 16. 1422 T. 10 September 2009, pp. 35-36; T. 11 September 2009, p. 18. 1423 T. 10 September 2009, p. 35. 1424 T. 10 September 2009, p. 36 (“...in short all categories of local authorities”). 1425 T. 11 September 2009, pp. 18-19. 1426 T. 10 September 2009, p. 36. 1427 T. 10 September 2009, p. 36. 1428 T. 10 September 2009, p. 38.

Page 130

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

127 arrived with the bourgmestre.1429 They asked the bourgmestre whether he had enough ammunition or bullets, and the bourgmestre said no.1430 Kanyarukiga and Habiya mbere then told those assembled that the only way to kill the Tutsi in the church was to destroy it.1431 Emmanuel Segayo promised to provide bulldozers from the Astaldi Company to destroy the church but said there was no fuel for the bulldozers.1432 Kanyarukiga said that he would purchase the fuel for the bulldozers.1433 According to Witness CDL, Kanyarukiga also said that demolishing the church would not be a problem because “there were enough people in Kivumu who would rebuild the church.”1434 521. Witness CDL further testified that it was agreed that the only means of exterminating the Tutsi was to destroy the church itself.1435 The witness testified that the decision to destroy the church was taken collectively, but it was the brainchild of Kanyarukiga, Habiya mbere and the official from the Astaldi Company.1436 522. Ndahimana, Kayishema, Habiya mbere, Kanyarukiga, Ndungutse, Kanani and gendarmes met with Father Seromba next to the secretariat at around 10.00 a.m.1437 and informed him of the decision to destroy the church.1438 According to the witness, Father Seromba agreed to the demolition, “since there were no other means whereby they could destroy the Tutsi”.1439 523. Witness CDL estimated that the two bulldozers used to destroy the church arrived on the parish grounds between 10.00 and 11.00 a.m. and immediately began to demolish the church.1440 The bulldozers were driven by two men named Mitima and Maurice.1441 They were assisted by Anastase Nkinamubanzi, whose nickname was “Two Thousand.”1442 They first attempted to destroy the bell tower of the church, but when that failed, Father Seromba suggested they go to the side where the sacristy was.1443 One bulldozer started at one side of the sacristy and the other started from the other side; they continued until the entire church was destroyed.1444 Witness CDL testified that the Tutsi were inside the church when it was destroyed.1445 524. Witness CDL testified that, other than Father Seromba, those who were present during the destruction of the church included Grégoire Ndahimana; Fulgence Kayishema; Joseph Habiya mbere; Gaspard Kanyarukiga; Télesphore Ndungutse; Védaste Murangwabugabo, an assistant of the bourgmestre; Gilbert Kanani, another assistant to the bourgmestre; François Munyaneza, the secretary of the commune; Arnold Mugarere, a census staff of the commune;

gendarmes; warrant officers; police officers; a conseiller; the witness and other members of the population.¹⁴⁴⁶ Witness CDL claimed that he personally was merely a spectator on

1429 T. 10 September 2009, pp. 38, 39. On page 38 the witness mentions Kayishema, while on page 39 he replaces Kayishema with Kanani. 1430 T. 10 September 2009, pp. 38, 39. 1431 T. 10 September 2009, pp. 38, 39. 1432 T. 10 September 2009, pp. 38, 39. 1433 T. 10 September 2009, pp. 38, 39. 1434 T. 10 September 2009, p. 39. 1435 T. 10 September 2009, p. 38. 1436 T. 10 September 2009, p. 39. 1437 T. 10 September 2009, pp. 36, 38-39; T. 11 September 2009, pp. 18-19. 1438 T. 10 September 2009, pp. 51-52. 1439 T. 10 September 2009, pp. 36, 38, 39. 1440 T. 11 September 2009, pp. 16, 17. 1441 T. 10 September 2009, p. 41. 1442 T. 10 September 2009, p. 42. 1443 T. 10 September 2009, p. 42. 1444 T. 10 September 2009, p. 42. 1445 T. 10 September 2009, pp. 42-43. 1446 T. 10 September 2009, p. 43.

Page 131

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

128 16 April 1994.¹⁴⁴⁷ As the church was being destroyed, Kanyarukiga and others tried to show the drivers of the bulldozers how to avoid being hit by the stones that the Tutsi were throwing from inside the church.¹⁴⁴⁸ 525. Witness CDL testified that “sometimes” he left the site.¹⁴⁴⁹ He testified that he left the church around midday to go to school “to see what was happening there” and to tell some people that their child had been abandoned at the parish.¹⁴⁵⁰ The witness returned to the church at around 2.00 p.m. and stayed until 4.00 p.m.¹⁴⁵¹ At that time, only the bell tower remained.¹⁴⁵² The witness insisted that Kanyarukiga spent the entire day at the site, closely following what was happening.¹⁴⁵³ However, the witness conceded Kanyarukiga might have left during the day to go to his pharmacy.¹⁴⁵⁴ Prosecution Witness CBK 526. Witness CBK testified that the Nyange Church was destroyed on 16 April 1994.¹⁴⁵⁵ According to the witness, there were more than 5000 assailants at the parish on that day.¹⁴⁵⁶ The assailants were wearing banana leaves on their heads, and “they could be easily distinguished from the refugees who were inside the church because the people in the church did not wear banana leaves.”¹⁴⁵⁷ 527. Witness CBK testified that he saw “Kanyarukiga, Kayishema and others” on the morning of 16 April 1994.¹⁴⁵⁸ They were in the inner courtyard of the presbytery, and the witness could see them talking.¹⁴⁵⁹ “[A]t some point they went upstairs into the room where they were holding the meeting. In any case, I felt they were not discussing anything good because afterwards the church was demolished.”¹⁴⁶⁰ 528. Witness CBK testified that Kanyarukiga was one of the leaders of the attacks on the Nyange Parish.¹⁴⁶¹ He said he reached this conclusion because “when Kanyarukiga arrived, he would meet with Father Seromba, along with Fulgence Kayishema. And after their meeting something would happen.”¹⁴⁶²

1447 T. 11 September 2009, p. 23. 1448 T. 10 September 2009, p. 43. 1449 T. 10 September 2009, p. 43. 1450 T. 10 September 2009, p. 43. 1451 T. 10 September 2009, p. 43. 1452 T. 10 September 2009, p. 43. 1453 T. 10 September 2009, p. 43. 1454 T. 10 September 2009, p. 43. 1455 T. 3 September

2009, p. 30. 1456 T. 3 September 2009, p. 22 (“The assailants were very many. They had come from all the secteurs of Kivumu commune. There were also assailants who had come from neighbouring communes, that is, communes sharing a border with Kivumu commune.”); T. 3 September 2009, p. 28. 1457 T. 3 September 2009, p. 28. Witness CBK testified that he also wore banana leaves on 16 April 1994. T. 3 September 2009, p. 67 (CS). 1458 T. 3 September 2009, p. 25. 1459 T. 3 September 2009, p. 25. 1460 T. 3 September 2009, p. 25. 1461 T. 3 September 2009, p. 26. 1462 T. 3 September 2009, p. 26 (“When I talk of authorities, I am referring to anyone who was holding a position of authority or who had influence. Take, for example, the bourgmestre who was heading the Kivumu commune. Fulgence Kayishema was also an authority because he was a police inspector for the commune. There were also businessmen[,] including Gaspard[,] who were influential. There were also communal policemen. All these people whom I have mentioned were authorities.”).

Page 132

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

129 529. According to the witness, Father Seromba gave the order to destroy the church.¹⁴⁶³ Seromba said, “[d]estroy the church. We are many. We can build another one.”¹⁴⁶⁴ Witness CBK testified that, when these words were uttered, he was standing with Seromba and Kanyarukiga at the entrance of the presbytery, next to the secretariat of the parish.¹⁴⁶⁵ In the meantime, Kanyarukiga instructed the assailants to intercept any Tutsi who tried to escape.¹⁴⁶⁶ 530. Witness CBK testified that the bell tower remained intact after the rest of the church had been demolished, and several Tutsi crowded into the upper part of the tower.¹⁴⁶⁷ Kanyarukiga asked Father Seromba if certain Tutsi, including Aloys Rwamasirabo, Théoneste Nsanzabaganwa, Mr. Bonera and a certain Kayiranga, had taken refuge at the parish.¹⁴⁶⁸ When Father Seromba answered in the affirmative, the assailants said that, “[i]f the Tutsis have arrived at the church, then they must be in the church tower and that tower should, therefore, be demolished.”¹⁴⁶⁹ The assailants said that, “if these Tutsis, educated Tutsis, were not killed, their efforts would have been in vain. Therefore, it was necessary to also kill the educated Tutsis.”¹⁴⁷⁰ He testified that he saw “assailants,” including Seromba and Kanyarukiga, standing on the veranda at the entrance to the presbytery when the bell tower was demolished.¹⁴⁷¹ 531. After the church was demolished, the assailants went to rest.¹⁴⁷² “They celebrated. They shared beer and wine.”¹⁴⁷³ Witness CBK testified that those who took part in the celebration, which was held in the bishop’s room in the presbytery, included Father Seromba, Fulgence Kayishema, Grégoire Ndahimana, Kanyarukiga and others.¹⁴⁷⁴ 532. Witness CBK estimated the number of deaths at the Nyange Parish to be around 3000 Tutsi.¹⁴⁷⁵ He testified that, on 16 April 1994, “[t]he Tutsis who were inside the church were killed atrociously.”¹⁴⁷⁶ Some of the victims were struck, others were chopped into pieces with machetes, others were killed under the collapsing walls, while others were beaten to death by clubs studded with nails.¹⁴⁷⁷ Prosecution Witness CBY 533. Witness CBY testified that 2500 to 3000 people had taken refuge at the parish as of 12 April 1994.¹⁴⁷⁸ The demolition of the

Nyange Church began on the afternoon of 15 April 1994.¹⁴⁷⁹ Some assailants spent the night of 15 April 1994 at the site of the church,¹⁴⁸⁰ while other

¹⁴⁶³ T. 3 September 2009, p. 22. ¹⁴⁶⁴ T. 3 September 2009, p. 22. ¹⁴⁶⁵ T. 3 September 2009, p. 23. ¹⁴⁶⁶ T. 3 September 2009, p. 22 (Kanyarukiga said, “[i]f a Tutsi escapes, he should be killed with traditional weapons, including machetes, bamboos, clubs studded with nails and so on.”); T. 4 September 2009, p. 24 (CS). ¹⁴⁶⁷ T. 3 September 2009, pp. 22, 31. ¹⁴⁶⁸ T. 3 September 2009, p. 28. ¹⁴⁶⁹ T. 3 September 2009, p. 28. ¹⁴⁷⁰ T. 3 September 2009, pp. 22, 28. When asked which assailants discussed intellectuals, Witness CBK testified that, “[i]t was Kanyarukiga himself who made that utterance.” T. 3 September 2009, p. 28. However, it is not clear from the witness’s testimony whether Kanyarukiga was the one who said that the bell tower needed to be demolished. ¹⁴⁷¹ T. 3 September 2009, pp. 28-29. ¹⁴⁷² T. 3 September 2009, p. 29. ¹⁴⁷³ T. 3 September 2009, p. 29. ¹⁴⁷⁴ T. 3 September 2009, p. 29. ¹⁴⁷⁵ T. 3 September 2009, p. 38. ¹⁴⁷⁶ T. 3 September 2009, p. 21. ¹⁴⁷⁷ T. 3 September 2009, p. 21. ¹⁴⁷⁸ T. 8 September 2009, p. 30. ¹⁴⁷⁹ T. 8 September 2009, p. 47. ¹⁴⁸⁰ T. 8 September 2009, p. 47.

Page 133

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

¹³⁰ assailants joined them the next day.¹⁴⁸¹ In the morning, the “authorities” had a meeting with “the priest” and then ordered the Hutu who spent the night at the presbytery to continue demolishing the church.¹⁴⁸² 534. The day after the demolition began, a second Caterpillar was brought to the church.¹⁴⁸³ The witness recalled that there was not enough diesel for the bulldozers, so Kayishema said “he was going to take diesel from Astaldi forcibly.”¹⁴⁸⁴ When asked about the arrival of the second Caterpillar, Witness CBY testified that, “I left the presbytery’s inner courtyard and went to the church. When I got to the church square, the second Caterpillar was already there and had started removing bricks which were ... near the church.”¹⁴⁸⁵ Witness CBY denied seeing people holding a meeting around the bulldozer.¹⁴⁸⁶ 535. Witness CBY testified that, “[o]n the 16th[,] the refugees were at the church tower. They were screaming. They made noise. As for the assailants, they were much lower. And at the time the bulldozer was destroying the church. Of course, as you would imagine, there was noise because a confrontation was going on.”¹⁴⁸⁷ 536. According to Witness CBY, Kayishema came to the Nyange Parish twice after the demolition of the church.¹⁴⁸⁸ According to the witness, Kayishema was the only “authority” to visit Father Seromba after the demolition.¹⁴⁸⁹ Prosecution Witness CBN 537. Prosecution Witness CBN sought refuge at the Nyange Parish Church on the night of 12 to 13 April 1994 but escaped on 15 April 1994, before the church was destroyed.¹⁴⁹⁰ Witness CBN returned to his home in Nyange in September 1994 and found that the church had been demolished.¹⁴⁹¹ Witness CBN testified that he “found a place where the people who had been killed inside the church had been buried.”¹⁴⁹² According to the witness, approximately 2000 people took refuge at the parish before the massacres.¹⁴⁹³ Defence Witness Jean-Bosco Twagirashema 538. Defence Witness Jean-Bosco Twagirashema, a Hutu, is a native of Giko cellule, Ngobagoba secteur,

Kivumu commune, Kibuye préfecture.¹⁴⁹⁴ The witness was 20 years old and in the fourth

1481 T. 14 September 2009, p. 25. 1482 T. 8 September 2009, p. 47 (explaining that, on the morning of 16 April 1994, the “authorities I mentioned returned” and “they came back towards the assailants and told them to complete their demolition of the church”). Earlier in this witness’s testimony, he mentioned the following “authorities”: Kayishema, Ndungutse, Ndahimana, Théodomir and Kanyarukiga. T. 8 September 2009, pp. 44-46. 1483 T. 14 September 2009, pp. 20-21. 1484 T. 14 September 2009, pp. 20-22. Witness CBY agreed that he told ICTR investigators that he saw people bring jerry cans of diesel to the parish. 1485 T. 14 September 2009, p. 21. 1486 T. 14 September 2009, p. 22. 1487 T. 14 September 2009, p. 25. The witness agreed that confusion prevailed until the church was completely destroyed. 1488 T. 14 September 2009, p. 35. It is not clear from the witness’s testimony when Kayishema came to see Father Seromba after the demolition. 1489 T. 14 September 2009, p. 35. 1490 T. 1 September 2009, pp. 49-50, 61, 62, 67. 1491 T. 1 September 2009, p. 69. 1492 T. 1 September 2009, p. 69. 1493 T. 1 September 2009, p. 60. 1494 T. 3 February 2010, p. 2; T. 3 February 2010, p. 8 (CS).

Page 134

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

131 year at Rubengera Groupe Scolaire in April 1994.¹⁴⁹⁵ Witness Twagirashema testified that Gaspard Kanyarukiga is from his commune and that he has known Kanyarukiga for a long time.¹⁴⁹⁶ 539. Witness Twagirashema testified that on Saturday, 16 April 1994, the Nyange Church was destroyed, and the people who had sought refuge in the church were killed.¹⁴⁹⁷ The witness stated that he “was present when the church was being destroyed” and personally witnessed the demolition.¹⁴⁹⁸ 540. Witness Twagirashema arrived near the church between 9.00 and 10.00 a.m. and left the area between 2.00 and 3.00 p.m.¹⁴⁹⁹ The witness stopped in front of the Statue of the Virgin Mary, where he could see a crowd of people moving towards the church.¹⁵⁰⁰ He testified that there were so many people in Nyange that he could not count them.¹⁵⁰¹ 541. The witness stated that he could clearly see the entrance to Kanyarukiga’s pharmacy from where he stood, and the pharmacy doors were closed.¹⁵⁰² Other shops were also closed.¹⁵⁰³ Witness Twagirashema did not see any vehicle, including Kanyarukiga’s red Nissan, in front of the pharmacy.¹⁵⁰⁴ He further testified that he did not see Kanyarukiga, nor did he hear that Kanyarukiga was at the pharmacy or the Statue of the Virgin Mary.¹⁵⁰⁵ 542. According to the witness, there was no fighting at the Statue of the Virgin Mary, but he and the others at the statue could see people heading to the church and could hear the sound of the church being demolished.¹⁵⁰⁶ Witness Twagirashema could not see the church from where he stood, and it was impossible for him to determine the number of displaced persons who were inside the church.¹⁵⁰⁷ 543. Witness Twagirashema testified that he was not afraid to be at the Statue of the Virgin Mary during the demolition because he was Hutu, and the Hutu “were not wanted”.¹⁵⁰⁸ He did not see local authorities on 16 April 1994; he only saw a teacher called Ndungutse and a reservist called Ephrem.¹⁵⁰⁹ According to the witness, Ndungutse was an interahamwe

leader.1510

1495 T. 3 February 2010, pp. 2-3, 12. 1496 T. 3 February 2010, pp. 3, 12 (“When I attained the age of reason, I knew him.”). 1497 T. 3 February 2010, p. 4. 1498 T. 3 February 2010, pp. 4-5. 1499 T. 3 February 2010, pp. 5, 6. 1500 T. 3 February 2010, p. 5. 1501 T. 3 February 2010, p. 5. 1502 T. 3 February 2010, p. 5. 1503 T. 3 February 2010, p. 5. 1504 T. 3 February 2010, p. 5. 1505 T. 3 February 2010, p. 6. He stated that, if Kanyarukiga had been there, Kanyarukiga’s pharmacy would have been open. 1506 T. 3 February 2010, p. 6. 1507 T. 3 February 2010, pp. 13-14, 15. The Tutsi were locked up inside the church, and the witness did not go inside the church to assess the number of displaced persons who were there. T. 3 February 2010, pp. 13, 15. 1508 T. 3 February 2010, p. 17. The witness denied wearing banana leaves on 16 April 1994. T. 3 February 2010, p. 16 (“I was not crazy. Of course, there were people who wore the banana leaves, but not everyone wore them. There were women and children and many other persons who did not wear banana leaves. I did not wear them.”). 1509 T. 3 February 2010, pp. 19-20. 1510 T. 3 February 2010, p. 20.

Page 135

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

132 Defence Witness Roger Kemena Mutume 544. Witness Mutume testified that the Nyange Church was destroyed on Saturday, 16 April 1994, and he “was an eyewitness to that event.”¹⁵¹¹ Witness Mutume left his parents’ house at around 9.00 a.m. and arrived in Nyange before noon.¹⁵¹² The witness stopped at the Nyange Centre and watched what was happening from there.¹⁵¹³ “There were people who were fighting against Tutsis who had sought refuge inside the church. They were trying to demolish the church because the refugees had barricaded themselves inside the church.”¹⁵¹⁴ 545. Witness Mutume and his friends decided to return home around 2.30 p.m.¹⁵¹⁵ He testified that he left the church “at the precise moment” when the church was being demolished because the situation was frightening.¹⁵¹⁶ 546. The witness further testified that the doors to Kanyarukiga’s pharmacy were closed on 16 April 1994 because “there had been confrontations outside for a number of days, and on that day, the confrontations were continuing.”¹⁵¹⁷ The witness did not see Kanyarukiga or Kanyarukiga’s car anywhere on 16 April 1994.¹⁵¹⁸ 547. The only people who the witness could describe as figures of authority were a local teacher and a judicial police inspector.¹⁵¹⁹ Defence Witness KG15 548. Witness KG15 testified that, on 16 April 1994, he stayed inside the refectory at the presbytery with Father Seromba until the church collapsed.¹⁵²⁰ The witness said that the church was destroyed around midday.¹⁵²¹ 549. According to Witness KG15, on 15 April 1994, Father Seromba and others asked the bourgmestre to arrange for the burial of those persons who had been killed at the parish.¹⁵²² The next morning, the bourgmestre sent a bulldozer to dig graves.¹⁵²³ The witness heard the sound of the bulldozer and then something that sounded like a bomb.¹⁵²⁴ They went out of the presbytery, but there was nothing they could do because there were approximately ten thousand people around.¹⁵²⁵ The back of the church was destroyed first and at the time, Father Seromba was in the refectory.¹⁵²⁶

1511 T. 27 January 2010, p. 28. 1512 T. 27 January 2010, pp. 28, 31. 1513 T. 27 January 2010, p. 29. 1514 T. 27 January 2010, p. 29. 1515 T. 27 January 2010, pp. 31, 45. 1516 T. 27 January 2010, pp. 31, 41. The witness said that the people who wore camouflage uniforms were rogues who were not from the vicinity and came from “far-off communes.” T. 27 January 2010, p. 43. 1517 T. 27 January 2010, p. 30. 1518 T. 27 January 2010, pp. 30-31, 41. The witness testified that no one told him that they had seen Kanyarukiga. T. 27 January 2010, p. 31. He speculated that Kanyarukiga was at home on 16 April 1994 but could not say which of Kanyarukiga’s homes he would have been at. T. 27 January 2010, pp. 31, 41, 47. 1519 T. 27 January 2010, p. 47. 1520 T. 11 February 2010, pp. 36-38 (CS). 1521 T. 11 February 2010, p. 20 (CS). 1522 T. 11 February 2010, p. 37 (CS). 1523 T. 11 February 2010, p. 37 (CS). 1524 T. 11 February 2010, p. 37 (CS). 1525 T. 11 February 2010, pp. 37, 38 (CS). 1526 T. 11 February 2010, p. 37 (CS).

Page 136

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

133 The witness was still in the refectory when the bell tower was destroyed.1527 According to the witness, Father Seromba remained in the refectory throughout the demolition of the church.1528 550. After the church was destroyed, the witness and Father Seromba and others left the refectory.1529 Witness KG15 testified that the situation at the parish became chaotic.1530 According to the witness, the assailants were “like drunk” or “like mad,” and the witness did not dare face them.1531 551. Witness KG15 testified that only two people, the bourgmestre and the IPJ, visited the presbytery on 16 April 1994.1532 At first, Witness KG15 said they came in the evening,1533 but later he stated that they visited “during the day,” some time between 11.00 a.m. or midday and 3.00 p.m.1534 The witness overheard Father Seromba and others discussing “the situation” with the bourgmestre and the IPJ in the presbytery courtyard for approximately 30 minutes.1535 While they were at the parish, the bourgmestre and the IPJ remained in the presbytery courtyard.1536 Witness KG15 did not see them enter any of the rooms in the presbytery, including the bishop’s room, nor did he otherwise learn of such an occurrence.1537 The witness denied seeing any organised meeting or anyone drinking beer or celebrating in the bishop’s room following the destruction of the church.1538 Defence Witness Fulgence Seminega 552. Witness Fulgence Seminega was 17 or 18 years old in April 1994 and lived in Kinga cellule, Ndaro secteur, Kivumu commune, Kibuye préfecture.1539 He testified that he has known Gaspard Kanyarukiga since he was around 10 years old.1540 553. Witness Seminega testified that he was on his hill farming when the Nyange Church was destroyed on 16 April 1994.1541 From his place of residence, the witness could hear the church bell.1542 He heard noise, and people said that the church had been destroyed.1543 Witness Seminega and the people who were with him rushed down to the church to see whether the church had actually been destroyed.1544 The witness arrived at the church between 3.00 p.m. and 4.00 p.m.1545

1527 T. 11 February 2010, p. 37 (CS). 1528 T. 11 February 2010, pp. 37-38 (CS). 1529 T. 11 February 2010, p. 38 (CS). 1530 T. 11 February 2010, pp. 37-38 (CS). 1531 T. 11 February 2010, pp. 37, 38 (CS). 1532 T. 11 February 2010, pp. 18, 19 (CS). 1533 T. 11 February 2010, p. 18 (CS). 1534 T. 11 February 2010, p. 19 (CS). 1535 T. 11 February 2010, pp. 18-19 (CS). According to the witness, “[t]he situation was worsening”, and the men discussed “the people and the church which had been destroyed”. He further testified that, “[t]here were people who were to be buried, there were machines. We were waiting behind the church. So we talked about the prevailing situation at the presbytery, around the church, as well.” See also T. 11 February 2010, p. 26 (CS). 1536 T. 11 February 2010, p. 19 (CS). 1537 T. 11 February 2010, p. 19 (CS). 1538 T. 11 February 2010, pp. 19-20 (CS). 1539 T. 27 January 2010, p. 49. 1540 T. 27 January 2010, pp. 49-50. 1541 T. 27 January 2010, pp. 50-51. 1542 T. 27 January 2010, p. 51. 1543 T. 27 January 2010, p. 51. 1544 T. 27 January 2010, p. 51. 1545 T. 27 January 2010, pp. 51, 52, 61.

Page 137

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

134 554. Witness Seminega testified that, when he reached the Statue of the Virgin Mary, Kanyarukiga’s pharmacy was closed and there were no vehicles in front of the pharmacy. 1546 Witness Seminega knew that Kanyarukiga owned a small red vehicle but did not see a red vehicle near the Statue of the Virgin Mary on 16 April 1994. 1547 555. When the witness arrived at the Nyange Parish on 16 April 1994, he saw people coming and going from the church. 1548 The church had already been demolished. 1549 556. Witness Seminega did not see Kanyarukiga on 16 April 1994, nor did anyone tell the witness that Kanyarukiga was in Nyange, in the vicinity of the church or elsewhere in the Kivumu commune on that day. 1550 Defence Witness Francois Sibomana 557. Witness Sibomana testified that the Nyange Parish Church was demolished on Saturday, 16 April 1994. 1551 Although he was not present during the destruction, Witness Sibomana stated that everyone in Nyange or the Kivumu commune knew about that event. 1552 558. Witness Sibomana testified that it was well known that Télesphore Ndungutse was involved in the killings at the Nyange Parish because Ndungutse was in charge of the interahamwe in Kivumu commune. 1553 He further testified that he heard, after going into exile, that Father Seromba was present during the destruction of the church, but “[p]eople did not state with any precision that [Seromba] killed this or that person or that he was directly involved in the acts.” 1554 Witness Sibomana denied having heard anything about the involvement of the bourgmestre. 1555 Finally, Witness Sibomana testified that he did not see Kanyarukiga in Kivumu commune on 16 April 1994; he did not see Kanyarukiga at his house or near his house. 1556 Defence Witnesses KG19, Damien Nayituriki and KG59 559. Defence Witnesses KG19, Damien Nayituriki and KG59 all testified that the Nyange Church was destroyed on 16 April 1994. 1557 None of these witnesses were in Nyange on 16 April 1994. 1558 Rather, other people told them that the church had been destroyed. 1559

1546 T. 27 January 2010, p. 52. According to the witness, “any vehicle coming [to the Nyange Centre] would not have been able to park there because there was a crowd there.” 1547 T. 27 January 2010, p. 52. 1548 T. 27 January 2010, pp. 51, 61. 1549 T. 27 January 2010, pp. 53, 61. The walls of the church had been destroyed, and all that Witness Seminega saw were bricks and debris on the ground. 1550 T. 27 January 2010, p. 52. Witness Seminega testified that he did not see Kanyarukiga nor did he hear that Kanyarukiga was around in Kivumu commune in April of 1994. 1551 T. 1 February 2010, p. 28. 1552 T. 1 February 2010, pp. 28, 38. 1553 T. 1 February 2010, p. 44. The witness stated that, “there was no way one could avoid hearing about [Ndungutse]” being involved in the killings at the Nyange Church. 1554 T. 1 February 2010, pp. 44, 45, 46. 1555 T. 1 February 2010, p. 44. 1556 T. 1 February 2010, p. 38. (“I cannot give you the names of the persons who were at the church when it was being demolished, but I can simply say that on the day the church was demolished, Kanyarukiga was not in our area.”). 1557 Witness KG19, T. 26 January 2010, p. 63 (CS); Witness Nayaturiki, T. 8 February 2010, p. 7; Witness KG59, T. 25 January 2010, p. 11 (CS). 1558 Witness KG19, T. 26 January 2010, pp. 64, 65 (CS); Witness Nayaturiki, T. 8 February 2010, p. 7; Witness KG59, T. 25 January 2010, p. 11 (CS). 1559 Witness KG19, T. 26 January 2010, p. 63 (CS); Witness Nayaturiki, T. 8 February 2010, p. 7; Witness KG59, T. 25 January 2010, p. 11 (CS).

Page 138

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

135 6.3. Deliberations 560. The Chamber notes that it has found, for the reasons outlined in paragraphs 121 to 137, that the alibi for 16 April 1994 is not reasonably possibly true. 561. It is not disputed that the Nyange Parish Church was destroyed on 16 April 1994 or that the Tutsi civilians who had taken refuge there were killed. Both Parties presented evidence that assailants used bulldozers to destroy the Nyange Church on 16 April 1994, crushing those inside. 562. Prosecution and Defence witnesses both testified that thousands of Hutu assailants surrounded the Nyange Church on 16 April 1994. 561 Prosecution Witnesses CNJ, CBY and CDL all testified that many of the assailants who were present on 16 April 1994 had spent the night at the parish. 562 Witness CBR, moreover, testified that there were already many assailants at the parish when he arrived between 6.00 and 7.00 a.m. and that the number of attackers continued to grow throughout the morning. 563 Defence Witness Twagirashema testified that there were so many people in Nyange on 16 April 1994 that he could not count them and that he saw a group of people moving towards the church. 564 Witness CBK estimated that there were more than 5000 assailants at the parish on 16 April 1994, whereas Witness KG15 testified that there were around 10,000. 565 563. Prosecution Witnesses CBR, CDL and CBY all testified that at least one bulldozer was brought from the Astaldi Company to the Nyange Parish on the morning of 16 April 1994. 566 Defence Witness KG15 agreed that a bulldozer arrived at the parish on the morning of 16 April 1994. 567 Witnesses CBR, CDL and CNJ testified that a Rwandan named Anasthase Nkinamubanzi, also known as “Two Thousand”, drove some of the equipment used to demolish the church on 16 April 1994. 568 Witnesses CBR and CDL further identified two Zaireans named

Mitima and Maurice.¹⁵⁶⁹ Witness CBR mentioned a third Zairean named Albert.¹⁵⁷⁰ This evidence is not disputed by the Defence. The Chamber is therefore satisfied that at least one bulldozer was brought to the Nyange Parish on 16 April 1994 and that it was operated by a Rwandan named Anasthase Nkinamubanzi and at least two Zaireans, known as Mitima and Maurice.

¹⁵⁶⁰ Witness CBN, T. 1 September 2009, p. 69; Witness CBK, T. 3 September 2009, pp. 21, 38; Witness CNJ, T. 7 September 2009, p. 27; Witness CBR, T. 10 September 2009, p. 11; T. 10 September 2009, pp. 10-11; Witness CDL, T. 10 September 2009, pp. 42-43; Witness CBY, T. 14 September 2009, p. 25; Witness KG59, T. 25 January 2010, p. 11 (CS); Witness KG19, T. 26 January 2010, p. 63 (CS); Witnesses Mutume, T. 27 January 2010, p. 29; Witness Seminega, T. 27 January 2010, p. 53; Witness Sibomana, T. 1 February 2010, pp. 28, 38; Witness Twagirashema, T. 3 February 2010, pp. 6, 13; T. 8 February 2010, pp. 6-7; Witness KG15, T. 11 February 2010, pp. 19, 27, 37 (CS). ¹⁵⁶¹ T. 3 September 2009, pp. 22, 28; T. 3 February 2010, pp. 5, 6; T. 11 February 2010, pp. 37, 38 (CS). Witness CNJ testified that he saw the same number of assailants at the parish on 16 April 1994 as he had seen on 15 April 1994. The Chamber recalls that Witness CNJ testified that there were 4000 Hutu assailants at the parish on 15 April 1994. T. 7 September 2009, pp. 15, 25. ¹⁵⁶² Witness CNJ, T. 7 September 2009, p. 23; Witness CBY, T. 8 September 2009, p. 47; Witness CDL, T. 10 September 2009, p. 35; T. 11 September 2009, p. 16. Their evidence was corroborated by Witnesses CBR and CBT, who both testified that assailants stayed at the church on the evening of 15 April 1994. Witness CBR, T. 9 September 2009, p. 29; Witness CBT, 14 September 2009, p. 49. ¹⁵⁶³ T. 10 September 2009, p. 8. ¹⁵⁶⁴ T. 3 February 2010, p. 5. ¹⁵⁶⁵ Witness CBK, T. 3 September 2009, pp. 22, 28; Witness KG15, T. 11 February 2010, pp. 37, 38 (CS). ¹⁵⁶⁶ Witness CBR, T. 9 September 2009, p. 32; T. 10 September 2009, p. 10; Witness CDL, T. 10 September 2009, p. 3; T. 11 September 2009, pp. 16-17; Witness CBY, T. 14 September 2009, pp. 20-21. ¹⁵⁶⁷ T. 11 February 2010, p. 37 (CS). ¹⁵⁶⁸ Witness CBR, T. 9 September 2009, p. 34; Witness CNJ, T. 7 September 2009, p. 26; Witness CDL, T. 10 September 2009, pp. 41-42. ¹⁵⁶⁹ Witness CBR, T. 9 September 2009, p. 34; Witness CDL, T. 10 September 2009, p. 41. ¹⁵⁷⁰ T. 9 September 2009, p. 34.

Page 139

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

¹³⁶ ⁵⁶⁴. It is not disputed that the bell tower was the last part of the church to be destroyed. Witness CDL testified that the bell tower was all that remained of the church when he left the parish at 4.00 p.m.¹⁵⁷¹ Defence Witness KG15 testified that the back of the church was destroyed before the bell tower.¹⁵⁷² Witness Seminega provided circumstantial support for this evidence when he testified that he heard the church bell, followed by a loud noise, on the afternoon of 16 April 1994 and that when he arrived at the church around 3.00 or 4.00 p.m., the church had already been demolished.¹⁵⁷³ According to Witnesses CBK and CNJ, the Tutsi who survived the earlier demolition congregated in the bell tower and were killed when the tower fell.¹⁵⁷⁴ This evidence is supported by Witness CBY, who testified that “the refugees were at the church tower”

and the assailants “were much lower.”¹⁵⁷⁵ Based on the combined testimony of Prosecution and Defence Witnesses, the Chamber is satisfied that the bell tower was the last part of the church to be destroyed. ⁵⁶⁵ Finally, the Chamber notes that Prosecution and Defence witnesses agreed that the Tutsi who had taken refuge at the Nyange Parish were still inside the church when it was demolished.¹⁵⁷⁶ A number of Prosecution witnesses testify that those that took refuge in the church included men, women, children and the elderly.¹⁵⁷⁷ Those who tried to escape were killed with traditional weapons.¹⁵⁷⁸ Witness CNJ estimated that the total number of victims on 16 April 1994 was around 2000, whereas Witness CBK put the total number of victims closer to 3000.¹⁵⁷⁹ The range provided by these two witnesses is consistent with the evidence of Witness CBN, who testified that there were 2000 Tutsi at the parish on the night of 14 April 1994, and Witness CBY, who said that around 2500 to 3000 people took refuge at the parish.¹⁵⁸⁰ Hence, while the Chamber has treated the evidence of Witnesses CNJ and CBK with extreme caution, the Chamber is satisfied, on the basis of their testimony as corroborated by the circumstantial evidence of Witnesses CBN and CBY, that at least 2000 Tutsi civilians were killed at the Nyange Parish on 15 and 16 April 1994. Of these, the majority were killed when the church was demolished on 16 April 1994.¹⁵⁸¹

¹⁵⁷¹ T. 10 September 2009, p. 43. ¹⁵⁷² T. 11 February 2010, p. 37 (CS). ¹⁵⁷³ T. 27 January 2010, pp. 51, 53, 61. While Witness Seminega testified that the church was already a pile of rubble when he arrived around 4.00 p.m., the Chamber does not consider such minor variations in the times provided by different witnesses to be significant. Indeed, the Chamber notes that Witness CNJ also testified that the demolition was complete by 4.00 p.m. T. 7 September 2009, p. 27. ¹⁵⁷⁴ Witness CBK, T. 3 September 2009, pp. 22, 31; Witness CNJ, T. 7 September 2009, p. 27. ¹⁵⁷⁵ T. 14 September 2009, p. 25. ¹⁵⁷⁶ See, e.g., Witness CNJ, T. 7 September 2009, p. 27; Witness CDL, T. 10 September 2009, pp. 42-43; Witness CBK, T. 3 September 2009, pp. 21-22; Witness CBY, T. 14 September 2009, p. 25; Witness Twagirashema, T. 3 February 2010, p. 4; Witness Mutume, T. 27 January 2010, p. 29; Witness Nayituriki, T. 8 February 2010, p. 21. ¹⁵⁷⁷ Witness CBN, T. 1 September 2009, p. 50; Witness CBS, T. 16 September 2009, pp. 44, 45; Witness YAU, T. 15 September 2009, p. 26; Witness CBK, T. 2 September 2009, p. 65 (“Amongst those refugees there were women, men, old people, children, intellectuals, uneducated people.”). ¹⁵⁷⁸ See, e.g., Witness CNJ, T. 7 September 2009, p. 27; Witness CBK, T. 3 September 2009, p. 21; Witness CDL, T. 10 September 2009, pp. 8, 9, 12. ¹⁵⁷⁹ Witness CNJ, T. 7 September 2009, p. 28; Witness CBK, T. 3 September 2009, p. 28. ¹⁵⁸⁰ Witness CBN, T. 1 September 2009, p. 60; Witness CBY, T. 8 September 2009, p. 30. ¹⁵⁸¹ Witness CNJ testified that, after the church was demolished, “[t]here was another bulldozer that was digging up the tombs below the church.” T. 7 September 2009, p. 28. Witness CNJ’s testimony is corroborated by that of Prosecution Witness CBN and Defence Witness KG15. Witness CBN testified that when he returned to Nyange in September 1994, he “found a place where the people who had been killed inside the church had been buried.” T. 1 September 2009, p.

69. Witness KG15 testified that the priests at the Nyange Parish asked the bourgmestre and IPJ for help in burying the bodies that had been left in the church compound. T. 11 February 2010, pp. 17-18, 26, 37 (CS). See also Prosecution Exhibit P6 (Photograph K023-5808 compound showing where the church was, far on the left, mass graves located in front of the memorial); Prosecution Exhibit P11 (Photograph K023-5815 church compound, view of mass graves); Prosecution Exhibit P12 (Photograph K023-5816 Church ruins, partial view of the mass graves as well as lined tombs).

Page 140

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

137 566. The issue before the Trial Chamber therefore concerns Kanyarukiga's alleged involvement in these established events. The Prosecution submits that, [T]he Accused was an important and crucial person in the decision that was taken to destroy the [Nyange Church]. The evidence demonstrates that he was one of the leaders involved in planning the logistics of the demolition, and in supervising its execution.¹⁵⁸² The Prosecution relies on the evidence of Witnesses CNJ, CBK, CBY, CBR and CDL to support these allegations.¹⁵⁸³ 567. The Defence submits that the Prosecution witnesses "are a group of self-serving, largely criminal, collaborating witnesses who have personal motives for placing the Accused at the scene".¹⁵⁸⁴ The Defence points to Kanyarukiga's alibi, discussed in Chapter III, Section One, as well as the testimony of Defence Witnesses Jean-Bosco Twagirashema, Fulgence Seminega, Roger Kemena Mutume and KG15, who testified that they neither saw nor heard that Kanyarukiga was in Nyange or involved in the events at Nyange Parish on 16 April 1994.¹⁵⁸⁵ Meeting at CODEKOKI on the Morning of 16 April 1994 568. Paragraph 16 of the Amended Indictment alleges that Kanyarukiga attended a meeting at the CODEKOKI building on the morning of 16 April 1994. The Prosecution, however, has not adduced any evidence of a meeting at the CODEKOKI on this day. Rather, when asked during its closing argument to identify evidence on the record in support of this allegation, the Prosecution pointed to Witness CDL's testimony regarding the alleged meeting in front of Kanyarukiga's pharmacy on 16 April 1994.¹⁵⁸⁶ 569. The Defence submits that Witness CDL's testimony that Kanyarukiga attended a meeting in front of his pharmacy on 16 April 1994 should be excluded for lack of notice.¹⁵⁸⁷ The Chamber recalls that the Prosecution did not make the link between Witness CDL's testimony and paragraph 16 of the Indictment until its closing argument. Instead, in response to the Defence's initial objection to this evidence, the Prosecution argued that the testimony fell within the scope of paragraph 5(B) of the Indictment and that the Defence had been given notice of this allegation by means of paragraph 36 of the Prosecutor's Pre-Trial Brief.¹⁵⁸⁸ The Chamber further recalls that, in its response to the Defence motion for a judgement of acquittal, the Prosecution argued that other than the date, there was no material difference between the allegation in the Indictment and the evidence adduced at trial of a meeting at the CODEKOKI on 15 April 1994.¹⁵⁸⁹

1582 Prosecutor's Final Trial Brief, para. 185. According to the Prosecution, "[t]he evidence also shows [Kanyarukiga] remained at Nyange the entire time the demolition was taking place." 1583 Prosecutor's Final Trial Brief, paras. 161-166, 186-189. 1584 Defence Final Brief, para. 260. 1585 Defence Final Brief, paras. 261-282. The Chamber notes that Witness Francois Sibomana also provided similar testimony. T. 1 February 2010, p. 31. 1586 T. 24 May 2010, pp. 97-98. 1587 Defence Final Brief, para. 254; Motion for a Stay of Proceedings, or Exclusion of Evidence Outside the Indictment, filed on 18 December 2009, para. 67. The Defence also objected to the admission of this evidence at trial; the objection was noted by the Trial Chamber. T. 10 September 2009, pp. 36, 38. In its 15 January 2010 decision on the Defence motion for exclusion of evidence, the Trial Chamber reserved its decision as to whether to exclude evidence of certain meetings allegedly attended by the Accused until the judgement. Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010, para. 17. 1588 T. 10 September 2009, pp. 37-38. 1589 Prosecutor's Response to the Motion for Acquittal Pursuant to Rule 98 bis, filed on 28 September 2009, paras. 16, 18.

Page 141

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

138 570. The Chamber further notes that Witness CDL first mentioned the meeting in front of Kanyarukiga's pharmacy in his statement to ICTR investigators in 2001, more than six years prior to the amendment of the indictment.¹⁵⁹⁰ Despite having this information in its possession, the Prosecution did not include the meeting at the pharmacy in the Amended Indictment. Rather, the Prosecution added the meeting at the CODEKOKI, as set forth in paragraph 16. It now seeks to "cure" this defect in the Indictment through its Pre-Trial Brief. 571. The Chamber is not persuaded. The meeting in front of the pharmacy was not mentioned in the text of the Prosecution's Pre-Trial Brief or the Prosecution's opening statement; it only appears in the summary of Witness CDL's anticipated testimony.¹⁵⁹¹ Moreover, the summary of Witness CDL's testimony does not simply add greater detail in a consistent manner to a more general allegation already pleaded in the Indictment.¹⁵⁹² Rather, it materially alters the allegation in the Indictment by changing both the location of the meeting and the nature of Kanyarukiga's participation.¹⁵⁹³ Accordingly, the Chamber has disregarded Witness CDL's testimony that Kanyarukiga attended a meeting in front of the pharmacy on 16 April 1994.¹⁵⁹⁴ Meeting at Nyange Parish on the morning of 16 April 1994 572. Paragraph 17 alleges that, after the meeting at the CODEKOKI, Kanyarukiga and others met with Father Seromba at the Nyange Parish and informed him of their decision to demolish the church and kill the Tutsi who had taken refuge inside. The Prosecution has presented evidence of a gathering at the parish in the early morning on 16 April 1994, as well as a meeting at or near the presbytery around 9.00 or 10.00 a.m. 573. The Chamber recalls that paragraph 17 of the Amended Indictment only alleges that the Accused attended one meeting at the Nyange Parish on the morning of 16 April 1994. Having considered the evidence of both gatherings, the Chamber is satisfied that the later meeting is that described

in paragraph 17 of the Indictment. However, because both assemblies appear to have been part of the same course of conduct,¹⁵⁹⁵ the Chamber has considered the evidence of the earlier gathering to the extent to which it supports the general allegation that the Accused and others were present during the events on 16 April 1994. Given that the Indictment clearly alleges that Gaspard Kanyarukiga and others were at the parish on this day, the Chamber is satisfied that the Accused had sufficient notice of this evidence. ⁵⁷⁴ Prosecution Witnesses CBR and CDL both testified that they arrived at the Nyange Parish before 8.00 a.m. on the morning of 16 April 1994.¹⁵⁹⁶ According to these witnesses, “authorities” were present and talking when they arrived.¹⁵⁹⁷ Witness CBR testified that when he arrived at the parish around 6.00 or 7.00 a.m., he saw Ndahimana, Kayishema, Kanyarukiga, Ndungutse,

¹⁵⁹⁰ Defence Exhibit D29(A) (Statement of Witness CDL dated 10 October 2001), p. 3. ¹⁵⁹¹ The Prosecutor’s Pre-Trial Brief, pp. 28-29. ¹⁵⁹² See Muvunyi, Judgement (AC), paras. 28, 98. ¹⁵⁹³ See Muvunyi, Judgement (AC), para. 28. Not only does Witness CDL allege that the decision to destroy the church was taken at the Accused’s pharmacy, but he also accuses Kanyarukiga of playing a leading role in that decision. T. 10 September 2009, pp. 36, 38-39; Defence Exhibit D29(A) (Statement of Witness CDL dated 10 October 2001), p. 3. ¹⁵⁹⁴ The Chamber recalls that it has treated Witness CDL’s testimony with extreme caution and has generally only relied on the witness’s evidence where corroborated by other credible evidence. Given that Witness CDL’s evidence about this meeting is uncorroborated, the Chamber finds that, even if it were to consider the evidence on its merits, it would not be sufficient to establish beyond reasonable doubt that Kanyarukiga attended a meeting in front of the pharmacy on the morning of 16 April 1994 or that the decision to destroy the church was taken during this meeting. ¹⁵⁹⁵ Based on the evidence of Witnesses CBR and CDL, these “meetings” were only separated by about an hour and were held in approximately the same location. ¹⁵⁹⁶ Witness CBR, T. 9 September 2009, p. 29; T. 10 September 2009, p. 8; Witness CDL, T. 10 September 2009, p. 35. ¹⁵⁹⁷ Witness CBR, T. 9 September 2009, pp. 29-30; Witness CDL, T. 10 September 2009, pp. 35, 38.

Page 142

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

¹³⁹ Habiyaambere, Murangwabugabo, Habarugira and Father Seromba talking in front of Seromba’s office.¹⁵⁹⁸ He did not hear what they were saying nor did he see them enter the presbytery.¹⁵⁹⁹ Witness CDL, who testified that he arrived at the parish with Ndahimana between 7.00 and 8.00 a.m., agreed that other people, including Seromba, police, gendarmes and reservists, were already present.¹⁶⁰⁰ Witness CDL testified that he spoke to Ndahimana, Seromba and the others who were with them.¹⁶⁰¹ ⁵⁷⁵ Witnesses CBR and CDL both testified that after these discussions, Bourgmestre Ndahimana initiated the day’s attacks by firing a gun in the direction of the church.¹⁶⁰² According to Witness CBR, this occurred around 8.00 a.m. and Kanyarukiga, Kayishema, Ndungutse, Habiyaambere, Murangwabugabo and Habarugira were standing near Ndahimana when the shots were fired.¹⁶⁰³ Witness CDL testified that he was at the

parish during this time, and after Ndahimana fired the first shots, police and others with firearms followed suit.¹⁶⁰⁴ Witness CDL did not see Kanyarukiga at this time.¹⁶⁰⁵ 576. The Chamber recalls that Witnesses CBR and CDL both participated in the attacks on the Nyange Parish and were detained together at the Kibuye Prison, where they participated in the same Gacaca sessions.¹⁶⁰⁶ Therefore, the Chamber has treated their evidence with appropriate caution. However, the fact that these witnesses are accomplices does not necessarily render their testimony unreliable. Indeed, the Chamber finds that as participants in the attacks, these witnesses were inherently well placed to observe the scene outside the Nyange Church on 16 April 1994. The Chamber has found that Witness CBR's evidence, in particular, was detailed and consistent. Further, while the Chamber has generally treated the evidence of Witness CDL with extreme caution due to concerns that the witness may have an interest in deflecting responsibility onto the Accused, the Chamber notes that, in this instance, the witness incriminated himself by testifying that he was with Ndahimana when Ndahimana fired on the church. Thus, based on their combined testimony, the Chamber is satisfied that certain "authorities," including Father Seromba and Bourgmestre Ndahimana, were present at the Nyange Parish before 8.00 a.m. on 16 April 1994 and were talking in front of Seromba's office. The Chamber is also satisfied that Bourgmestre Ndahimana fired shots in the direction of the Nyange Church around 8.00 a.m., initiating the day's attacks. 577. Only Witness CBR placed Kanyarukiga at the parish during these events. While the Chamber is generally satisfied that Witness CBR provided a detailed and consistent account of the events he experienced on 16 April 1994, it finds that in view of Witness CDL's conflicting testimony, it cannot rely on Witness CBR's uncorroborated evidence to establish that Kanyarukiga was at the Nyange Parish before 9.00 or 10.00 a.m. Rather, given Witness CDL's testimony that he accompanied Ndahimana on the morning of 16 April 1994, the Chamber finds that, had Kanyarukiga also been near the bourgmestre, Witness CDL would have seen him.

1598 T. 9 September 2009, pp. 29-30. 1599 T. 9 September 2009, p. 31; T. 10 September 2009, p. 9. 1600 T. 10 September 2009, p. 35. 1601 T. 10 September 2009, p. 35. 1602 Witness CBR, T. 9 September 2009, p. 32; Witness CDL, T. 10 September 2009, p. 35; T. 11 September 2009, p. 18. 1603 T. 9 September 2009, p. 32; T. 10 September 2009, pp. 9, 11. 1604 T. 10 September 2009, pp. 35-36, 38 (line 32), 39 (line 20); T. 11 September 2009, p. 18. 1605 T. 11 September 2009, p. 18. 1606 Witness CNJ, T. 8 September 2009, pp. 10-11; Defence Exhibit D18 (List of Protected Names shown to Witness CNJ); Witness CBR, T. 9 September 2009, pp. 49-52; Defence Exhibit D25 (List of Protected Names shown to Witness CBR); Witness CDL, T. 10 September 2009, pp. 72-75; Defence Exhibit D28 (List of Protected Names shown to Witness CDL). See also Personal Identification Sheets of Witnesses CNJ, CDL and CBR.

Page 143

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

140 578. In crediting Witness CDL's evidence on this point, the Chamber has considered that while Witness CDL claimed to be a bystander, other witnesses identified him as a key player in the attacks on 15 and 16 April 1994.¹⁶⁰⁷ Given that Witness CDL is still serving time in Rwanda for crimes related to the events of 1994,¹⁶⁰⁸ he could have personal motivations to implicate the Accused while minimising his own role in the attacks.¹⁶⁰⁹ With respect to these particular events, however, Witness CDL has done exactly the opposite; he has placed himself at the parish with Bourgmestre Ndahimana while acknowledging that he did not see the Accused until later. 579. For these reasons, the Chamber finds that it has not been established beyond reasonable doubt that Kanyarukiga was at the Nyange Parish during the gathering before 8.00 a.m. or when Ndahimana fired at the church. 580. Witnesses CBR, CDL, CBK and CBY testified that Kanyarukiga also attended a meeting at the Nyange Parish later in the morning on 16 April 1994.¹⁶¹⁰ According to Witness CBR, Ndahimana, Kanyarukiga, Kayishema, Ndungutse, Habiyaambere, Murangwabugabo and Habarugira returned to Father Seromba's office between 9.00 and 10.00 a.m.¹⁶¹¹ Witness CDL also placed the meeting near the secretariat.¹⁶¹² He testified that Ndahimana, Kayishema, Habiyaambere, Kanyarukiga, Ndungutse, Gilbert Kanani and others informed Father Seromba of the decision to destroy the church¹⁶¹³ and that Seromba accepted the decision because it was the only way to eliminate the Tutsi.¹⁶¹⁴ Witness CBK agreed that Kanyarukiga, Kayishema and others met with Father Seromba on the morning of 16 April 1994 but said that they talked in the inner courtyard of the presbytery and then went upstairs to the bishop's room.¹⁶¹⁵ Witness CBY confirmed that the "authorities" had a meeting with a priest on the morning of 16 April 1994, but he did not say where.¹⁶¹⁶ 581. The Chamber notes that, while the witnesses disagreed somewhat over the exact venue of the meeting and its participants, they corroborated each other by giving evidence that: a meeting was held at the Nyange Parish on the morning of 16 April 1994, as alleged in paragraph 17 of the

1607 See, e.g., Witness CBK, T. 2 September 2009, p. 70; T. 3 September 2009, p. 9; Witness CDL, T. 11 September 2009, p. 23; Witness CNJ, T. 7 September 2009, p. 25; Witness CBS, T. 16 September 2009, p. 4. The Trial Chamber has omitted other similar references for witness protection reasons. The Chamber recalls that Witness CDL testified that he was a spectator during the events on 16 April 1994 and only pled guilty because he did not do anything to assist the victims of the attacks. T. 11 September 2009, p. 23. Given the narrow parameters of this alleged confession, the Chamber finds that the witness could have an incentive to minimise his involvement in the attacks in order to avoid additional charges. 1608 Order for Transfer of Detained Witnesses CDL and CDK, 20 August 2009; T. 10 September 2009, pp. 55, 60 (CS). 1609 Along these lines, the Chamber does not believe Witness CDL's testimony that he left the Nyange Parish during the demolition of the church in order to check on something at a school and to see the parents of a boy who had allegedly been left at the parish. T. 10 September 2009, p. 43. The Chamber is concerned that this story may have been concocted to take the witness away from the parish during the height of the demolition. 1610 Witness CBR, T. 9 September 2009, p. 32; Witness CDL, T. 10 September 2009, pp. 38-39, 51-52; Witness CBK, T. 3 September 2009, pp. 25-26; Witness CBY, T. 8 September 2009, p. 47. 1611 T. 9 September 2009, p. 32; T. 10 September 2010, p. 9. 1612 T. 10 September 2009, pp. 51-52; Prosecution Exhibit P55 (Coloured Photocopy of Nyange Church

Secretariat Photo K027-1655). 1613 T. 10 September 2009, pp. 51-52. 1614 T. 10 September 2009, pp. 36, 38-39. The Chamber notes that page 36 of the transcript only refers to meetings at the pharmacy, which have been excluded for notice. However, it also says that Father Seromba agreed to the demolition “since there were no other means whereby they could destroy the Tutsis.” T. 10 September 2009, p. 36. Witness CDL testified elsewhere, however, that the decision to destroy the church was communicated to Seromba at the parish. T. 10 September 2009, pp. 51-52. Therefore, the Chamber has used the evidence from page 36 of the transcript to the extent to which it relates to informing Seromba of the decision to destroy the church. 1615 T. 3 September 2009, p. 25. 1616 T. 8 September 2009, p. 47. According to his earlier testimony, the witness appears to be referencing Kayishema, Ndungutse, Ndahimana, “Théodomir” and Kanyarukiga. T. 8 September 2009, pp. 44-46.

Page 144

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

141 Indictment; and Kanyarukiga was present at that meeting with Father Seromba, IPJ Kayishema and others. The Chamber finds that the slight variations between the witnesses’ accounts can be explained by the passage of time and the witnesses’ different vantage points on 16 April 1994. 582. The Chamber has also considered the evidence of Defence Witnesses KG15, Jean-Bosco Twagirashema, Roger Mutume, Fulgence Seminega and Francois Sibomana. 583. Witness KG15 testified that Father Seromba did not leave the presbytery until after the church was demolished,¹⁶¹⁷ and the only two people who visited the parish presbytery on 16 April 1994 were the bourgmestre and the IPJ, who arrived some time between 11.00 a.m. and 3.00 p.m.¹⁶¹⁸ As previously discussed, the Chamber has serious doubts about Witness KG15’s overall credibility. Further, with respect to this specific event, the Chamber recalls that Witness KG15 testified that he did not leave the presbytery on 16 April 1994 and did not even look outside until the bulldozer began to demolish the church.¹⁶¹⁹ Thus, given the evidence that the meeting was held outside of the presbytery, the Chamber does not consider Witness KG15’s testimony sufficient to cast doubt on the Prosecution evidence. Moreover, while Witness KG15 testified in this case that Father Seromba remained inside the refectory until after the church was demolished, he said in the Seromba trial that Father Seromba went out during the demolition.¹⁶²⁰ In view of these irregularities, the Chamber has disregarded Witness KG15’s testimony as to Father Seromba’s whereabouts. 584. Defence Witnesses Twagirashema, Mutume and Seminega all testified that they went to Nyange on 16 April 1994, but they did not see Kanyarukiga or Kanyarukiga’s vehicle, nor did they hear that Kanyarukiga was present.¹⁶²¹ Considering none of these witnesses went to the church during the demolition and that there were thousands of people in Nyange on 16 April 1994, the Chamber does not consider this testimony sufficient to cast doubt on the Prosecution evidence. 585. Witness Sibomana acknowledged that he was not in Nyange during the destruction of the church but testified that he did not see Kanyarukiga in Kivumu commune, including at the Accused’s house, on 16 April 1994.¹⁶²² This is not a sufficient basis of knowledge for the Chamber

to make any findings concerning Kanyarukiga's involvement in the alleged meeting at the parish. 586. Finally, Defence Witnesses Twagirashema, Mutume and Seminega also testified that Kanyarukiga's pharmacy was closed on 16 April 1994.¹⁶²³ While the Chamber is not convinced that the pharmacy was closed, it observes that, even if it had been closed, the Accused did not work in his pharmacy.¹⁶²⁴ Thus, the Chamber does not consider this evidence relevant to the question of whether Kanyarukiga was at the Nyange Parish on 16 April 1994.

1617 T. 11 February 2010, pp. 37-38 (CS). 1618 T.11 February 2010, pp. 18-19 (CS). 1619 T. 11 February 2010, pp. 18, 23, 37 (CS). 1620 T. 11 February 2010, p. 38 (CS). 1621 Witness Twagirashema, T. 3 February 2010, pp. 5-6; Witness Mutume, T. 27 January 2010, pp. 30-31, 41; Witness Seminega, T. 27 January 2010, p. 52. 1622 T. 1 February 2010, p. 38. 1623 Witness Seminega, T. 27 January 2010, p. 52; Witness Mutume, T. 27 January 2010, p. 30; Witness Twagirashema. T. 3 February 2010, p. 5. 1624 Witness Sibomana, T. 1 February 2010, p. 27; Witness Tugirumukiza, T. 1 February 2010, p. 53; Witness Twagirashema, T. 3 February 2010, p. 24. See also Witness CBR, T. 9 September 2009, p. 30 ("I knew him as someone who carried out his business activities in Kigali and who was known at the Kivumu commune ... I saw him on few occasions, maybe on four occasions. When he was coming to see what was going on at his pharmacy, that is when I saw him."); Witness CBT, T. 14 September 2009, pp. 42-43 (stating that Kanyarukiga was a prosperous businessman in Kigali and that he also owned a pharmacy in the Nyange Trading Centre); Witness YAU, T. 15 September 2009, p. 30 (stating that she used to see Kanyarukiga when he visited the Nyange pharmacy but that she did not see him often).

Page 145

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

142 587. Accordingly, while the Chamber has been cautious in its assessment of the Prosecution evidence,¹⁶²⁵ it finds that the Prosecution has proven beyond reasonable doubt that in the late morning of 16 April 1994, Kanyarukiga attended a meeting at the Nyange Parish with Father Seromba, Grégoire Ndahimana, Fulgence Kayishema, Télesphore Ndungutse, Judge Joseph Habiyaambere and others. The Chamber, however, is not convinced that Francois Gashugu or Védaste Mupende attended this meeting, as alleged in the Indictment. There is no evidence in the record regarding Francois Gashugu. Moreover, while Witnesses CBR, CNJ and CDL all testified that a certain Védaste Murangwabugabo was among the leaders of the attacks on 16 April 1994, there is no evidence that Védaste Murangwabugabo was Védaste Mupende.¹⁶²⁶ 588. The Prosecution further alleges that during this meeting, Gaspard Kanyarukiga, Grégoire Ndahimana, Fulgence Kayishema, Télesphore Ndungutse, Judge Joseph Habiyaambere and others informed Father Seromba of their decision to destroy the Nyange Church.¹⁶²⁷ Only Witness CDL testified that the decision to destroy the church was communicated to Seromba during this meeting.¹⁶²⁸ Neither Witness CBR nor Witness CBK heard what was discussed during the meeting.¹⁶²⁹ However, because the destruction of the church followed the meeting, they assumed that the meeting had addressed the demolition.¹⁶³⁰ Witness CBY likewise testified that after the meeting,

the “authorities” ordered the assailants who had spent the night at the parish to demolish the church.¹⁶³¹ 589. As discussed above, the Chamber is satisfied that Witness CDL accompanied Bourgmestre Ndahimana to the Nyange Parish on 16 April 1994.¹⁶³² Considering several witnesses identified Witness CDL as one of the leaders of the attacks, the Chamber is satisfied that Witness CDL attended the meeting at the parish and was in close proximity to Ndahimana and the other “officials.” Witness CDL’s testimony was also partially corroborated by the circumstantial evidence of Witnesses CBR, CBK and CBY, who testified that the destruction of the church followed the meeting at the parish. Thus, while the Chamber has generally treated Witness CDL’s evidence with extreme caution, it finds, based on Witness CDL’s first-hand account and the circumstantial evidence provided by Witnesses CBR, CBK and CBY, that the demolition of the church was discussed and agreed to during the meeting at the Nyange Parish on the morning of 16 April 1994.

Accord Witness CNJ, T. 7 September 2009, pp. 12, 35 (testifying that Kanyarukiga had a residence in Kigali and then that he knew Kanyarukiga from when Kanyarukiga came to Nyange to build the pharmacy and because Kanyarukiga came to Nyange on weekends); Witness CDL, 10 September 2009, p. 29 (suggesting that the pharmacy was built as a development project for Kivumu commune); Witness CBS, T. 16 September 2009, p. 50 (stating that Kanyarukiga owned a pharmacy in Nyange and also carried out business activities in Kigali); T. 17 September 2009, p. 7 (agreeing that Kanyarukiga owned two residences, that his main residence was in Ndera and that he only came to Nyange at times). ¹⁶²⁵ See e.g. paragraphs 181, 257, 498 306, 441, 453, 485, 487, 491, 565, 576, 589, 591, 598, 605. ¹⁶²⁶ Witness CBR, T. 9 September 2009, pp. 30, 32; Witness CDL, T. 10 September 2009, p. 43; Witness CNJ, T. 7 September 2009, pp. 25-26. Two of these witnesses also identified Védaste Murangwabugabo as an assistant bourgmestre. Witness CBR, T. 9 September 2009, p. 30. ¹⁶²⁷ Amended Indictment, para. 17. ¹⁶²⁸ T. 10 September 2009, pp. 38 (line 37), 39 (line 1), 51, 52. The Chamber notes that, while pages 38 and 39 refer primarily to the meeting at the pharmacy, which has been disregarded, pages 51 and 52 make clear that the decision to demolish the church was communicated to Father Seromba at the parish, outside the secretariat. Prosecution Exhibit P55 (Coloured Photocopy of Nyange Church Secretariat Photo K027-1655 as Marked by Witness CDL). ¹⁶²⁹ Witness CBR, T. 9 September 2009, p. 32; Witness CBK, T. 3 September 2009, p. 26 (CS); T. 3 September 2009, p. 68 (CS). ¹⁶³⁰ T. 9 September 2009, p. 32; T. 3 September 2009, p. 25. ¹⁶³¹ T. 8 September 2009, p. 47. ¹⁶³² T. 10 September 2009, pp. 38, 39.

Page 146

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

¹⁴³ 590. Finally, the Prosecution alleges that after this meeting, Kanyarukiga instigated the demolition of the church by suggesting that another one would be built.¹⁶³³ Prosecution Witness CBR was the only witness to testify in support of this allegation. He attested that between 9.00 and 10.00 a.m., he overheard Kanyarukiga tell Ndahimana, Kayishema, Ndungutse,

Habiyambere, Habarugira and Murangwabugabo that, “[t]his church has to be demolished. I would reconstruct it. I would make it my responsibility to reconstruct in three days.”¹⁶³⁴ According to the witness, Kanyarukiga was neither addressing the crowd of assailants nor speaking quietly.¹⁶³⁵ 591. The Chamber recalls that Witness CBR was an accomplice to the events at the Nyange Parish and was incarcerated at the Kibuye Prison with four other witnesses in this case.¹⁶³⁶ The Chamber has therefore approached the witness’s evidence with requisite caution.¹⁶³⁷ The Chamber notes, however, that Witness CBR has already confessed¹⁶³⁸ and been sentenced in Rwanda.¹⁶³⁹ Thus, notwithstanding Rwanda’s confession law,¹⁶⁴⁰ the Chamber finds no reason to believe that Witness CBR would now receive favourable treatment for testifying against Kanyarukiga.¹⁶⁴¹ The Chamber also recalls that Witness CBR is a member of Kanyarukiga’s extended family, who told the court that, because of this relationship, he has “nothing against Gaspard Kanyarukiga.”¹⁶⁴² 592. The Chamber has considered the Defence submission that “there is direct evidence of collusion” between Witnesses CBR, CDL, CBT, CDK and CNJ.¹⁶⁴³ As discussed above, the Chamber is mindful that these witnesses attended Gacaca sessions together in prison but does not believe that this alone supports an inference of collusion.¹⁶⁴⁴

¹⁶³³ Amended Indictment, para. 17; Prosecutor’s Final Trial Brief, para. 164. See also T. 9 September 2009, p. 32. ¹⁶³⁴ T. 9 September 2009, p. 32; T. 10 September 2009, p. 9. ¹⁶³⁵ T. 9 September 2009, p. 32. ¹⁶³⁶ T. 9 September 2009, pp. 49-52; Defence Exhibit D25 (List of Protected Names Shown to Witness CBR). See also paragraph 452. ¹⁶³⁷ See, e.g., Nchamihigo, Judgement (AC), para. 42 (“[N]othing in the Statute or the Rules prohibits a Trial Chamber from relying upon the testimony of accomplice witnesses. However, such evidence is to be treated with caution, ‘the main question being to assess whether the witness concerned might have motives or incentives to implicate the accused.’”(internal citations omitted)). ¹⁶³⁸ T. 9 September 2009, pp. 33, 49. The Chamber notes that Witness CBR admitted to killing four of his neighbours with a machete and throwing stones during the attacks at the Nyange Parish. While the witness did not answer directly when asked whether he killed anyone at the parish, the Chamber finds this insufficient to cast doubt on his otherwise consistent and compelling testimony regarding the actions of the Accused. T. 10 September 2009, p. 12. ¹⁶³⁹ T. 9 September 2009, p. 33. The witness noted that the longest sentence he received was 20 years. He testified that he is currently a “free man” but appears to still be serving the “community labour” portion of his sentence. ¹⁶⁴⁰ T. 9 September 2009, pp. 48-49. See also T. 10 September 2009, pp. 71-72. ¹⁶⁴¹ The Chamber also notes that the witness was a member of a group in prison that “sensitised” other prisoners to plead guilty. T. 9 September 2009, p. 49. The Chamber, however, does not believe that the witness’s membership in this group necessarily renders his evidence unreliable. ¹⁶⁴² T. 10 September 2009, p. 7 (CS). ¹⁶⁴³ Defence Final Brief, para. 328. See also paragraphs 452 to 453 of this judgement. ¹⁶⁴⁴ Although Witness CBR was in Arusha, he was housed with Witnesses CDL and CBT, who also testified that Kanyarukiga said that the Nyange Church could be rebuilt (Witness CBR, T. 9 September 2009, pp. 39-40 (CS); Witness CDL, T. 10 September 2009, p. 39; Witness CBT, T. 14 September 2009, p. 46, T. 15 September 2009, p. 1), all three witnesses mentioned Kanyarukiga’s alleged remarks several years prior to their testimony in this case. Defence Exhibit D27(B) (Statement of Witness CBR

dated 9 October 2001), p. 4; Defence Exhibit D29(A) (Statement of Witness CDL dated 10 October 2001), p. 3; Defence Exhibit D42(B) (Statement of Witness CBT dated 14 and 16 August 2000), p. 4. Moreover, while they all attributed similar statements to the Accused, the witnesses placed these statements at different geographical locations and points during the sequence of events on 15 and 16 April 1994, clearly indicating that they were not describing the same incident. Witness CDL, T. 10 September 2009, p. 39; Witness CBT, T. 14 September 2009, p. 46; T. 15 September 2009, p. 1. Therefore, the Chamber does not consider their housing arrangement in Arusha to support an inference of collusion.

Page 147

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

144 593. Moreover, the Chamber finds that Witness CBR's sworn testimony was detailed,¹⁶⁴⁵ internally consistent and consistent with other credible evidence on a number of points.¹⁶⁴⁶ The Chamber was impressed by the witness's demeanour in court and found his narration of events compelling. 594. Finally, the Chamber finds circumstantial support for Witness CBR's testimony regarding Kanyarukiga's remark. In particular, the Chamber has found that immediately prior to making this statement to the other "officials", Kanyarukiga attended a meeting at which the demolition of the church was discussed.¹⁶⁴⁷ As mentioned above, Witness CBY testified that after this meeting, the "authorities" ordered the assailants to complete the demolition of the church.¹⁶⁴⁸ Witness CBR further testified that after Kanyarukiga's remark, Kayishema and Ndungutse went to fetch a bulldozer, which was brought to the church.¹⁶⁴⁹ Witnesses CBY, CDL and KG15 all corroborated Witness CBR with respect to the arrival of a bulldozer(s) in the late morning on 16 April 1994.¹⁶⁵⁰ Finally, as discussed further below, the church was demolished later that day. 595. Accordingly, based on Witness CBR's consistent and compelling eye-witness testimony, as supported by other circumstantial evidence in the record, the Chamber finds it established beyond reasonable doubt that, after the meeting at the parish on the morning of 16 April 1994, the Accused told Bourgmestre Ndahimana, IPJ Kayishema, Judge Habiyambere, Ndungutse and others that the Nyange Church had to be destroyed and that he would make it his responsibility to rebuild it in three days. Demolition of Nyange Parish Church 596. Paragraph 18 of the Amended Indictment alleges that Kanyarukiga was present during the demolition of the church and that he instigated the attackers to kill the Tutsi who had barricaded themselves inside.¹⁶⁵¹ 597. Witness CBR testified that after the meeting near the secretariat, Kayishema and Ndungutse went to find a bulldozer.¹⁶⁵² According to the witness, a bulldozer and a truck were brought to the parish between 10.00 and 11.00 a.m. and immediately started demolishing the church.¹⁶⁵³ Witness CDL agreed that the bulldozers arrived and began demolishing the church between 10.00 and 11.00 a.m. but testified that there were two of them.¹⁶⁵⁴ Witness CBY testified that one bulldozer was left

1645 For example, in narrating the events in which he participated at the Nyange Parish, Witness CBR gave the names of several of his co-perpetrators (T. 9 September 2009, p. 34.), provided the times at which most, if not all, major events occurred (See, e.g., T. 9 September 2009, pp. 15, 16, 18, 29, 52, 57, 58-59, 66; T. 10 September 2009, pp. 9, 10, 11) and gave detailed information regarding the statements he said he heard between 14 and 16 April 1994 (T. 9 September 2009, pp. 3, 15-28, 11, 25, 32, 57-66). 1646 See e.g., paragraphs 327, 434, 435, 436, 436, 438, 440, 475, 479, 483, 563, 580, 589, 601, 603. 1647 T. 9 September 2009, p. 32. See also paragraph 587 above. 1648 T. 8 September 2009, p. 47. 1649 T. 9 September 2009, p. 32. 1650 Witness CBY, T. 14 September 2009, pp. 20-21 (The Chamber recalls that Witness CBY's prior statements did not place this event on 16 April 1994 and that the Chamber has treated Witness CBY's testimony regarding dates with caution. However, given the corroboration in this instance, the Chamber accepts Witness CBY's testimony that a bulldozer was brought to the parish on 16 April 1994.); Witness CDL, T. 10 September 2009, p. 36; T. 11 September 2009, pp. 16, 17; Witness KG15, T. 11 February 2010, pp. 19, 37 (CS). 1651 Amended Indictment, para. 18. 1652 T. 9 September 2009, p. 32. 1653 T. 9 September 2009, p. 32; T. 10 September 2009, pp. 10-11. 1654 T. 10 September 2009, p. 41; T. 11 September 2009, pp. 16, 17.

Page 148

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

145 at the parish overnight from 15 April 1994¹⁶⁵⁵ and that a second bulldozer was brought on 16 April 1994.¹⁶⁵⁶ Witness CBY did not say when the bulldozer arrived on 16 April 1994 but testified that when he left the presbytery, the bulldozer had already begun removing bricks from the church.¹⁶⁵⁷ Finally, Defence Witness KG15 testified that a bulldozer arrived at the parish on the morning of 16 April 1994 and the church was destroyed around midday.¹⁶⁵⁸ 598. The Chamber recalls that, while it has treated Witness CBR's testimony with requisite caution, it has found the witness to be generally credible. Furthermore, the Chamber recalls that Witness CBR's testimony regarding the arrival of the bulldozer and the demolition of the church was largely corroborated by Witnesses CBY, CDL and KG15. Thus, based on this evidence, the Chamber is satisfied that at least one bulldozer was brought to the parish from the Astaldi Company in the late morning on 16 April 1994. While the evidence is inconclusive as to whether two bulldozers were brought to the parish on that day, the Chamber finds that the number of bulldozers is immaterial to the resolution of the issues in this case. Further, based on Witness CBR's evidence, the Chamber is satisfied that Kayishema and Ndungutse were the ones to fetch the bulldozer(s) on 16 April 1994. There is no evidence that Kanyarukiga was involved in bringing the bulldozers to the parish. Finally, in view of the consistent and corroborative testimony of Witnesses CBR, CDL and KG15, the Chamber finds it established beyond reasonable doubt that the demolition of the church began around midday, shortly after the arrival of the bulldozer(s). 599. Prosecution Witness CNJ provided a somewhat different account, testifying that "the bulldozer" was already at the parish when he arrived between 8.00 and 9.00 a.m. on 16 April 1994.¹⁶⁵⁹ According to the witness,

Kanyarukiga, Rushema, Théodomir Kiragi, Kayishema, Ndungutse, Habiyaambere and Murangwabugabo were standing around the bulldozer talking, while the driver was onboard, ready to demolish the church.¹⁶⁶⁰ Witness CNJ suggested that the men were discussing strategy and testified that Murangwabugabo's recommendation that holes be bored in the sides of the church was rejected by the bourgmestre.¹⁶⁶¹ IPJ Kayishema went to get Father Seromba, who spoke to the men for a few minutes.¹⁶⁶² After that, Ndahimana said that they could start and Kayishema instructed the bulldozer driver to begin the demolition.¹⁶⁶³ The bulldozer began by demolishing a door on the left side of the church, near the altar.¹⁶⁶⁴ According to Witness

¹⁶⁵⁵ T. 14 September 2009, pp. 20-21. The Chamber is mindful that Witness CBY's testimony that one of the bulldozers was left at the parish overnight is inconsistent with that of Witnesses CBR and CDL. Witness CBR, T. 10 September 2009, p. 8; Witness CDL, T. 11 September 2009, p. 16. Therefore, while the Chamber has generally found Witness CBY to be credible, it finds that the witness's testimony on this specific point is insufficient to support a finding beyond reasonable doubt that one of the bulldozers was left at the parish overnight. At the same time, given the passage of time and Witness CBY's general confusion with respect to dates, the Chamber does not consider this discrepancy to be significant. ¹⁶⁵⁶ T. 14 September 2009, pp. 20-21. Witness CBY testified that, when the second bulldozer arrived on 16 April 1994, it did not have enough fuel, so IPJ Kayishema said that "he was going to take diesel from Astaldi forcibly." T. 14 September 2009, pp. 20-21. The witness did not say how he learned about Kayishema's comment but agreed during cross-examination that he saw people carrying jerry cans of fuel to the parish. T. 14 September 2009, pp. 21-22. Despite Witness CBY's difficulties recalling details such as dates and times, the Chamber has generally regarded him as a credible and reliable witness. With respect to this particular event, however, the Chamber notes that Witness CBY did not provide any information regarding the basis for his knowledge other than his observation that people were bringing fuel to the parish in jerry cans. Consequently, the Chamber finds that the witness's evidence is too tenuous to support a finding of fact beyond reasonable doubt. ¹⁶⁵⁷ T. 14 September 2009, p. 21. ¹⁶⁵⁸ T. 11 February 2010, pp. 19, 37 (CS). ¹⁶⁵⁹ T. 7 September 2009, pp. 23-24, 25-26. ¹⁶⁶⁰ T. 7 September 2009, pp. 25-26. ¹⁶⁶¹ T. 7 September 2009, pp. 25-26. ¹⁶⁶² T. 7 September 2009, p. 26. ¹⁶⁶³ T. 7 September 2009, pp. 26-27. ¹⁶⁶⁴ T. 7 September 2009, p. 27.

Page 149

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

¹⁴⁶ CNJ, the demolition began around 9.00 a.m., approximately 30 minutes after the witness arrived at the parish.¹⁶⁶⁵ 600. The Chamber recalls that it has treated Witness CNJ's evidence with extreme caution and only relied on his testimony when corroborated by other credible evidence. In this case, the Chamber notes that the witness's testimony regarding the arrival of the bulldozer and the commencement of the demolition was not only uncorroborated but also inconsistent with the evidence of Witnesses CBR, CBY, CDL and KG15. The Chamber further notes that Witness CNJ's testimony was inconsistent with his own prior statements, in which he

said that he arrived at the parish at the same time as the bulldozer and that the demolition was already underway when he arrived.¹⁶⁶⁶ Accordingly, the Chamber has disregarded Witness CNJ's testimony regarding the timing of the arrival of the bulldozer and the commencement of the demolition. ⁶⁰¹. While Witness CNJ's testimony on this point appears to have been partially corroborated by Witness CDL, who testified that Father Seromba recommended demolishing the side of the church near the sacristy,¹⁶⁶⁷ Witness CDL is largely regarded by the Chamber as an unreliable witness. In addition, the Chamber recalls that Witnesses CBY and CBR denied seeing anyone holding a meeting or a discussion around the bulldozer before the demolition.¹⁶⁶⁸ Hence, the Chamber finds that the evidence is insufficient to establish beyond reasonable doubt that Kanyarukiga, Rushema, Théodomir Kiragi, Kayishema, Ndungutse, Habiyaambere and Murangwabugabo had a conversation or a meeting around the bulldozer prior to the demolition. Likewise, the Prosecution has failed to establish that Védaste Murangwabugabo suggested that holes be bored into the sides of the church; that this recommendation was rejected by Bourgmestre Ndahimana; that Father Seromba spoke to the others near the bulldozer; that Ndahimana said that they could start and that Kayishema instructed the bulldozer driver to begin the demolition. ⁶⁰². In contrast, Witness CNJ's testimony regarding the presence of certain individuals on 16 April 1994 is well corroborated. Witnesses CNJ and CDL both testified that Bourgmestre Ndahimana, IPJ Kayishema, Judge Joseph Habiyaambere, teacher Téléphore Ndungutse and Assistant Bourgmestre Védaste Murangwabugabo were present during the demolition of the church.¹⁶⁶⁹ Their evidence was corroborated by Witnesses CBK and KG15, who mentioned Kayishema and Ndahimana;¹⁶⁷⁰ Defence Witnesses Sibomana and Twagirashema, who identified Ndungutse as one of the leaders of the attacks;¹⁶⁷¹ and Witnesses Mutume and CBY, who mentioned the IPJ.¹⁶⁷² The Chamber notes that while he did not specify whether they were still present during the demolition, Witness CBR also testified that Ndahimana, Kayishema, Habiyaambere, Ndungutse and Murangwabugabo were at the parish on the morning of

¹⁶⁶⁵ T. 7 September 2009, pp. 27, 69. ¹⁶⁶⁶ Defence Exhibit D19 (Statement of Witness CNJ dated 26 & 27 August 2002), p. 7 ("Early in the morning on Saturday 16 April 1994, I returned to Nyange [C]hurch, arriving there at the same time as an Astaldi Caterpillar."); Defence Exhibit D22(B) (Confession Letter of Witness CNJ dated 21 August 2000), p. 2 ("By the time we arrived at the premises, the church was being brought down using a bulldozer belonging to ASTALDI."); Defence Exhibit 24(B) (Additional Confession Letter of Witness CNJ), p. 1 ("When I arrived, the mechanical shovel had already begun destroying the church."); Defence Exhibit D27(B) (Confession Letter of Witness CNJ dated 27 May 2001), p. 2 ("When we returned to the scene the following day, the destruction had begun with a digger."). ¹⁶⁶⁷ T. 10 September 2009, p. 42. ¹⁶⁶⁸ Witness CBR, T. 10 September 2009, p. 11; Witness CBY, T. 14 September 2009, p. 22. ¹⁶⁶⁹ Witness CNJ also mentioned Théodomir Kiragi and Rushema. T. 7 September 2009, pp. 25-26. Witness CDL mentioned Assistant Bourgmestre Gilbert Kanani. T. 10 September 2009, p. 43. ¹⁶⁷⁰ Witness CBK, T. 3 September 2009, pp. 21-22, 25-26, 29; Witness KG15, T. 11 February 2010, pp. 18-19 (CS). ¹⁶⁷¹ Witness Twagirashema, T. 3 February 2010, pp. 19-20; Witness Sibomana, T. 1 February 2010, p. 44. ¹⁶⁷² Witness Mutume, T. 27 January 2010, p. 47; Witness CBY, T. 14 September 2009,

pp. 20-21. Witness CBY did not say explicitly that he saw Kayishema at the parish, but he suggested that Kayishema was present given his testimony that Kayishema said that they should take fuel from Astaldi.

Page 150

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

147 16 April 1994.¹⁶⁷³ Accordingly, while the evidence is inconclusive as to who was present when, the Chamber is satisfied that at least Ndahimana, Kayishema and Ndungutse were at the Nyange Parish on the day the church was demolished.¹⁶⁷⁴ 603. Witnesses CBK, CNJ, CDL, CBR and CBY also testified that Father Seromba was at the Nyange Parish on 16 April 1994.¹⁶⁷⁵ This evidence was partially corroborated by Defence Witnesses KG15 and Sibomana.¹⁶⁷⁶ Witnesses CBY, CBR, CDL and CNJ all suggested that Father Seromba agreed to the demolition of the church.¹⁶⁷⁷ Witness CBK went so far as to say that Father Seromba gave the order to demolish the church¹⁶⁷⁸ and said that they could rebuild it.¹⁶⁷⁹ In view of this evidence, the Chamber is satisfied that Father Seromba was present on 16 April 1994 and agreed to the demolition of the church. 604. Finally, Witnesses CNJ, CDL and CBK all testified that Kanyarukiga was present during the demolition of the church. Witness CNJ testified that Kanyarukiga was present but did not say what the Accused was doing.¹⁶⁸⁰ Only Witnesses CBK and CDL testified about the Accused's activities during the demolition. Witness CBK testified that Kanyarukiga instructed the assailants to kill any Tutsi who tried to escape.¹⁶⁸¹ Witness CDL testified that the Accused showed the driver of the bulldozer a part of the church he should "tackle" where the stones thrown from inside the church would not reach him.¹⁶⁸² Witness CBR did not see Kanyarukiga after the bulldozers arrived at the parish.¹⁶⁸³ 605. As discussed elsewhere, the Chamber has treated the evidence of Witnesses CNJ, CDL and CBK with extreme caution. With respect to this particular event, moreover, the Chamber recalls that, while Witness CDL testified that Kanyarukiga was present throughout the demolition, the witness claimed to have left the parish between 12.00 and 2.00 p.m. and again at 4.00 p.m.¹⁶⁸⁴ Thus, even if his evidence were believed, Witness CDL, by his own admission, was not in a position to know Kanyarukiga's whereabouts for much of the afternoon on 16 April 1994. In addition, Witnesses CBK and CDL gave testimony at trial that was inconsistent with their prior statements. Witness CBK suggested in his 26 April 2001 statement, which dealt specifically with the Accused,

¹⁶⁷³ T. 9 September 2009, pp. 31-32. Witness CBR also mentioned Warrant Officer Habarugira.
¹⁶⁷⁴ For the reasons discussed above, the Chamber is not convinced that Védaste Mupende was present during the demolition, as alleged in paragraph 18 of the Amended Indictment. ¹⁶⁷⁵ Witness CBK, T. 3 September 2009, p. 22; Witness CNJ, T. 7 September 2009, p. 26; Witness CDL, T. 10 September 2009, pp. 36, 38-39; Witness CBR, T. 9 September 2009, p. 30; Witness CBY, T. 8 September 2009, p. 47. ¹⁶⁷⁶ Witness KG15 did not accept that Father Seromba was involved in the destruction of the church but testified that Seromba was at the parish presbytery throughout the demolition. T. 11 February 2010, pp. 24, 37-38 (CS). The Chamber does not accept Witness KG15's

testimony that Father Seromba remained inside the refectory until the demolition was complete but credits Witness KG15's testimony that Seromba was at the parish to the extent to which it is corroborated by other evidence. The Chamber recalls that Witness Sibomana was not in Nyange on 16 April 1994 and was only told about Father Seromba's presence after he went into exile. T. 1 February 2010, pp. 44-45, 46. 1677 T. 8 September 2009, p. 47 (Witness CBY testified that the "authorities" met with the priest and then ordered the Hutu assailants to demolish the church.); T. 9 September 2009, pp. 31-32 (Witness CBR inferred that the decision to demolish the church was made during a meeting with Father Seromba.); T. 10 September 2009, pp. 36, 38-39, 42 (Witness CDL testified that Father Seromba agreed that the church had to be destroyed and provided instructions on where to begin the demolition.); T. 7 September 2009, p. 26 (Witness CNJ testified that Seromba spoke to the authorities near the bulldozer shortly before the demolition began.). 1678 T. 3 September 2009, p. 22. 1679 T. 3 September 2009, pp. 22, 23. The Chamber recalls that other witnesses attributed similar comments to the Accused. 1680 T. 7 September 2009, p. 27. 1681 T. 3 September 2009, p. 22. 1682 T. 10 September 2009, p. 43. 1683 T. 10 September 2009, p. 11. 1684 T. 10 September 2009, p. 43. The witness also suggested that Kanyarukiga may have gone to his pharmacy and then returned to the parish later.

Page 151

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

148 that the last time he saw Kanyarukiga was on the evening of 15 April 1994.1685 While the witness placed Kanyarukiga at the parish in other statements, he did not say that Kanyarukiga instigated the assailants to kill Tutsi with traditional weapons.1686 Witness CDL did not say in either of his statements that Kanyarukiga told the driver of the bulldozer how to avoid being hit by stones.1687 606. Thus, considering that Witnesses CNJ, CDL and CBK cannot be relied upon unless corroborated by credible evidence and that, in this case, they are only corroborated by each other, the Chamber finds that it cannot rely on their testimony to establish that Kanyarukiga was at the Nyange Parish during the demolition of the church. 607. Witness CBK further testified that, after the rest of the church had been demolished, Kanyarukiga asked Father Seromba if certain educated Tutsi, including Rwamasirabo,1688 Nsanzabaganwa, Bonera and Kayiranga, had taken refuge at the parish.1689 Father Seromba answered in the affirmative and the "assailants" said that they must be in the bell tower.1690 The "assailants" said that if the educated Tutsi were not killed, their efforts would have been in vain.1691 Witness CBK testified that Kanyarukiga and Seromba both watched the destruction of the bell tower from the presbytery veranda.1692 608. As discussed in paragraph 491, the Chamber has serious concerns about Witness CBK's overall credibility and has therefore only relied on his testimony where corroborated by other credible evidence. Witness CBK's testimony on this particular point was both uncorroborated and partially contradicted by that of Witnesses CBS and CBR, who denied that Aloys Rwamasirabo and Théoneste Nsanzabaganwa were at the Nyange Church on 15 and 16 April 1994.1693 Although the Chamber accepts that Kanyarukiga and Seromba could have made the comments attributed to

them irrespective of whether Rwamasirabo and Nsanzabaganwa were at the parish, it finds that this evidence casts doubt on Witness CBK's testimony. 609. The Chamber further notes that there are inconsistencies between Witness CBK's prior statements and his testimony at trial. Witness CBK did not say anything in his statement of 15 August 2000 about intellectuals hiding in the bell tower or Kanyarukiga's alleged remarks.¹⁶⁹⁴ Nor did Witness CBK mention the comments allegedly made by Kanyarukiga in his statement of

¹⁶⁸⁵ Defence Exhibit D15(A) (Statement of Witness CBK dated 26 April 2001), p. 4. ¹⁶⁸⁶ Defence Exhibit D16(A) (Statement of Witness CBK dated 15 August 2000); Defence Exhibit D14(A) (Statement of Witness CBK dated 24 October and 19 & 20 November 2002). ¹⁶⁸⁷ Defence Exhibit D29(A) (Statement of Witness CDL dated 10 October 2001); Defence Exhibit D30(A) (Statement of Witness CDL dated 8 August 2002 & 24 February 2003). ¹⁶⁸⁸ The Chamber notes that at one point in the transcript, this name is spelled Rwamaserabo. ¹⁶⁸⁹ T. 3 September 2009, p. 28. ¹⁶⁹⁰ T. 3 September 2009, p. 28. ¹⁶⁹¹ T. 3 September 2009, pp. 22, 28. ¹⁶⁹² T. 3 September 2009, p. 29. ¹⁶⁹³ T. 9 September 2009, p. 40 (CS) (When asked whether he had heard from other assailants that Aloys Rwamasirabo was the church, specifically in the bell tower, Witness CBR responded, "[n]o one gave me such information. I did not discuss such a matter with any person."); T. 17 September 2009, p. 28 (CS) (Witness CBS testified during cross-examination that he did not see Aloys Rwamasirabo or Théoneste Nsanzabaganwa at the parish during April 1994. According to the witness, "[t]hey did [not] seek refuge there."). ¹⁶⁹⁴ Defence Exhibit D16(A) (Statement of Witness CBK dated 15 August 2000).

Page 152

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

¹⁴⁹ 26 April 2001, which dealt specifically with the Accused.¹⁶⁹⁵ Finally, while the witness referred to this event in his 2002 statement, he did not attribute any specific comments to the Accused. ¹⁶⁹⁶ 610. For these reasons, the Chamber finds that it has not been established that Kanyarukiga was present during the demolition of the bell tower or that he asked Father Seromba if certain Tutsi intellectuals had taken refuge in the church. ⁶¹¹. Finally, Prosecution Witness CBK testified that, after the church was demolished, Father Seromba, Kayishema, Ndahimana, Kanyarukiga and others met in the presbytery, where they celebrated by drinking beer and wine.¹⁶⁹⁷ Again, the Chamber has treated Witness CBK's testimony with extreme caution due to its concerns about the witness's overall credibility, including his tendency to exaggerate. With respect to this particular incident, the Chamber also finds that there are a number of inconsistencies between Witness CBK's prior statements and his testimony at trial. The witness did not mention any celebrations at the parish presbytery in either his 15 August 2000 or his 26 April 2001 statement.¹⁶⁹⁸ Further, while Witness CBK said in his 2002 statement that Father Seromba drank beer, wine and other alcoholic beverages after the Nyange Church was demolished, he did not mention the presence of the Accused during these celebrations.¹⁶⁹⁹ Thus, the Chamber finds that the Prosecution has failed to establish that Kanyarukiga and others

celebrated by drinking beer and wine at the presbytery after the church was demolished. 6.4.

Conclusion

612. In conclusion, the Chamber finds that the Prosecution has failed to establish beyond reasonable doubt the allegation in paragraph 16 of the Indictment that, on the morning of 16 April 1994, Gaspard Kanyarukiga, Fulgence Kayishema, Télesphore Ndungutse, Judge Habiyambere, Francois Gashugu, Védaste Mupende, Grégoire Ndahimana and others held a meeting at the CODEKOKI, at which they mutually agreed and planned to kill all the Tutsi in the church by destroying it. 613. The Chamber finds it established beyond reasonable doubt that on the morning of 16 April 1994, Gaspard Kanyarukiga, Fulgence Kayishema, Télesphore Ndungutse, Judge Habiyambere and Grégoire Ndahimana and others met Father Athanase Seromba at the Nyange Parish and discussed demolishing the church. Furthermore, the Prosecution has established beyond reasonable doubt that following this meeting, Kanyarukiga suggested that another church would be built. The Prosecution, however, has failed to establish beyond reasonable doubt that during the meeting, the attendees “informed [Father Seromba] of their decision to demolish the church in order to kill all the Tutsi refugees,” as alleged in paragraph 17 of the Indictment. The Prosecution has also failed to establish that Védaste Mupende or Francois Gashugu attended this meeting. 614. Finally, the Chamber finds that the Prosecution has proven beyond reasonable doubt that on 16 April 1994, the Nyange Church was destroyed using a bulldozer, killing about 2000 Tutsi

1695 Defence Exhibit D15(A) (Statement of Witness CBK dated 26 April 2001). Witness CBK said that he saw Kanyarukiga twice in April 1994 and that the last time was on the evening of 15 April 1994. When asked about this statement at trial, Witness CBK denied saying that he saw Kanyarukiga only twice. According to the witness, “[i]f the statements only mentioned two occasions, then that is not the truth.” The witness insisted that he saw Kanyarukiga several times and that “the investigators did not take down my statement well by saying that I had seen him only twice.” T. 4 September 2009, p. 22 (CS). The Chamber does not accept this explanation for the inconsistency between the witness’s testimony and his prior statement. 1696 Defence Exhibit D14(A) (Statement of Witness CBK dated 24 October and 19 & 20 November 2002), pp. 8-9. 1697 T. 3 September 2009, p. 29. See also Prosecutor’s Final Trial Brief, para. 189. 1698 Defence Exhibit D15(A) (Statement of Witness CBK dated 26 April 2001); Defence Exhibit D16(A) (Statement of Witness CBK dated 15 August 2000). 1699 Defence Exhibit D14(A) (Statement of Witness CBK dated 24 October and 19 & 20 November 2002), p. 10.

Page 153

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

150 civilians who had barricaded themselves inside the church. It has also been established beyond reasonable doubt that Fulgence Kayishema, Grégoire Ndahimana and Athanase Seromba were at the Nyange Parish during the demolition of the church and agreed to its destruction. In contrast, the Prosecution has failed to establish beyond reasonable doubt that Gaspard Kanyarukiga was present during the demolition of the church or that he instigated the attackers to kill all the Tutsi. Furthermore, it has not been established that Védaste Mupende was at the Nyange Parish during the demolition of the church.

Page 154

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

151

CHAPTER IV: LEGAL FINDINGS 1.

Introduction

615. In its factual findings, the Trial Chamber found that on 15 and 16 April 1994, interahamwe, communal police and armed civilians killed approximately 2000, mostly Tutsi, civilians at the Nyange Parish in Kivumu commune, Kibuye préfecture. The Chamber has found that the vast majority of these victims were killed on 16 April 1994 when the Nyange Church was destroyed. The Trial Chamber will discuss below whether Kanyarukiga bears criminal responsibility for these acts. 2. Criminal Responsibility 616. The Amended Indictment charges Gaspard Kanyarukiga with genocide or, in the alternative, complicity in genocide and extermination as a crime against humanity for crimes allegedly committed in Kivumu commune, Kibuye préfecture, between 6 and 30 April 1994. The Accused is charged with individual criminal responsibility, pursuant to Article 6(1) of the Statute, for planning, ordering, instigating, committing or otherwise aiding and abetting in the planning, preparation or execution of these crimes.1700 The Prosecution alleges that Gaspard Kanyarukiga acted either individually or in concert, as part of a joint criminal enterprise.1701 2.1. Applicable Law 617. Under Article 6(1) of the Statute, any person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the Statute shall be individually responsible for the crime. 618. "Planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.1702 It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.1703 The mens rea for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.1704 619. "Instigating" implies prompting another person to commit an offence.1705 It is not necessary to prove that the crime would not have been perpetrated

without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct

1700 Amended Indictment, paras. 6-8. Although paragraphs 6 and 7 of the Amended Indictment, so-called chapeau paragraphs, do not mention “ordering” as a mode of liability, paragraph 18 of the Indictment states, “[b]y reason of the facts alleged in paragraphs 14 through 18 herein Gaspard Kanyarukiga is individually responsible for planning, ordering, instigating, committing or otherwise aiding and abetting the killing of Tutsi civilians at Nyange Parish on 15 and 16 April 1994 in furtherance of the joint criminal enterprise” (emphasis added). Paragraph 19, which charges the Accused with extermination as a crime against humanity, also lists ordering as a mode of liability. Amended Indictment, paras. 18, 19. 1701 Amended Indictment, paras. 4-6, 19. 1702 Nahimana et al., Judgement (AC), para 479, citing Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, Judgement (AC), 17 December 2004, para. 26. 1703 Nahimana et al., Judgement (AC), para. 479, citing Kordić and Čerkez, Judgement (AC), para. 26. 1704 Nahimana et al., Judgement (AC), para. 479, citing Kordić and Čerkez, Judgement (AC), paras. 29, 31. 1705 Nahimana et al., Judgement (AC), para. 480, citing Ndindabahizi, Judgement (AC), para. 117; Kordić and Čerkez, Judgement (AC), para. 27.

Page 155

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

152 of another person committing the crime.¹⁷⁰⁶ The mens rea for this mode of responsibility is intent to instigate another person to commit a crime or at a minimum, awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.¹⁷⁰⁷ 620. A person in a position of authority may incur criminal liability for “ordering” under Article 6(1) where he or she instructs another person to commit an offence.¹⁷⁰⁸ A superior-subordinate relationship between the accused and the perpetrator is not required.¹⁷⁰⁹ It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused’s order.¹⁷¹⁰ This authority may be informal or of a purely temporary nature.¹⁷¹¹ 621. An aider or abettor carries out “acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime.”¹⁷¹² The act(s) of the aider or abettor need not serve as a condition precedent for the underlying crime and may occur before, during or after the principal crime is committed.¹⁷¹³ The requisite mental element for aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.¹⁷¹⁴ In cases of specific intent crimes, such as persecution or genocide, the aider or abettor must know of the principal perpetrator’s specific intent.¹⁷¹⁵ 622. The Appeals Chamber has held that commission covers, primarily, direct and physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a

1706 Nahimana et al., Judgement (AC), para. 480, citing Gacumbitsi, Judgement (AC), para. 129; Kordić and Čerkez, Judgement (AC), para. 27. 1707 Nahimana et al., Judgement (AC), para. 480, citing Kordić and Čerkez, Judgement (AC), paras. 29, 32. 1708 Semanza, Judgement (AC), para. 361, citing Kordić and Čerkez, Judgement (AC), para. 28. See also Nahimana et al., Judgement (AC), para. 481. Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order and that crime is subsequently effectively committed by the person who received the order. Nahimana et al., Judgement (AC), para. 481, citing Prosecutor v. Galić, Case No. IT-98-29-A, Judgement (AC), 30 November 2006, paras. 152, 157; Kordić and Čerkez, Judgement (AC), para. 30; Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 42. 1709 Semanza, Judgement (AC), para. 361. 1710 Semanza, Judgement (AC), para. 361. 1711 Semanza, Judgement (AC), para. 363. 1712 Muvunyi, Judgement (AC), para. 79; Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-A, Judgement (AC), 9 May 2007, para. 127, citing Simić, Judgement (AC), para. 85. See also Ntagurera et al., Judgement (AC), para. 370; Blaškić, Judgement (AC), paras. 45-46; Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgement (AC), 25 February 2004, para. 102. In some cases, an accused may be convicted of aiding or abetting where it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime. Muvunyi, Judgement (AC), para. 80, citing Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgement (AC), 3 April 2007, paras. 273, 277. 1713 Blagojević & Jokić, Judgement (AC), para. 127, citing Blaškić, Judgement (AC), para. 48. See also Ntagurera et al., Judgement (AC), para. 372. 1714 Muvunyi, Judgement (AC), para. 79; Ntagurera et al., Judgement (AC), para. 370; Simić, Judgement (AC), para. 86; Vasiljević, Judgement (AC), para. 102. See also Blaškić, Case Judgement (AC), paras. 46, 49. The aider or abettor need not (although he or she may) share the principal's criminal intent. See, e.g., Prosecutor v. Mpambara, Case No. ICTR-01-65-T, Judgement (TC), 11 September 2006, para. 16, citing Blaškić, Judgement (AC), para. 49; Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgement (AC), 17 September 2003, para. 51; Vasiljević, Judgement (AC), para. 102; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003, para. 388 ("The accused need not necessarily share the mens rea of the principal perpetrator; the accused must be aware, however, of the essential elements of the principal's crime including the mens rea."). 1715 Blagojević & Jokić, Judgement (AC), para. 127; Simić, Judgement (AC), para. 86; Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement (AC), 19 April 2004, paras. 140, 141.

Page 156

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

153 rule of criminal law.1716 According to the Appeals Chamber, "[i]n the context of genocide ... 'direct and physical perpetration' need not mean physical killing; other acts can constitute direct participation in the actus reus of the crime" as long as they are as much an integral part of the genocide as the killings they enabled.1717 Furthermore, while not explicitly delineated in Article

6(1), the Appeals Chamber has held that participation in a joint criminal enterprise (JCE) is also a form of “commission” under Article 6(1).¹⁷¹⁸ 623. Three categories of JCE have been found to have the status of customary international law: basic, systemic and extended.¹⁷¹⁹ The Prosecution in this case has indicated that it is relying only on the first category of JCE.¹⁷²⁰ 624. All three forms of JCE share the same *actus reus*, which is comprised of three elements:¹⁷²¹ a plurality of persons, who do not need to be organised in a military, political or administrative structure;¹⁷²² a common plan, design or purpose, which need not have been previously arranged or formulated and which amounts to or involves the commission of a crime provided for in the Statute¹⁷²³ and the participation of the accused in the common purpose.¹⁷²⁴ The accused’s participation need not involve the commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape) but may take the form of assistance in, or contribution to, the execution of the common purpose.¹⁷²⁵ Further, although an accused’s contribution to a JCE need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is found to be responsible.¹⁷²⁶ 625. The three forms of the JCE are distinguished by their requisite *mens rea*. For the basic form of joint criminal enterprise, all co-perpetrators must share the intent to perpetrate a certain crime.¹⁷²⁷ Where the crime committed by the JCE requires a special intent, all participants in the joint criminal enterprise must share the special intent with the principle perpetrator.¹⁷²⁸

¹⁷¹⁶ Nahimana et al., Judgement (AC), para. 478; Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, para. 188. See also Seromba, Judgement (AC), para. 161; Gacumbitsi, Judgement (AC), para. 60. ¹⁷¹⁷ Gacumbitsi, Judgement (AC), para. 60 (finding that the accused “committed” genocide where he was physically present during a massacre, which he directed and supervised, and personally directed Tutsi and Hutu to separate). See also Seromba, Judgement (AC), paras. 161, 171 (finding that Father Athanase Seromba “committed” genocide where he “fully exercised his influence over the bulldozer driver who, as the Trial Chamber’s findings demonstrate, accepted Athanase Seromba as the only authority, and whose directions he followed”). ¹⁷¹⁸ Ntakirutimana and Ntakirutimana, Judgement (AC), para. 462, citing Tadić, Judgement (AC), paras. 188, 226; Prosecutor v. Milutinović et al., Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise (AC), 21 May 2003, para. 20. ¹⁷¹⁹ Ntakirutimana and Ntakirutimana, Judgement (AC), paras. 463-465, citing Tadić, Judgement (AC), paras. 195-226. See also Vasiljević, Judgement (AC), paras. 96-99. ¹⁷²⁰ The Prosecutor’s Pre-Trial Brief, para. 23. ¹⁷²¹ Vasiljević, Judgement (AC), para. 100; Krnojelac, Judgement (AC), para. 31. See also Kvočka et al., Judgement (AC), para. 96; Ntakirutimana and Ntakirutimana Judgement (AC), para. 466. ¹⁷²² Ntakirutimana and Ntakirutimana, Judgement (AC), para. 466, citing Tadić, Judgement (AC), para. 227. ¹⁷²³ Ntakirutimana and Ntakirutimana, Judgement (AC), para. 466, citing Tadić, Case No. Judgement (AC), para. 227. The common purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise. ¹⁷²⁴ Ntakirutimana and Ntakirutimana, Judgement (AC), para. 466, Tadić, Judgement (AC), para. 227. ¹⁷²⁵ Prosecutor v. Stakić, Case No. IT-97-24-A, Judgement (AC), 22 March 2006, para. 64; Ntakirutimana and Ntakirutimana, Judgement (AC), para. 466; Tadić, Judgement (AC), para. 227. ¹⁷²⁶ Simba,

Judgement (AC), para. 303, citing Brđanin, Judgement (AC), para. 430. 1727 Ntakirutimana and Ntakirutimana, Judgement (AC), para. 467 (“The basic form of [JCE] requires the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators.”); Vasiljević, Judgement (AC), para. 101. 1728 Kvočka et al., Judgement (AC), paras. 109-110, citing Krnojelac, Judgement (AC), para. 111.

Page 157

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

154 2.2. Notice 626. The Chamber recalls that the Prosecution is required to plead in the indictment the specific mode or modes of liability under which the accused is charged.¹⁷²⁹ The Appeals Chamber has routinely discouraged the Prosecution from merely restating the language of Article 6(1) unless it intends to rely on all modes of liability contained therein.¹⁷³⁰ If the Prosecution intends to rely on all modes of responsibility contained in Article 6(1), it must plead the material facts for each mode in the Indictment.¹⁷³¹ The Trial Chamber shall consider here whether certain modes of liability charged by the Prosecution in this case were properly pleaded. Joint Criminal Enterprise 627. When the accused is charged with “committing” pursuant to Article 6(1) of the Statute, the indictment must specify whether the term is to be understood as physical commission, participation in a joint criminal enterprise or both.¹⁷³² If the Prosecution relies on a theory of JCE, the purpose of the enterprise, the identity of the participants, the nature of the accused’s participation in the enterprise and the period of the enterprise must be pleaded in the indictment.¹⁷³³ The indictment should also clearly indicate which form of JCE is being alleged.¹⁷³⁴ Failure to plead these elements will result in a defective indictment. As explained above, a defect can only be cured in exceptional circumstances.¹⁷³⁵ 628. In this case, Paragraphs 4 to 6 of the Amended Indictment make explicit reference to JCE. According to these paragraphs, the purpose of the JCE in this case was the commission of genocide and crimes against humanity targeting the Tutsi racial or ethnic group and the destruction, in whole or in part, of the Tutsi racial or ethnic group in Kivumu commune, Kibuye préfecture, respectively. The alleged timeframe for the joint criminal enterprise is from 6 to 16 April 1994.¹⁷³⁶ It is clear from the concise statement of facts in the Indictment (“Factual Basis for counts 1-3”) and the Prosecutor’s Pre-Trial Brief that the alleged common criminal purpose comprised the killing of Tutsi civilians hiding in the Nyange Parish Church on 15 and 16 April 1994.¹⁷³⁷ Paragraph 4 of the Amended Indictment names nine officials and mentions gendarmes, the interahamwe militia and communal policemen, with whom, according to the Prosecution, Gaspard Kanyarukiga acted in concert as part of a joint criminal enterprise. Paragraphs 11 to 18 identify the alleged contribution of these participants to the JCE. The specific nature of the Accused’s participation in the JCE is also mentioned in paragraphs 11 to 18 of the Indictment. Paragraph 18, in particular, states that the Accused, “is individually responsible for planning, ordering, instigating, committing or otherwise aiding and abetting the killing of Tutsi civilians at Nyange Parish on 15 and 16 April 1994 in furtherance of the joint criminal enterprise.” (Emphasis added)

1729 Simić, Judgement (AC), para. 21; Kvočka et al., Judgement (AC), para. 29. Accord Ntakirutimana and Ntakirutimana, Judgement (AC), para. 473. 1730 Simić, Judgement (AC), para. 21 (referring to Article 7(1) of the ICTY Statute); Semanza, Judgement (AC), para 357; Ntakirutimana and Ntakirutimana, Judgement (AC), para. 473. 1731 Simic, Judgement (AC), para. 21; Kvočka et al., Judgement (AC), para. 29 (referring to Article 7(1) of the ICTY Statute). 1732 Krnojelac, Judgement (AC), para. 138; Ntakirutimana and Ntakirutimana, Judgement (AC), para. 475. 1733 Kvočka et al., Judgement (AC), para. 28; Ntagerura et al., Judgement (AC), para. 24; Simba Judgement (AC), para. 63; Simić, Judgement (AC), para. 22. See also Gacumbitsi, Judgement (AC), para. 162. 1734 Simba Judgement (AC), para. 63; Simić, Judgement (AC), para. 22; Ntagerura et al., Judgement (AC), para. 24. 1735 See paragraphs 36 to 38. 1736 Amended Indictment, para. 4 (“During the period covered by this indictment ...”). 1737 Amended Indictment, para. 6 (“The crimes enumerated within this Indictment were within the object of the joint criminal enterprise.”); The Prosecutor’s Pre-Trial Brief, paras. 36-45.

Page 158

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

155 629. While the Indictment fails to plead the specific form of JCE with which the Accused is charged, the Prosecution indicated in its Pre-Trial Brief that it relies only on the first category of JCE in this case.1738 Paragraph 23 of the Pre-Trial Brief also states that, “[t]he Accused must ... share the intent of the other members of the JCE, to commit a particular crime”, which further suggests that the Prosecution is relying on the first form of JCE. 630. For these reasons, the Chamber finds that the theory of joint criminal enterprise was pleaded with sufficient specificity in the Indictment and that the Accused was provided with adequate notice that he was charged with individual criminal responsibility pursuant to the basic form of JCE. Planning 631. Chapeau paragraphs 6, 7 and 19 of the Amended Indictment charge the Accused with planning genocide and extermination as a crime against humanity pursuant to Article 6(1) of the Statute. In the concise statement of the facts, however, only paragraphs 16 and 18 explicitly mention planning as a mode of liability. The Prosecution alleges in paragraph 16 that, during a meeting at the CODEKOKI on 16 April 1994, the Accused and others “planned to kill all the Tutsi refugees in the church by destroying it.” The Chamber recalls that the Prosecution did not adduce any evidence of a meeting at the CODEKOKI on 16 April 1994 and that the Chamber has disregarded evidence of a meeting at the pharmacy on that day for lack of notice. The Chamber therefore must consider whether “planning” was adequately pleaded as a mode of liability for the acts charged in the other paragraphs of the Indictment.1739 632. The Chamber notes that, even if an individual count in the indictment does not indicate precisely the form of responsibility pleaded, an accused might still have received clear and timely notice of the form of responsibility, for instance in other paragraphs of the indictment.1740 The Appeals Chamber has held that, in considering whether an accused received clear and timely notice, the indictment must be read as whole.1741 In this case, the Chamber notes that, in addition to the references to planning in the

chapeau paragraphs, paragraph 18 of the Amended Indictment states that, “[b]y reason of the facts alleged in paragraphs 14 through 18 herein Gaspard Kanyarukiga is individually responsible for planning ... the killing of Tutsi civilians at Nyange Parish”; the language suggests that the Accused is charged with planning all of the events pleaded in paragraphs 14 through 18. Moreover, the Chamber notes that the factual allegations in this case all relate to a single course of conduct, which resulted in the demolition of the Nyange Church on 16 April 1994. Finally, the Chamber notes that in paragraph 36 of its Pre-Trial Brief, the Prosecution alleged that Kanyarukiga attended meetings at Seromba’s home and elsewhere between 10 and 16 April 1994 “to plan the killing of Tutsis.”¹⁷⁴² Through this paragraph, the Prosecution indicated that all of the meetings charged in the Amended Indictment were being charged as “planning”. Thus, in view of the overarching allegation of planning in the chapeau paragraphs, the allegations that Kanyarukiga attended four meetings between 10 and 16 April 1994 and the allegation in paragraph 16 that the Accused participated in planning the demolition of the church, the Chamber is satisfied that the Accused had sufficient notice that he was accused of planning the criminal conduct in question.

¹⁷³⁸ The Prosecutor’s Pre-Trial Brief, para. 23. ¹⁷³⁹ See *Rukundo v. Prosecutor*, Case No. ICTR-2001-70-A, Judgement (AC), 20 October 2010, paras. 33, 35, 37. ¹⁷⁴⁰ *Semanza*, Judgement (AC), para. 259. ¹⁷⁴¹ *Gacumbitsi*, Judgement (AC), para. 123. ¹⁷⁴² The Prosecutor’s Pre-Trial Brief, para. 36 (“It is the Prosecution case that the Accused and other members of the [j]oint [c]riminal [e]nterprise attended meetings at Seromba’s home and elsewhere to plan the killing of Tutsis. The Prosecution will adduce evidence to show that these meetings were held from 10 April 1994 before the killings started at Nyange Church and continued throughout the following days up to and including 16 April 1994 ... the meetings were for the purpose of planning the destruction of the Tutsi ethnic group in whole or in part.”).

Page 159

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

¹⁵⁶ Other Modes of Liability 633. Having considered its findings of fact in this case, the Chamber finds that the Prosecution has failed to prove beyond reasonable doubt that the Accused ordered, instigated, aided or abetted or physically committed the crimes charged in the Amended Indictment. Thus, the Chamber need not consider whether these modes of liability were properly pleaded in this case. 3. Genocide 3.1. Applicable Law 634. Count 1 of the Indictment charges Gaspard Kanyarukiga with genocide, pursuant to Article 2(3)(a) and Article 6(1) of the Statute.¹⁷⁴³ Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;

- (b) Causing serious bodily or mental harm to members of the group; ...1744 635. A person commits the crime of genocide under Article 2(3)(a) of the Statute if he or she commits one of the acts enumerated in Article 2(2) with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.¹⁷⁴⁵ The victims must be targeted because of their membership in the protected group.¹⁷⁴⁶ The jurisprudence also suggests that an accused must have the intent to destroy at least a reasonably substantial number of members in the protected group relative to the total population of the group.¹⁷⁴⁷ Where a person is accused of planning,

1743 Amended Indictment, para. 7. 1744 Article 2(2) of the Statute. 1745 Nahimana et al., Judgement (AC), para. 492; Prosecutor v. Ntawukulilyayo, Case No. ICTR-05-82-T, Judgement and Sentence (TC), 3 August 2010, para. 450. See also Seromba, Judgement (AC), para. 175; Gacumbitsi, Judgement (AC), para. 39. 1746 Niyitegeka, Judgement (AC), para. 53 (“Thus the Trial Chamber was correct in interpreting ‘as such’ to mean that the proscribed acts were committed against the victims because of their membership in the protected group, but not solely because of such membership.”). See also Seromba, Judgement (AC), para. 176; Rutaganda, Judgement (AC), paras. 524-525; Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement (AC), 5 July 2001, para. 47. 1747 Prosecutor v. Sikirica et al., Case No. IT-95-8-T, Judgement on Defence Motions to Acquit (TC), 3 September 2001, para. 65. See also Semanza, Judgement (TC), para. 316 (“Although there is no numeric threshold of victims necessary to establish genocide, the Prosecutor must prove beyond reasonable doubt that the perpetrator acted with the intent to destroy the group as such, in whole or in part. The intention to destroy must be, at least, to destroy a substantial part of the group.” (some internal citations omitted)), citing Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgement (TC), 7 June 2001, para. 64. Compare Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgement (TC), 21 May 1999, para. 97 (“The Trial Chamber opines, therefore, that ‘in part’ requires the intention to destroy a considerable number of individuals who are part of the group.”). Accord Gacumbitsi, Judgement (AC), para.

44. Compare Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement (TC), 2 August 2001, para. 590 (“The Trial Chamber is therefore of the opinion that the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.”); Prosecutor v. Jelisić, Case No. IT-95-10- T, Judgement (TC), 14 December 1999, para. 82 (“Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.”). The Trial Chamber notes that several recent judgements of this Tribunal have adopted the standard articulated in Semanza. See, e.g., Ntawukulilyayo, Judgement (TC), para. 450; Prosecutor v. Bagosora et al., Case No. ICTR-98- 41-T, Judgement and Sentence (TC), 18 December 2008, para. 2115;

Prosecutor v. Simba, Case No. ICTR-01-76-T,

Page 160

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

157 instigating, ordering or aiding and abetting the commission of genocide by one or more other persons, the Prosecutor must establish that the accused's acts or omissions substantially contributed to the commission of acts of genocide.¹⁷⁴⁸ 636. In the absence of direct evidence demonstrating the perpetrator's specific intent to commit genocide, such intent may be inferred from his statements or other circumstantial evidence.¹⁷⁴⁹ Factors that may enable a Trial Chamber to infer the perpetrator's genocidal intent include the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group or the repetition of destructive and discriminatory acts.¹⁷⁵⁰ The perpetrator need not be motivated solely by a genocidal intent and having a personal motive will not preclude such a specific intent.¹⁷⁵¹ 637. The Amended Indictment charges Kanyarukiga with genocide for killing and/or causing serious bodily or mental harm to members of the Tutsi ethnic group. Trial Chambers have defined "killing members of the group" as requiring a showing that the principal perpetrator intentionally killed one or more members of the group.¹⁷⁵² "Serious bodily or mental harm" is not defined in the Statute and has not been squarely addressed by the Appeals Chamber.¹⁷⁵³ The Trial Chambers, however, have largely adopted the following definition from Kayishema and Ruzindana: "causing serious bodily harm" ... could be construed to mean harm that seriously injures the health, causes disfigurement, or causes any serious injury to the external, internal organs or senses."¹⁷⁵⁴ Typical examples of serious bodily harm include torture and rape.¹⁷⁵⁵ With respect to "serious mental harm," several Trial Chambers have said that it refers to "more than minor or temporary impairment of mental faculties."¹⁷⁵⁶ However, there does not appear to be any jurisprudential foundation for this

Judgement and Sentence (TC), 13 December 2005, para. 412; Prosecutor v. Seromba, Case No. ICTR-2001-66-I, Judgement (TC), 13 December 2006, para. 319. ¹⁷⁴⁸ Nahimana et al., Judgement (AC), para. 492. ¹⁷⁴⁹ Kayishema and Ruzindana, Judgement (AC), paras. 158, 159. See also Seromba, Judgement (AC), para. 176; Gacumbitsi Judgement (AC), paras. 40-41; Rutaganda Judgement (AC), paras. 525, 528; Krstić, Judgement (AC), para. 34; Semanza, Judgement (AC), para. 262, quoting Jelisić, Judgement (AC), para. 47. ¹⁷⁵⁰ Semanza, Judgement (AC), para. 262, quoting Jelisić, Judgement (AC), para. 47. See also Rutaganda, Judgement (AC), para. 525. ¹⁷⁵¹ Simba, Judgement (AC), para. 269; Jelisić, Judgement (AC), para. 49. Accord Niyitegeka, Judgement (AC), para. 53. ¹⁷⁵² See, e.g., Ntawukulilyayo, Judgement (TC), para. 452; Bagosora et al., Judgement (TC), para. 2117; Simba, Judgement (TC), para. 414; Semanza, Judgement (TC), para. 319. See also Kayishema and Ruzindana, Judgement (AC), para. 151 ("[I]f the word "virtually" is interpreted in a manner that suggests a difference, though minimal, between the two terms, it would construe them both as referring to intentional but not necessarily

premeditated murder, this being, in its view, the meaning to be assigned to the word “meurtre.”). 1753 See Seromba, Judgement (AC), para. 46. 1754 Kayishema and Ruzindana, Judgement (TC), para. 109. See Ntawukulilyayo, Judgement (TC), para. 452; Bagosora et al., Judgement (TC), para. 2117; Prosecutor v. Ntagerura et al., Case No. ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004, para. 664; Semanza, Judgement (TC), para. 320. 1755 Seromba, Judgement (AC), para. 46. 1756 See, e.g., Ntawukulilyayo, Judgement (TC), para. 452; Rukundo, Judgement (TC), para. 260; Bagosora et al., Judgement (TC), para. 2117; Ntagerura et al., Judgement (TC), para. 664; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence (TC), 1 December 2003, para. 815; Semanza, Judgement (TC), para. 321.

Page 161

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

158 definition. 1757 Rather, the judgement upon which this line of jurisprudence rests states that “causing serious mental harm” should be interpreted on a case-by-case basis. 1758 To support a conviction for genocide, the bodily or mental harm inflicted on members of a protected group must be of such a serious nature as to threaten the destruction of the group in whole or in part. 1759 3.2. Application 638. The Trial Chamber has taken judicial notice of the facts that, between 6 April and 17 July 1994, Rwandan citizens were ethnically classified as Hutu, Tutsi and Twa and that a genocide was carried out against the Tutsi ethnic group. 1760 It is well established that the Tutsi ethnicity is a protected group under Article 2 of the Statute. 1761 639. Based on the evidence presented at trial, the Chamber has found that, following the death of President Habyarimana on 6 April 1994, Tutsi civilians were attacked by Hutu assailants in Kivumu commune and sought refuge in the Nyange Parish Church. More than 2000 civilians, of whom at least the vast majority were Tutsi, took refuge at the Nyange Parish prior to 16 April 1994. The Chamber has found that, from approximately 12 April 1994, gendarmes were posted to the Nyange Parish, ostensibly to “ensure the security” of the Tutsi who had taken refuge there. The Tutsi civilians were also surrounded by armed assailants, including interahamwe. 640. Further, the Chamber has found that, between 13 and 16 April 1994, Hutu assailants attacked the Tutsi at the Nyange Parish and demolished the church, killing approximately 2000 Tutsi men, women and children. It is undisputed that these attacks were ethnically motivated. The Chamber has found that members of the Hutu population were asked to go to Nyange to attack the Tutsi who had taken refuge at the parish and that Hutu assailants referred to their victims as “inyenzi” and chanted slogans such as, “let us exterminate them” and “let no-one escape”. In attempting to annihilate the Tutsi civilians who had taken refuge at the parish, the assailants attacked their victims with traditional weapons, stones, firearms and at least one grenade and attempted to destroy the church with dynamite and by using fuel to set it ablaze. When these attempts failed, the assailants took the extreme step of demolishing the Nyange Parish Church with at least one bulldozer, crushing those inside. The Chamber has found that thousands of Hutu assailants armed with traditional weapons surrounded the Nyange Church on 16 April 1994 and attacked

anyone who tried to escape the demolition. 641. Given the manner in which the attacks were conducted, the Chamber finds that the assailants intentionally targeted and killed members of a protected group. Having considered the number of

1757 The Trial Chambers that have adopted this definition rely on paragraph 110 of the Trial Chamber's judgement in Kayishema and Ruzindana to support their finding. See, e.g., Ntawukulilyayo, Judgement (TC), para. 452; Rukundo, Judgement (TC), para. 260; Bagosora et al., Judgement (TC), para. 2117; Kajelijeli, Judgement (TC), para. 815; Semanza, Judgement (TC), para. 321. According to Semanza, for example, the Trial Chamber in Kayishema and Ruzindana held that serious mental harm meant more than minor or temporary impairment of mental faculties. Semanza, Judgement (TC), para. 321. However, paragraph 110 of the Kayishema and Ruzindana judgement does not include any findings or conclusions by the Trial Chamber. Rather, it merely summarises the argument made by the Prosecution. In contrast, paragraph 113 of the Kayishema and Ruzindana Trial Judgement, in which the Trial Chamber actually sets forth its findings on this issue, states that, "[t]he Chamber opines that 'causing serious mental harm' should be interpreted on a case-by-case basis in light of the relevant jurisprudence." Kayishema and Ruzindana, Judgement (TC), paras. 110, 113. 1758 See Kayishema and Ruzindana, Judgement (TC), para. 113. 1759 Seromba, Judgement (AC), para. 46. 1760 Decision on the Prosecution Motion for Judicial Notice (TC), 14 May 2009, paras. 12, 14. 1761 See Bagosora et al., Judgement (TC), para. 2117, fn. 2338 ("Furthermore, every judgement rendered by this Tribunal concerning genocide has recognised that the Tutsi ethnicity is a protected group."). See also Karemera et al., Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), para. 25.

Page 162

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

159 victims and the obvious intent of the assailants to eliminate the Tutsi who had taken refuge at the parish, the Chamber is satisfied that the assailants as a group intended to destroy at least a substantial part of the Tutsi ethnic group. The Chamber therefore finds that the destruction of the Nyange Church and the associated attacks constitute genocide. 642. The Chamber shall now consider whether the Accused bears criminal responsibility for these acts. Joint Criminal Enterprise 643. Although the first form of JCE was properly pleaded in the Amended Indictment, the Trial Chamber is not convinced that the Prosecution has proven beyond reasonable doubt that the Accused participated in a joint criminal enterprise, as alleged. The Chamber recalls that, in order for an accused to be convicted of "committing" pursuant to a theory of JCE, it must be established that he or she participated in the execution of the common plan or purpose of the enterprise.¹⁷⁶² While the Trial Chamber has found that Kanyarukiga participated in the planning of the destruction of the Nyange Church (discussed further below), it does not find any credible evidence to suggest that the Accused ordered, instigated, encouraged or provided material assistance to the attackers in this case. Thus, the Chamber finds that the evidence is insufficient to establish that the Accused significantly contributed to the execution or

commission of the crimes charged. Moreover, the Trial Chamber recalls that an accused cannot be convicted of planning and committing the same offence.¹⁷⁶³ Having considered both JCE, which is a form of commission, and planning as possible modes of liability, the Chamber finds that, in view of the factual findings in this case, planning more aptly captures the alleged criminal conduct of the accused than JCE. Planning 644. As stated above, planning requires that one or more persons design the criminal conduct of a statutory crime that is later committed. In this case, the Trial Chamber has found that, after the attacks on the Tutsi at the Nyange Parish on 15 April 1994, the Accused had a conversation with IPJ Kayishema, during which the men said that the church had to be demolished. The following day, the Accused attended a meeting at the Nyange Parish with Father Seromba, Grégoire Ndahimana, Fulgence Kayishema, Téléphone Ndungutse, Judge Joseph Habiyaambere and others, at which the demolition of the Nyange Church was discussed. Immediately following this meeting, the Accused told Ndahimana, Kayishema, Habiyaambere, Ndungutse and others that the church had to

¹⁷⁶² Stakić, Judgement (AC), para. 64; Kvočka et al., Judgement (AC), para. 96, quoting Vasiljević, Judgement (AC), para. 100. See also Ntakirutimana and Ntakirutimana, Judgement (AC), para. 466; Tadić, Judgement (AC), para. 227 (“Participation of the accused in the common design [involves] the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.”). Compare Simba, Judgement (AC), para. 250 (“It is well-established that in a JCE, it is not necessary for a participant to have participated in its planning. All that is required is the participation of an accused in the common design involving the perpetration of one of the crimes provided for in the Statute.”); Kvočka et al., Judgement (AC), para. 99 (“A participant in a joint criminal enterprise need not physically participate in any element of any crime, so long as the requirements of joint criminal enterprise responsibility are met. As the Tadić Appeals Chamber explained, [a]lthough only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question.” (internal citations omitted)).

¹⁷⁶³ See, e.g., Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgement (TC), 1 September 2004, para. 268; Prosecutor

- v. Stakić, Case No. IT-97-24-T, Judgement (TC), 31 July 2003, para. 443; Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, Judgement (TC), 26 February 2001, para. 386. The Chamber notes that, where the accused is convicted of committing the offence in question, the accused’s role in planning the offence is considered as an aggravating factor during sentencing. See, e.g., Stakić, Judgement (TC), para. 443.

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

160 be destroyed and that he would rebuild it. The Chamber recalls that Kanyarukiga was in the presence of several of these same men during the attacks on 15 April 1994 and that at least some of them participated in or directed attacks against the Tutsi on 15 and 16 April 1994.^{1764 645} It has been established that after the meeting on the morning of 16 April, during which the destruction of the church was planned, Fulgence Kayishema and Télesphore Ndungutse, who had participated in the aforementioned meeting, went to get a bulldozer. The bulldozer was subsequently brought to the parish and used to demolish the church, crushing those inside. The Chamber has found beyond reasonable doubt that approximately 2000 Tutsi men, women and children were killed during the demolition on 16 April 1994. In view of these findings, the Chamber is satisfied beyond reasonable doubt that Gaspard Kanyarukiga, Grégoire Ndahimana, Fulgence Kayishema, Télesphore Ndungutse, Joseph Habiyaambere and others planned the destruction of the Nyange Church on 15 and 16 April 1994 and that the church was destroyed on the afternoon of 16 April 1994, killing those inside. For these reasons, the Chamber is satisfied that Kanyarukiga and others planned certain criminal conduct that was later perpetrated. ⁶⁴⁶ Next, having found that Kanyarukiga participated in the planning of the destruction of the church, the Chamber must consider whether this planning was a factor that substantially contributed to the killing of the Tutsi at the parish. The Trial Chamber recalls that Hutu assailants attacked the Tutsi who had taken refuge at the Nyange Parish on 13 and 14 April 1994 but that the Tutsi were able to repel these attacks. On 15 April 1994, the Hutu assailants redoubled their efforts and sought out reinforcements from various secteurs in Kivumu commune, as well as other communes. The Chamber has found beyond reasonable doubt that the IPJ Kayishema drove around in a pick-up, outfitted with a public address system, and urged members of the Hutu population to come to Nyange to fight the Tutsi at the parish. ⁶⁴⁷ On 15 April 1994, thousands of Hutu assailants converged on the Nyange Trading Centre and attacked the Tutsi who had taken refuge at the parish with stones and traditional weapons. Nevertheless, the Tutsi were able to push the assailants down the hill from the parish to the Statue of the Virgin Mary by throwing stones. Later in the day, a reservist named Rukara threw at least one grenade towards the Tutsi who were on the road between the Statue of the Virgin Mary and the church. This attack resulted in numerous deaths and drove those who had survived the attack back to the parish. The Trial Chamber has found it established that the Tutsi subsequently sought refuge inside the church building. ⁶⁴⁸ When the Tutsi barricaded themselves inside the church, the assailants attempted to attack the church itself. Communal police fired on the church. At some point in the afternoon, Kayishema brought fuel to the parish, which was used in an attempt to burn down the church. These attempts were unsuccessful; the church remained standing, and the Tutsi remained barricaded inside. That evening, Kanyarukiga and IPJ Kayishema had a conversation, during which they said that the church needed to be destroyed. ⁶⁴⁹ As discussed above, the Chamber has inferred from the facts that, on the morning of 16 April 1994, after another failed attempt to kill the Tutsi with firearms, the Accused, Ndahimana, Kayishema, Ndungutse, Habiyaambere and others decided to destroy the Nyange Church. At least one bulldozer brought to the parish and put to work demolishing the church. The demolition began around midday, and

within a matter of hours, the church had been demolished. As the church

1764 See the Trial Chamber's factual findings regarding: Kayishema recruiting attackers, paragraph 441; Ndahimana ordering people to begin work, paragraph 472; Kayishema bringing petrol to Nyange Church, paragraph 493; Ndungutse and Kayishema being present during the attempted burning of the Nyange Church, paragraph 483 and Ndahimana shooting at the church prior to its destruction, paragraph 576.

Page 164

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

161 collapsed, approximately 2000 Tutsi civilians who had taken refuge inside were either crushed by falling walls or slaughtered by one of the thousands of Hutu assailants who had surrounded the church. Having decided to destroy the Nyange Church with at one bulldozer, Gaspard Kanyarukiga, Fulgence Kayishema, Grégoire Ndahimana, Télesphore Ndungutse, Joseph Habiyaambere and others achieved in one afternoon what had eluded the assailants for more than three days: the annihilation of a substantial portion of the Tutsi population. For these reasons, the Chamber finds, beyond reasonable doubt, that the plan to destroy the church substantially contributed to the killing of the Tutsi at the Nyange Parish on 16 April 1994. 650. Finally, in order to be criminally responsible for planning the killings at the Nyange Parish, it must be established that Kanyarukiga had the intent to plan the commission of a crime or the awareness of the substantial likelihood that a crime would be committed in execution of the acts planned. In this case, the Chamber has found that, after discussing the destruction of the church with IPJ Kayishema on the evening of 15 April 1994, the Accused attended a meeting on the morning of 16 April 1994, during which the demolition of the church was discussed and accepted. Furthermore, after the meeting on 16 April 1994, Kanyarukiga told others that, "[t]his church has to be demolished. I would reconstruct it. I would make it my responsibility to reconstruct in three days." Based on his comments and participation in the meeting on 16 April 1994, the Chamber finds it established beyond reasonable doubt that the Accused had the intent to plan the destruction of the Nyange Church. 651. Moreover, the Chamber finds that there is overwhelming circumstantial evidence to show that Kanyarukiga knew that there were people inside the Nyange Church on 16 April 1994 and that those people would be killed if and when the church was destroyed. The Chamber recalls that the Accused attended a meeting at the Nyange Parish Presbytery on 14 April 1994. While it is not established that this meeting had any criminal purpose, the Chamber notes that there were Tutsi civilians at the parish on this day and that many of them were in the courtyard in front of the church when Kanyarukiga arrived and departed. Thus, it is the only reasonable inference that the Accused had knowledge that Tutsi had taken refuge at the parish as early as 14 April 1994. The Prosecution has established that Kanyarukiga was in Nyange, both at the Statue of the Virgin Mary and at the parish, during the confrontations on the morning of 15 April 1994. The Accused was also with Bourgmestre Ndahimana when the latter instructed the assailants to "start working" or "begin work" on 15

April 1994 and with Kayishema at the Nyange Parish on the evening of 15 April 1994, after the attempted burning of the church. Finally, the Accused was at the parish on the morning of 16 April 1994 and in the company of others, such as Ndahimana, Kayishema and Ndungutse, who the Chamber has established were overseeing and directing attacks on 15 and 16 April 1994. In view of this evidence, the Chamber finds that it has been established beyond reasonable doubt that Kanyarukiga was aware that, if the planned demolition went forward, the Tutsi who had taken refuge in the Nyange Church would be killed. 652. For these reasons, the Chamber finds beyond reasonable doubt that the Accused and others planned the destruction of the Nyange Church, which resulted in the killing of approximately 2000 members of the Tutsi ethnic group. The Chamber shall now consider whether, in so doing, the Accused acted with the intent to destroy the Tutsi ethnic group in whole or in part.

Page 165

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

162 Genocidal intent 653. The Chamber recalls that genocidal intent may be inferred from the facts.¹⁷⁶⁵ In this case the Accused attended a meeting at which the demolition of the Nyange Church was discussed, that he suggested to others that the church should be destroyed and that he was present during the attacks on the Tutsi on the morning of 15 April 1994, including when Ndahimana instructed the assailants to start working, which was understood to mean “kill the Tutsi”. The Accused was also seen repeatedly on 15 and 16 April 1994 in the presence of individuals such as Ndahimana, Kayishema and Ndungutse, who were overseeing and directing the attacks. Having considered the totality of the evidence, the Chamber finds it established beyond reasonable doubt that Kanyarukiga acted with the special intent to destroy the Tutsi ethnic group, either in whole or in part. 3.3.

Conclusion

654. Accordingly, the Chamber finds that the Accused is guilty of genocide (Count 1) under Article 6(1) of the Statute for planning the killing of members of the Tutsi ethnic group at the Nyange Church. 4. Complicity in Genocide 655. Count 2 of the Amended Indictment charges Kanyarukiga with complicity in genocide under Article 2(3)(e) of the Statute. The count is pleaded alternatively to Count 1, which charges genocide.¹⁷⁶⁶ As the Chamber has already entered a conviction for Count 1, it finds Kanyarukiga not guilty on this count. 5. Crimes Against Humanity (Extermination) 5.1. Applicable Law 656. In Count 3 of the Amended Indictment, the Prosecution charges Gaspard Kanyarukiga with extermination as a crime against humanity pursuant to Article 3 of the Statute. According to Article 3, extermination constitutes a crime against humanity when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. 657. For any of the enumerated crimes under Article 3 of the Statute to qualify as a crime against humanity, the Prosecution must prove that the act

was committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds.¹⁷⁶⁷ For the purposes of Article 3 of the Statute, an attack against a civilian population means the perpetration against a civilian population of a series of acts of violence or of the kind of mistreatment referred to in subparagraphs (a) to (i) of the Article.¹⁷⁶⁸ Intended to be read disjunctively, “widespread” refers to the large-scale nature of the attack and the number of persons targeted, whereas “systematic” describes the organised nature of the acts of violence and the improbability of their random occurrence.¹⁷⁶⁹ The requisite mens rea is the intent to commit the

¹⁷⁶⁵ See paragraph 636 and see also Seromba, Judgement (AC), para. 176; Gacumbitsi, Judgement (AC), paras. 40-41; Semanza, Judgement (AC), para. 262, quoting Jelisić, Judgement (AC), para. 47; Rutaganda, Judgement (AC), paras. 525, 528; Krstić, Judgement (AC), para. 34. ¹⁷⁶⁵ Amended Indictment, paras. 7-8. ¹⁷⁶⁶ Amended Indictment, paras. 7-8. ¹⁷⁶⁷ See Ntakirutimana and Ntakirutimana, Judgement (AC), para. 516. ¹⁷⁶⁸ Nahimana et al., Judgement (AC), para. 918. ¹⁷⁶⁹ Nahimana et al., Judgement (AC), para. 920, quoting Kordić and Čerkez, Judgement (AC), para. 94.

Page 166

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

¹⁶³ underlying offence, knowledge that there is a discriminatory attack on the civilian population and knowledge that the accused's acts formed part of that attack.¹⁷⁷⁰ The accused, however, need not have shared the purpose or goals behind the broader attack or have possessed a discriminatory intent.¹⁷⁷¹ 658. Extermination is the act of killing on a large scale.¹⁷⁷² The expression “on a large scale,” however, does not require a numerical minimum.¹⁷⁷³ The actus reus underlying extermination consists of any act, omission or combination thereof, which contributes directly or indirectly to the killing of a large number of individuals.¹⁷⁷⁴ To be found guilty of extermination as a crime against humanity, it must be established that the accused participated in a widespread or systematic killing or subjected a widespread number of people to conditions of living that would inevitably lead to their deaths, and that by his acts or omissions, the accused intended this result.¹⁷⁷⁵ 5.2. Application 659. The Trial Chamber has taken judicial notice of the facts that, between 6 April and 17 July 1994, there were widespread or systematic attacks throughout Rwanda against a civilian population based on Tutsi ethnic identification, and that, as a result of these attacks, many persons of Tutsi ethnicity were killed.¹⁷⁷⁶ 660. The evidence in this case also supports the conclusion that there were widespread or systematic attacks against the Tutsi population in Kivumu commune in April 1994. The Chamber has already found that, in Kivumu commune, persons of Tutsi ethnicity were singled out and targeted in their communities following the death of President Habyarimana. As a result of these attacks, more than 2000 Tutsi men, women and children sought refuge at the Nyange Parish, where the vast majority were eventually killed. Thus, the Chamber is satisfied that, in April 1994, there were widespread attacks against members of the Tutsi ethnic group in Kivumu commune. 661. The Chamber has further found that the Tutsi who sought refuge at the Nyange Parish were attacked

repeatedly between 13 and 16 April 1994, that many died during attacks on 15 April 1994 and that the vast majority were massacred on 16 April 1994. The Chamber recalls that the Hutu assailants attacked the Tutsi over multiple days with an array of weapons before ultimately demolishing the church with at least one bulldozer on 16 April 1994. The Chamber has found that Gaspard Kanyarukiga, Grégoire Ndahimana, Fulgence Kayishema, Télesphore Ndungutse, Joseph Habyambere and others intentionally planned the demolition of the Nyange Church, which resulted in the killing of approximately 2000 Tutsi on 16 April 1994. Based on these findings, the Chamber is satisfied that the attacks on the Tutsi at the Nyange Parish were also systematic. 662. Finally, the Chamber is satisfied that the Tutsi killed in the massacres at the Nyange Parish were civilians.

1770 See Gacumbitsi, Judgement (AC), para. 86; Kordić and Čerkez, Judgement (AC), paras. 99-100; Kunarac et al. v. Prosecutor, Case Nos. IT-96-23 and IT-96-23/1-A, Judgement (AC), 12 June 2002, paras. 99, 102-103; Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgement (AC), 1 June 2001, para. 467. 1771 See Kunarac et al., Judgement (AC), para. 103; Semanza, Judgement (AC), paras. 268-269, quoting Akayesu, Judgement (AC), para. 467. The requirement that crimes against humanity be committed “on national, political, ethnic, racial or religious grounds” does not mean that a discriminatory mens rea must be established. 1772 Seromba, Judgement (AC), para. 189; Ntakirutimana and Ntakirutimana, Judgement (AC), para. 516; Stakić, Judgement (AC), para. 259. Accord Nahimana et al., Judgement (AC), para. 924 (comparing the number of victims required for extermination to that required for other crimes against humanity). 1773 Ntakirutimana and Ntakirutimana, Judgement (AC), para. 516. 1774 Seromba, Judgement (AC), para. 189. 1775 Ntakirutimana and Ntakirutimana, Judgement (AC), para. 522. See also Gacumbitsi, Judgement (AC), para. 86. 1776 Decision on the Prosecution Motion for Judicial Notice (TC), 14 May 2009, paras. 12, 14.

Page 167

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

164 663. Thus, based on the evidence presented at trial, the Chamber finds that the Prosecution has established beyond reasonable doubt that in Kivumu commune, there were widespread or systematic attacks against a civilian population on ethnic grounds. The Chamber also finds that, in view of the events leading up to the demolition of the Nyange Church and the presence of Kanyarukiga and the other planners at the parish on 15 and 16 April 1994,¹⁷⁷⁷ it is inconceivable that Kanyarukiga and the others did not know that their actions formed part of a widespread or systematic attack against the Tutsi civilian population. Similarly, the Chamber is satisfied that the principal perpetrators of the attacks were also aware of the broader context, particularly given the scale of the atrocities and the participation of at least some of them in attacks prior to the massacres at the parish. 664. Thus, the Chamber finds beyond reasonable doubt that the demolition of the Nyange Church was committed as part of a widespread or systematic attack against the Tutsi civilian population on ethnic grounds and that the Accused knew that his acts

formed part of this broader attack. The Chamber is therefore satisfied that the destruction of the Nyange Church constitutes a crime against humanity. 665. Given the number of persons who died during the demolition, the Chamber finds that this killing can only be described as large-scale and therefore amounts to extermination. Furthermore, for the reasons stated above, the Chamber finds that the victims of these killings were targeted on the basis of their Tutsi ethnicity. Thus, having found that Kanyarukiga participated in the planning of the demolition that resulted in these deaths, the Chamber finds that the Accused intentionally contributed to a mass killing of Tutsi civilians, amounting to extermination as a crime against humanity. 5.3.

Conclusion

666. Accordingly, the Chamber finds that the Accused is guilty of extermination as a crime against humanity (Count 3) under Article 6(1) of the Statute for planning the killing of approximately 2000 Tutsi civilians as part of a widespread or systematic attack on the Tutsi ethnic group.

1777 See paragraphs 639-641, 644-652.

Page 168

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

165

CHAPTER V: VERDICT 667. For the reasons set out in this judgement, having considered all evidence and arguments, the Trial Chamber finds unanimously as follows in respect of Gaspard Kanyarukiga: Count 1: GUILTY of Genocide Count 2: NOT GUILTY of Complicity in Genocide Count 3: GUILTY of Extermination as a Crime against Humanity

Page 169

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

166

CHAPTER VI: SENTENCING 668. The Trial Chamber has found Gaspard Kanyarukiga guilty of genocide (Count 1 of the Indictment) and extermination as a crime against humanity (Count 3 of the Indictment) for planning the destruction of the Nyange Parish Church and the resulting killing of approximately 2000 Tutsi civilians. The Chamber shall now determine an appropriate sentence. 1. Applicable Law 669. A person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or for the remainder of his life.¹⁷⁷⁸ The penalty imposed should reflect the aims of retribution, deterrence and, to a lesser extent, rehabilitation.¹⁷⁷⁹ Pursuant to Article 23 of the Statute and Rule 101 of the Rules, the Trial Chamber shall consider the general

practice regarding prison sentences in Rwanda, the gravity of the offences (the gravity of the crimes for which the accused has been convicted and the form of responsibility for these crimes) as well as the individual circumstances of the convicted person, including aggravating and mitigating circumstances.¹⁷⁸⁰ In addition, the Trial Chamber shall consider the extent to which any penalty imposed by a court of any State on the accused for the same act has already been served¹⁷⁸¹ and shall credit the accused for any time spent in detention pending his surrender to the Tribunal and during trial.¹⁷⁸²

Submissions

670. The Prosecution requests that the Trial Chamber impose a sentence of imprisonment for the remainder of Kanyarukiga's life.¹⁷⁸³ The Prosecution submits that life imprisonment is an appropriate sentence in light of the gravity of Kanyarukiga's offence, his individual circumstances and certain alleged aggravating factors.¹⁷⁸⁴ The Prosecution identifies five potential aggravating circumstances: Kanyarukiga's position in the community and his abuse of that authority; Kanyarukiga's premeditation in carrying out the acts leading to the massacre; Kanyarukiga's direct participation in the crimes as a perpetrator; the violent and humiliating nature of his acts and the vulnerability of the victims; and the duration of the offences and the suffering of the victims.¹⁷⁸⁵ The Prosecution contends that there are no mitigating circumstances in this case.¹⁷⁸⁶ 671. The Defence does not make submissions on sentencing in its closing brief. Rather, the Defence submits that, because it has asked the Chamber to acquit Kanyarukiga on all counts, "[t]o make submissions on sentencing or possible mitigating factors at this stage would violate Gaspard Kanyarukiga's presumption of innocence."¹⁷⁸⁷ The Defence submits that it "reserves its right to make submissions on sentencing and mitigating factors in the event of a conviction, after the verdict is rendered in the final judgement."¹⁷⁸⁸

¹⁷⁷⁸ Rule 101(A) of the Rules. ¹⁷⁷⁹ See Nahimana et al., Judgement (AC), para. 1057; Stakić, Judgement (AC), para. 402. ¹⁷⁸⁰ Articles 23(1) and 23(2) of the Statute; Rule 101(B) of the Rules. ¹⁷⁸¹ Rule 101(B)(iv) of the Rules. ¹⁷⁸² Rule 101(C) of the Rules. ¹⁷⁸³ Prosecutor's Final Trial Brief, para. 517. ¹⁷⁸⁴ Prosecutor's Final Trial Brief, para. 517. ¹⁷⁸⁵ Prosecutor's Final Trial Brief, para. 538. ¹⁷⁸⁶ Prosecutor's Final Trial Brief, paras. 517, 567-570. ¹⁷⁸⁷ Defence Final Brief, para. 502. ¹⁷⁸⁸ Defence Final Brief, para. 505. The Defence reiterated in its closing argument that it was not making submissions on sentencing or mitigation. T. 24 May 2010, p. 84.

Page 170

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

167 3. Deliberations 672. The Chamber recalls that Rule 86(C) of the Rules provides that the parties shall address matters of sentencing in their closing arguments. Thus, notwithstanding that the Defence did not make submissions on sentencing in its closing brief and argument, the

Chamber has nevertheless made findings on this matter. In reaching its determinations, the Chamber has considered the totality of the evidence in the record. 3.1. Gravity of the Offence 673. The Appeals Chamber has held that all crimes within the jurisdiction of the Tribunal are serious violations of international humanitarian law and that there is no hierarchy of crimes under the Statute.¹⁷⁸⁹ When determining an appropriate sentence, a Trial Chamber has broad discretion to individualise the penalties to fit the circumstances of the convicted person and to reflect the gravity of the crimes for which the accused has been convicted.¹⁷⁹⁰ 674. The Chamber has found Kanyarukiga guilty of genocide and extermination as a crime against humanity. Genocide is, by definition, a crime of the most serious gravity, which affects the very foundations of society and shocks the conscience of humanity. Crimes against humanity are also extremely serious offences because they are heinous in nature and shock the collective conscience of mankind.¹⁷⁹¹ 675. The Chamber has determined that Kanyarukiga participated in the planning of the destruction of the Nyange Church on 16 April 1994, which resulted in the deaths of over 2000 Tutsi civilians. These crimes were grave and resulted in overwhelming human suffering. 676. Although Kanyarukiga's crimes are grave, the Chamber is not satisfied that he is deserving of the most serious sanction available under the Statute, given that it has not been established that he directly participated in, or was present during the destruction of Nyange Church itself. 3.2. Aggravating Circumstances 677. The Chamber has wide discretion in determining both what constitute aggravating and mitigating circumstances and the weight to be accorded to such circumstances.¹⁷⁹² The Trial Chamber recalls that aggravating circumstances must be proven beyond reasonable doubt.¹⁷⁹³ Furthermore, any particular circumstance that is included as an element of the offence for which the Accused was convicted cannot also be considered as an aggravating factor.¹⁷⁹⁴ 678. In the Chamber's view, it has been established beyond reasonable doubt that the victims in this case were particularly vulnerable. The evidence shows that they took refuge in a place of

¹⁷⁸⁹ Kayishema and Ruzindana, Judgement (AC), para. 367. ¹⁷⁹⁰ Seromba, Judgement (AC), para. 228. ¹⁷⁹¹ Prosecutor v. Rugambarara, Case No. ICTR-00-59-T, Sentencing Judgement (TC), 16 November 2007, para. 19; Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgement and Sentence (TC), 1 June 2000, para. 48. ¹⁷⁹² See, e.g., Simba, Judgement (AC), para. 328; Ntagerura et al., Judgement (AC), para. 430; Musema, Judgement (AC), paras. 395-396; Delalić et al. (Čelebići case), Judgement (AC), para. 777; Prosecutor v. Deronjić, Case No. IT-02-61-S, Sentencing Judgement (TC), 30 March 2004, para. 155. See also Prosecutor v. Bagaragaza, Case No. ICTR-05-86-S, Sentencing Judgement (TC), 17 November 2009, para. 29; Rugambarara, Judgement (TC), para. 13; Serushago v. Prosecutor, Case No. ICTR-98-39-A, Reasons for Judgement (AC), 6 April 2003, para. 23. ¹⁷⁹³ See, e.g., Nahimana et al., Judgement (AC), para. 1038; Simba, Judgement (AC), para. 328. See also Delalić et al. (Čelebići case), Judgement (AC), para. 763. ¹⁷⁹⁴ Ndindabahizi, Judgement (AC), para. 137, citing Blaškić, Judgement (AC), para. 693.

Page 171

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

168 worship, that they were disarmed on 13 April 1994, prior to when the attacks began and that, during the attacks on 15 April 1994, they were driven into the Nyange Church and forced to lock themselves inside. It is also established that the victims were civilians, including women, children and the elderly.¹⁷⁹⁵ Further, the church was surrounded on 16 April 1994 so that none of those inside could escape. Finally those who had taken refuge in the Nyange Church were ultimately crushed by the church structure itself. They had no means to defend themselves.¹⁷⁹⁶ 679. Given this, the Chamber finds that the vulnerability of the victims in this case is an aggravating factor in sentencing.¹⁷⁹⁷ 3.3. Mitigating Circumstances 680. Mitigating circumstances need only be established on a balance of probabilities.¹⁷⁹⁸ Mitigating circumstances need not be directly related to the offence.¹⁷⁹⁹ 681. The Chamber recalls that in a number of cases, both at the ICTR and ICTY, it has found that the advanced age of an accused at the time of sentencing was a mitigating factor.¹⁸⁰⁰ The Chamber notes that the age of the Accused in this case has not been established beyond reasonable doubt. Nevertheless, mitigating factors only have to be established on a balance of probabilities, and the Accused appears to be between 63 and 72 years old.¹⁸⁰¹ Given this, the Chamber has treated the Accused's age as a mitigating circumstance. 3.4. Sentencing Practice 682. In determining an appropriate sentence, the Appeals Chamber has stated that "sentences of like individuals in like cases should be comparable."¹⁸⁰² However, it has also noted the inherent limitations of this approach considering that "any given case contains a multitude of variables,

¹⁷⁹⁵ See paragraph 565. ¹⁷⁹⁶ See paragraphs 194-198, 308, 325-327, 438, 560, 562, 563-565. ¹⁷⁹⁷ Several Trial Chambers have held that the vulnerability or defencelessness of an accused's victims may constitute an aggravating factor. See, e.g., *Prosecutor v. Nikolić*, Case No. IT-94-02-T, Sentencing Judgement (TC), 18 December 2003, paras. 184-185; *Prosecutor v. Banović*, Case No. IT-02-65-T, Sentencing Judgement (TC), 28 October 2003, paras. 50, 52-53; *Krstić*, Judgement (TC), para. 703; *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1 T, Judgement (TC), 22 February 2001, para. 867. ¹⁷⁹⁸ See, e.g., *Nahimana et al.*, Judgement (AC), para. 1038; *Simba*, Judgement (AC), para. 328. See also *Deronjić*, Sentencing Judgement (TC), para. 155. ¹⁷⁹⁹ *Rugambarara*, Judgement (TC), para. 30; *Nikolić*, Judgement (TC), para. 145; *Deronjić*, Sentencing Judgement (TC), para. 155. ¹⁸⁰⁰ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgement (TC), 31 January 2005, para. 469 (The accused was 71 years old.); *Prosecutor v. Jokić*, Case No. IT-01-42/1-S, Judgement (TC), 18 March 2004, paras. 100-101 (The accused was 68 years old.); *Prosecutor v. Plasvšić*, Case No. IT-00-39 and 40/1-S, Sentencing Judgement (TC), 27 February 2003, paras. 97, 106 (The accused was 72 years old.); *Ntakirutimana and Ntakirutimana*, Judgement (TC), para. 898 (The accused was 78 years old.); *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgement (TC), 15 March 2002, para. 533 (The accused was 62 years old.). ¹⁸⁰¹ The Chamber notes that the Amended Indictment shows that the Accused is 65 years old. Amended Indictment, para. 1. On his application for political asylum in South Africa, Kanyarukiga wrote his birth date to be 15 June 1938. The log book in which South African Police recorded Kanyarukiga's arrest on 16 July 2004 states his age as 57 (which would put his birth year at 1947), and the Docket recording more detailed information about the Accused (which includes his arrest record noting his date of birth as 1947, and his Rwandan Driver Licence which lists his date of birth as 1944). Disclosure of

Documents Retrieved from Investigations Conducted in Compliance of the Chamber's Order, 25 September 2009, pp. 18, 24, 30, 31, 34, 37, 57; Prosecutor's Further Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure, 24 September 2009, Annex II Declaration of Leon Phanaliphi, South African Police Services, para. 6. 1802 Kvočka et al., Judgement (AC), para. 681.

Page 172

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

169 ranging from the number and type of crimes committed to the personal circumstances of the individual.”¹⁸⁰³ 683. The Trial Chamber has considered that, under Rwandan law, genocide and crimes against humanity carry possible penalties of life imprisonment, or life imprisonment with special provisions, depending on the nature of the accused's participation.¹⁸⁰⁴ 684. The Chamber has also taken into consideration the sentencing practices at the ICTR and the ICTY. The Chamber recalls that, at this Tribunal, principal perpetrators convicted of genocide and extermination as a crime against humanity have received sentences ranging from 25 years to imprisonment for the remainder of their lives, except in cases where the accused pled guilty or there were other significant mitigating circumstances.¹⁸⁰⁵ Senior authorities, particularly Ministers, have received the most severe sentences.¹⁸⁰⁶ Life imprisonment has also been imposed on those at a lower level if they planned or ordered atrocities or if they participated in the crimes with particular zeal or sadism.¹⁸⁰⁷ Secondary or indirect forms of participation have usually entailed a lower sentence.¹⁸⁰⁸ 685. The Chamber has considered this in determining an appropriate sentence. 3.5. Credit for Time Served ⁶⁸⁶. According to Rule 101(C) of the Rules, credit shall be given for the period during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal. Gaspard Kanyarukiga was originally arrested and detained on 16 July 2004 in South Africa. He was transferred to the Tribunal on 19 July 2004 and detained at the United Nations Detention Facility in Arusha, Tanzania. Pursuant to Rule 101(C) of the Rules, Kanyarukiga is therefore entitled to credit for time served as of 16 July 2004.

¹⁸⁰³ Kvočka et al., Judgement (AC), para. 681. ¹⁸⁰⁴ Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC), 6 June 2008, paras. 22-25 (assessing Rwanda's penalty structure); Organic Law No. 08/1996 of 31 August 1996, on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990, published in the Official Gazette of the Republic of Rwanda, Year

35. No. 17, 1 September 1996, as amended by Organic Law No. 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty. ¹⁸⁰⁵ Prosecutor v. Karera, Case No. ICTR-01-74-T, Judgement and Sentence (TC), 7 December 2007, para. 583. ¹⁸⁰⁶ Life sentences have been imposed against senior government authorities in Bagosora et al., Judgement (TC), paras.

2265, 2268, 2269, 2277-2279; Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence (TC), 4 September 1998, paras. 44, 61-62, Disposition (Prime Minister); Niyitegeka, Judgement (TC), paras. 499, 502 (Minister of Information); Prosecutor v. Ndindabahazi, Case No. ICTR-2001-71-I, Judgement and Sentence (TC), 15 July 2004, paras. 505, 508, 511 (Minister of Finance); Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Judgement (TC), 22 January 2004, paras. 6, 764, 770 (Minister of Higher Education and Scientific Research); Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Sentence, (TC), 21 May 1999, paras. 11, 27 (prefect). 1807 Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement (TC), 6 December 1999, paras. 465, 468-469, 472 (second vice-president of interahamwe at national level); Musema, Judgement (TC), paras. 999, 1003, Disposition (influential director of a tea factory who exercised control over killers); Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgement (TC), 28 April 2005, paras. 604, 618 (conseiller); Gacumbitsi, Judgement (AC), para. 207 (bourgmestre; increased by the Appeals Chamber from 30 years). 1808 See Rukundo, Judgement (TC), para. 605.

Page 173

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

170 4.

Conclusion

687. The Chamber has the discretion to impose a single sentence and notes that this practice is usually appropriate where the offences may be characterised as belonging to a single criminal transaction.¹⁸⁰⁹ In this case, the Accused's convictions for genocide and extermination as a crime against humanity are based on the same underlying criminal acts. 688. Considering all the relevant circumstances discussed above and having ensured that the Accused is not being punished twice for the same offence, the Chamber sentences Gaspard Kanyarukiga for genocide (Count 1), pursuant Article 2(3)(a) of the Statute, and extermination as a crime against humanity (Count 3) pursuant to Article 3(b), to a single sentence of THIRTY YEARS' IMPRISONMENT⁶⁸⁹. This sentence shall be enforced immediately, and pursuant to Rule 101(C) of the Rules, Gaspard Kanyarukiga shall receive credit for time served as of 16 July 2004. ⁶⁹⁰. In accordance with Rules 102(A) and 103 of the Rules, Gaspard Kanyarukiga shall remain in the custody of the Tribunal pending transfer to the State where he will serve his sentence.

Arusha, 1 November 2010, in English,

Taghrid Hikmet Seon Ki Park Joseph Masanche Presiding Judge Judge Judge

[Seal of the Tribunal]

1809 Nahimana et al., Judgement (AC), paras. 1042-1043. See also Setako, Judgement (TC), para. 507; Karera, Judgement (TC), para. 585; Ndindabahazi, Judgement (TC), para. 497.

Page 174

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

171

ANNEX A: PROCEDURAL HISTORY 1. The Indictment 691. Gaspard Kanyarukiga was initially indicted on charges of genocide, complicity in genocide, conspiracy to commit genocide and extermination as a crime against humanity on 21 February 2002.¹⁸¹⁰ Judge William Sekule confirmed the Indictment on 4 March 2002 and ordered that the Indictment and Arrest Warrant be placed under seal so that they would not be disclosed to the public or media prior to being served on the Accused.¹⁸¹¹ The non-disclosure order was rescinded on 9 April 2003, following an ex parte motion by the Prosecution.¹⁸¹² 692. The Accused was arrested in South Africa on 16 July 2004 and transferred to the ICTR on 19 July 2004. On 22 July 2004, Kanyarukiga made his initial appearance before Trial Chamber III, pleading not guilty to all four counts in the Indictment.¹⁸¹³ 693. On 14 November 2007, the Pre-Trial Chamber granted a Prosecution request to amend the Indictment and ordered the Prosecution to file the Amended Indictment in both French and English within five days of the filing of the Chamber's decision.¹⁸¹⁴ The Prosecution filed the Amended Indictment the same day, charging Kanyarukiga with genocide, complicity in genocide and extermination as a crime against humanity¹⁸¹⁵ for planning, ordering, instigating, committing or otherwise aiding and abetting an attack on Tutsi civilians taking refuge at the Nyange Parish Church in Kivumu commune on 15 April 1994 and the destruction of that church on 16 April 1994. 2. Motion for Referral Under Rule 11 bis 694. On 7 September 2007, the Prosecution filed a motion requesting that Gaspard Kanyarukiga's case be transferred to Rwanda pursuant to Rule 11 bis of the Rules.¹⁸¹⁶ On 2 October 2007, the President of the Tribunal designated Trial Chamber I, composed of Judges Erik Møse

1810 [Original] Indictment, filed 21 February 2002. 1811 Decision on the Prosecutor's Ex Parte Motion for Review and Confirmation of the Indictment and Other Related Orders (TC), 4 March 2002. 1812 Decision on the Prosecutor's Ex Parte Request to Rescind the Non-Disclosure Order of 4 March 2002 Relating to the Indictment and Warrant of Arrest (TC), 9 April 2003. 1813 T. 22 July 2004, pp. 1, 7. 1814 Decision on Prosecution Request to Amend the Indictment (TC), 14 November 2007. 1815 Amended Indictment, filed 14 November 2007. 1816 Prosecutor's Request for the Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule 11 bis of the Tribunal's Rules of Procedure and Evidence, filed 7 September 2007. The Chamber granted amicus curiae status to the Republic of Rwanda on 9 November 2007 and invited Rwanda to file written submissions with regard to its ability to satisfy the requirements of Rule 11 bis no later than 23 November 2007. Decision on the Request of the Republic of Rwanda for Leave to Appear as Amicus Curiae (TC), 9 November 2007. The Republic of Rwanda filed an amicus curiae brief on 22

November 2007. Amicus Curiae Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the Above Case to Rwanda Pursuant to Rule 11 bis, filed 22 November 2007. On 22 February 2008, the Chamber decided five additional requests for leave to appear and make submissions as amicus curiae in relation to the Prosecutor's request for referral under Rule 11 bis. The Chamber granted amicus curiae status to the Kigali Bar Association and the International Criminal Defence Attorneys' Association (ICDAA) and invited both organisations to make written submissions no later than 7 March 2008. Decision on Amicus Curiae Request by the Kigali Bar Association (TC), 22 February 2008; Decision on Amicus Curiae Request by the International Criminal Defence Attorneys' Association (ICDAA) (TC), 22 February 2008. The Chamber denied motions by the Organisation of Defence Counsel (ADAD) and Ibuka and Avega for leave to appear and make submissions as amicus curiae. Finally, in response to a Defence request to grant amicus curiae status to four non-governmental organisations, the Chamber granted amicus curiae status to Human Rights Watch but denied the request with respect to Amnesty International, Reporters Sans Frontières and Liprodor.¹⁸¹⁶ The Chamber invited Human Rights Watch to provide written submissions concerning the Republic of Rwanda's ability to satisfy the requirements of Rule 11 bis no later than 7 March 2008.

Page 175

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

172 (Presiding), Sergei Alekseevich Egorov and Florence Rita Arrey, to consider the Prosecutor's request for transfer under Rule 11 bis.¹⁸¹⁷ 695. On 6 June 2008, the Chamber denied the Prosecution's request to refer Kanyarukiga's case to the Republic of Rwanda.¹⁸¹⁸ 696. On 23 June 2008, the Prosecution filed a Notice of Appeal from the Trial Chamber's denial of its request for transfer under Rule 11 bis.¹⁸¹⁹ On 24 June 2008, the Presiding Judge of the Appeals Chamber assigned Judges Fausto Pocar (Presiding), Mohamed Shahabuddeen, Mehmet Güney, Liu Daqun and Andréia Vaz to hear the appeal.¹⁸²⁰ 697. On 2 September 2008, the Appeals Chamber granted a request from the Republic of Rwanda for leave to appear as amicus curiae and ordered Rwanda to file its brief within 10 days of the filing of the Chamber's decision.¹⁸²¹ The Appeals Chamber also dismissed two Defence motions for leave to file additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence.¹⁸²² 698. On 30 October 2008, the Appeals Chamber dismissed the Prosecution's appeal against the Trial Chamber's Rule 11 bis decision and upheld the Trial Chamber's decision to deny the request for referral to Rwanda.¹⁸²³ 3. Pre-Trial Phase 699. On 9 November 2004, the Pre-Trial Chamber granted in part a Defence motion requesting that all documents in the case be translated into Kinyarwanda, the only language understood by the Accused.¹⁸²⁴ The Chamber ordered that all evidentiary material relating to the determination of charges, including prior witness statements, and all decisions and orders of the Chambers, be translated into Kinyarwanda for the benefit of the Accused.¹⁸²⁵ 700. On 29 November 2004, the Pre-Trial Chamber denied a Defence motion to join Kanyarukiga's case with that of Accused Athanase Seromba (Case No. ICTR-2001-66-T).¹⁸²⁶ 701. On 3 June 2005, the Pre-

Trial Chamber granted in part a Prosecution motion for witness protective measures.¹⁸²⁷

1817 Designation of a Trial Chamber for the Referral of the Case of Gaspard Kanyarukiga to Rwanda (TC), 2 October 2007. 1818 Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC), 6 June 2008. On 19 June 2008, the Chamber denied as moot a Defence motion to file additional evidence in support of its response to the Prosecution's request for referral. Decision on Defence Motion to Admit Additional Evidence (TC), 19 June 2008. 1819 Prosecutor's Notice of Appeal, filed 23 June 2008. 1820 Order Assigning Judges to a Case before the Appeals Chamber (AC), 24 June 2008. 1821 Decision on Request from the Republic of Rwanda for Permission to File an Amicus Curiae Brief (AC), 2 September 2008. 1822 Decision on Request to Admit Additional Evidence of 18 July 2008 (AC), 2 September 2008; Decision on Request to Admit Additional Evidence of 1 August 2008 (AC), 2 September 2008. 1823 Decision on the Prosecution's Appeal against Decision on Referral Under Rule 11 bis (AC), 30 October 2008. 1824 Decision on the Defence Request for Kinyarwanda Translations of All Documents (TC), 9 November 2004. 1825 Decision on the Defence Request for Kinyarwanda Translations of All Documents (TC), 9 November 2004, para. 5. 1826 *Décision Relative À La Requête de Gaspard Kanyarukiga en Jonction et en Suspension de Procès* (TC), 29 Novembre 2004. 1827 Decision on Prosecution Motion for Protective Measures (TC), 3 June 2005. The Chamber ordered that protective measures be granted for all witnesses mentioned in the Prosecution motion but rejected requests from the Prosecution to delay disclosing witness identities to the Defence until 21 days prior to their testimony (rolling disclosure) and to share protected information with the Accused only in the presence of Defence Counsel. Decision on Prosecution Motion for Protective Measures (TC), 3 June 2005, paras. 4-5.

Page 176

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

173 702. On 16 May 2007, the Defence moved the Pre-Trial Chamber to set a date for trial.¹⁸²⁸ In a decision issued on 11 June 2007, the Chamber declared the request premature, noting that the Chamber was in the process of ascertaining the Parties' availability for a status conference.¹⁸²⁹ 703. On 20 June 2008, the Pre-Trial Chamber denied, without prejudice, a Defence request for French and Kinyarwanda translations of the Appeals Chamber judgement in the Seromba¹⁸³⁰ case.¹⁸³¹ 704. Lead Counsel for the Accused passed away on 8 December 2008. Mr. David Jacobs was appointed as Lead Counsel on 9 January 2009. On 30 January 2009, the President of the Tribunal held a pre-trial meeting with representatives of the two Parties, during which the trial was tentatively scheduled for 1 June 2009.¹⁸³² The case was re-assigned to Trial Chamber II for pre-trial on 26 March 2009. Co-Counsel for the Accused was appointed on 31 March 2009.¹⁸³³ 705. A Status Conference was held on 17 April 2009.¹⁸³⁴ On 24 April 2009, the Chamber issued a Scheduling Order instructing the Prosecution to present its case between 1 and 19 June 2009.¹⁸³⁵ The Pre-Trial Chamber further ordered the Prosecution to file a Pre-Trial Brief by 4 May 2009.¹⁸³⁶ The Prosecution filed its Pre-Trial Brief on 4 May 2009.¹⁸³⁷ 706. On 14 May 2009, the

Pre-Trial Chamber issued a decision on a motion by the Prosecution for the Chamber to take judicial notice of certain facts pursuant to Rules 94(A) and 94(B) of the Rules.¹⁸³⁸ The Chamber granted the Prosecution's request for judicial notice to be taken of certain facts of common knowledge about the situation in Rwanda between 6 April and 17 July 1994 but declined to take judicial notice of certain previously adjudicated facts.¹⁸³⁹ 707. On 20 May 2009, the Defence filed an Extremely Urgent Motion for Postponement of the Start of the Trial.¹⁸⁴⁰ On 26 May 2009, the Defence filed an addendum to its earlier motion, indicating that Co-Counsel for the Accused had resigned.¹⁸⁴¹ Co-Counsel was withdrawn by the Registrar on 29 May 2009.¹⁸⁴² The same day, the Pre-Trial Chamber granted in part the Defence motion for postponement of the start of the trial.¹⁸⁴³ The Chamber held that the new commencement date would be communicated to the parties in due course and instructed the Defence and the Registry to make immediate arrangements for the replacement of Co-Counsel.¹⁸⁴⁴ On 8 June 2009, the Registrar assigned Mr. Claver Sindayigaya as Co-Counsel for the Accused.¹⁸⁴⁵

1828 La requête de Kanyarukiga Gaspard aux fins de la fixation du procès, filed 16 May 2007. 1829 Decision on Defence Motion to Set a Date for Trial (TC), 11 June 2007. 1830 Prosecutor v. Seromba, Case No. ICTR-2001-66. 1831 Decision on Defence Request for Translation (TC), 20 June 2008. 1832 Minutes of the Informal Pre-Trial Meeting on Prosecutor v. Kanyarukiga, 30 January 2009. 1833 Letter from Defence Counsel and Detention Management Section to Mr Paul Skolnik entitled "[y]our assignment as Co-Counsel to Represent the Accused Gaspard Kanyarukiga", dated 31 March 2009. 1834 T. 17 April 2009 pp. 1-2. 1835 Scheduling Order (TC), 24 April 2009, para. 1(I). 1836 Scheduling Order (TC), 24 April 2009, para. 1(V). 1837 The Prosecutor's Pre-Trial Brief, filed on 4 May 2009. 1838 Decision on the Prosecution Motion for Judicial Notice (TC), 14 May 2009. 1839 Decision on the Prosecution Motion for Judicial Notice (TC), 14 May 2009. 1840 Extremely Urgent Defence Motion for Postponement of the Start of the Trial, filed on 20 May 2009. 1841 Addendum to Extremely Urgent Defence Motion for Postponement of the Start of the Trial, filed on 27 May 2009. 1842 Decision Withdrawing Mr. Paul Skolnik as Co-Counsel for the Accused Gaspard Kanyarukiga, filed on 29 May 2009. 1843 Decision on the Extremely Urgent Defence Motion for Postponement of the Start of the Trial (TC), 29 May 2009. 1844 Decision on the Extremely Urgent Defence Motion for Postponement of the Start of the Trial (TC), 29 May 2009. 1845 Letter from Defence Counsel and Detention Management Section to Mr. Claver Sindayigaya entitled "Your assignment as Co-Counsel to Represent the Accused Gaspard Kanyarukiga," dated 10 June 2009.

Page 177

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

174 708. On 2 July 2009, the President of the Tribunal withdrew his designation of Trial Chamber II, composed of Judges Emile Short, Seon Ki Park and Joseph Masanche, and designated Trial Chamber II, comprising Judge Taghrid Hikmet (presiding), Judge Seon Ki Park and Judge Joseph Masanche, as the Pre-Trial bench for this case.¹⁸⁴⁶ 709. On 7 July 2009, the Chamber issued a

Scheduling Order instructing the Prosecution to present its case from 31 August to 18 September 2009.¹⁸⁴⁷ 710. On 11 August 2009, the Chamber granted a Prosecution motion to vary its witness list.¹⁸⁴⁸ 711. On 7 August 2009, the Defence filed a motion pursuant to Rule 68(A), requesting that the Prosecution disclose and return three laissez-passers allegedly seized from the Accused at the time of his arrest.¹⁸⁴⁹ The Prosecution responded on 11 August 2009, arguing that it did not have custody of the laissez-passers requested by the Defence.¹⁸⁵⁰ On 18 August 2009, the Chamber issued an Interim Order, instructing the Prosecutor to provide further information regarding the arrest of the Accused and the seizure, inventory and custody of the Accused possessions.¹⁸⁵¹ 712. The Prosecutor filed a response to the Chamber's Interim Order on 21 August 2009.¹⁸⁵² The Prosecutor conceded that the Accused made notations on the 10 September 2004 inventory, indicating that certain seized items were missing.¹⁸⁵³ The Prosecutor also acknowledged that certain items included in the 19 July 2004 inventory were not accounted for in the 10 September 2004 inventory.¹⁸⁵⁴ The Prosecution provided several possible explanations for the inconsistencies between the two inventories.¹⁸⁵⁵ Finally, the Prosecution indicated that it had contacted authorities in South Africa regarding the items seized from the Accused at the time of his arrest.¹⁸⁵⁶ 713. On 20 August 2009, the Chamber issued an order transferring detained Witnesses CDL and CDK to the United Nations Detention Facility in Arusha.¹⁸⁵⁷ 714. On 26 August 2009, the Chamber granted, in part, a Defence motion for disclosure of exhibits from the Seromba trial, ordering the Prosecution to review the Seromba exhibits together with the Defence and to disclose to the Defence any closed session exhibits deemed material to the applicant's case.¹⁸⁵⁸

¹⁸⁴⁶ President Dennis C.M. Byron, Notice of Designation, Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-02-78, dated 2 July 2009. ¹⁸⁴⁷ Scheduling Order (TC), 7 July 2009. ¹⁸⁴⁸ Decision on Prosecutor's Motion to Vary his Witness List (TC), 11 August 2009. ¹⁸⁴⁹ Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009. ¹⁸⁵⁰ Prosecutor's Response to the Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 11 August 2009. ¹⁸⁵¹ Interim Order Concerning the Defence Request for Rule 68 Disclosure (TC), 18 August 2009. ¹⁸⁵² Prosecutor's Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure, filed on 21 August 2009. ¹⁸⁵³ Prosecutor's Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure, filed on 21 August 2009, para. 12. ¹⁸⁵⁴ Prosecutor's Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure, filed on 21 August 2009, para. 14. ¹⁸⁵⁵ Prosecutor's Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure, filed on 21 August 2009, paras. 13-15. ¹⁸⁵⁶ Prosecutor's Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure, filed on 21 August 2009, para. 5. ¹⁸⁵⁷ Order for Transfer of Detained Witnesses CDL and CDK (TC), 20 August 2009. ¹⁸⁵⁸ Decision on the Extremely Urgent Defence Motion for Disclosure of All Exhibits from the Seromba Trial (TC), 26 August 2009.

Page 178

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

175 715. On 25 August 2009, the Defence filed an extremely urgent motion for a stay of the proceedings, arguing that a fair trial was not possible due to the alleged disappearance of the three laissez-passers, which the Defence claimed were seized from the Accused at the time of his arrest.¹⁸⁵⁹ On 28 August 2009, the Chamber issued a decision denying the Defence motion for a stay of the proceedings but remaining seized of the underlying issues.¹⁸⁶⁰ 4. Trial Phase 716. The trial in this case began on 31 August 2009.¹⁸⁶¹ After calling 11 witnesses over 14 trial days, the Prosecution closed its case on 17 September 2009.¹⁸⁶² 717. On 31 August 2009, the Defence made two oral motions for postponement of the trial, arguing that additional time was needed to allow the Prosecution to locate the alleged laissez- passers and to allow the Defence time to review recently disclosed Seromba exhibits.¹⁸⁶³ In an oral decision rendered the same day, the Trial Chamber denied the first Defence motion for postponement for the same reasons cited in its decision on the Defence motion for a stay of the proceedings.¹⁸⁶⁴ The Chamber ruled that it would decide the second Defence request for postponement on a case-by-case basis as the documents were presented.¹⁸⁶⁵ 718. On 3 September 2009, the Chamber granted a Defence motion for witness protection measures.¹⁸⁶⁶ 719. On 4 September 2009, the Defence filed a confidential application for immediate production of documents mentioned by Prosecution Witness CBK during his 4 September 2009 testimony.¹⁸⁶⁷ On 7 September 2009, the Defence filed a confidential addendum to its initial application, requesting that the Trial Chamber: 1) order the Prosecution to explain whether it had prior knowledge of Witness CBK's allegations; 2) order the Witness and Victims' Support Section to appear in court for examination on these allegations and 3) recall Witness CBK for additional cross- examination.¹⁸⁶⁸ The Defence also requested that the proceedings be adjourned and that the witness's open session testimony from Friday, 4 September 2009, be moved to the closed session transcript.¹⁸⁶⁹ 720. On 7 September 2009, the Trial Chamber rendered an oral decision ordering the Prosecution to immediately disclose documents received from Witness CBK, ordering the Registry to extract the portion of the Witness CBK's testimony that was given in open session on 4 September 2009

¹⁸⁵⁹ Extremely Urgent Defence Motion for a Stay of Proceedings Due to the Impossibility of Having a Fair Trial Following the Disappearance of Exculpatory Evidence in the Hands of the Prosecutor, filed on 25 August 2009. The same day, the Chamber issued an Interim Order, instructing the Prosecution to file its response, if any, by 26 August 2009 and the Defence to file its reply, if any, by close of business on 27 August 2009. Interim Order (TC), 25 August 2009. ¹⁸⁶⁰ Decision on the Extremely Urgent Defence Motion for a Stay of the Proceedings (TC), 28 August 2009. ¹⁸⁶¹ T. 31 August 2009, p. 1. ¹⁸⁶² T. 17 September 2009, p. 39. ¹⁸⁶³ T. 31 August 2009, pp. 14-19. ¹⁸⁶⁴ T. 31 August 2009, p. 26. ¹⁸⁶⁵ T. 31 August 2009, p. 26. ¹⁸⁶⁶ Decision on the Defence Motion for Witness Protection Measures (TC), 3 September 2009. ¹⁸⁶⁷ Extremely Urgent Application for an Order of the Trial Chamber for the Immediate Production of Documents, filed on 4 September 2009. ¹⁸⁶⁸ Addendum to the Defence's 4 September 2009 Extremely Urgent

Application for an Order of the Trial Chamber for the Immediate Production of Documents, filed on 7 September 2009. The Defence repeated these requests through oral submissions made the same day. T. 7 September 2009, pp. 2-3 (CS). 1869 T. 7 September 2009, p. 2 (CS).

Page 179

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

176 and denying the Defence request for adjournment.¹⁸⁷⁰ The Chamber also ordered the Prosecution to file its response to the remaining Defence submissions by close of business on Wednesday, 9 September 2009.¹⁸⁷¹ On 7 September 2009, the Prosecution disclosed the documents received from Witness CBK.¹⁸⁷² On 9 September 2009, the Prosecutor filed a joint response to the Defence application and addendum, arguing that the Defence request for production of the documents mentioned by Witness CBK was now moot and that the Defence had not shown just cause to recall Witness CBK.¹⁸⁷³ On 17 September 2009, Prosecution Witness CBK was recalled for further cross- examination on the issues raised during his 4 September 2009 testimony.¹⁸⁷⁴ 721. On 8 September 2009, in response to oral submissions from the Defence, the Trial Chamber ordered the Prosecution to disclose Witness CBY's Gacaca records to the Defence as soon as practicable.¹⁸⁷⁵ On 9 September 2009, the Trial Chamber reiterated its instruction and ordered Witness CBY to remain in Arusha until 11 September 2009 for the completion of his cross- examination.¹⁸⁷⁶ 722. On 11 September 2009, the Chamber ordered the Registry to transmit to the Prosecution an inventory of items with which the Accused arrived at the United Nations Detention Facility in Arusha.¹⁸⁷⁷ 723. On 16 September 2009, the Chamber denied a Defence motion for certification to appeal the Trial Chamber's decision denying the Defence motion for a stay of the proceedings.¹⁸⁷⁸ 724. On 17 September 2009, the Chamber denied a Defence motion for certification to appeal the Trial Chamber's oral decisions of 31 August 2009, finding that the Defence request for certification to appeal its decision on the motion for adjournment due to the late disclosure of Seromba exhibits was premature because the Trial Chamber had not denied the Defence request.¹⁸⁷⁹ The Chamber also found that the Defence's successive applications regarding the laissez-passers were unnecessary and disruptive and amounted to relitigation of issues that had already been decided by the Trial Chamber.¹⁸⁸⁰ The Chamber concluded that the motion was frivolous and denied fees and associated costs.¹⁸⁸¹

¹⁸⁷⁰ T. 7 September 2009, pp. 26-27. ¹⁸⁷¹ T. 7 September 2009, p. 27. ¹⁸⁷² Disclosure of Documents Retrieved from Witness CBK in Compliance with the Chamber's Oral Ruling on 7 September 2009, filed on 7 September 2009. ¹⁸⁷³ Prosecutor's Joint Response to the Extremely Urgent Application for an Order of the Trial Chamber for the Immediate Production of Documents and the Addendum to the Defence's 4 September 2009 Extremely Urgent Application for an Order of the Trial Chamber for the Immediate Production of Documents, filed on 9 September 2009. ¹⁸⁷⁴ T. 17 September 2009, p. 14 (CS). ¹⁸⁷⁵ T. 8 September 2009, pp. 55, 60. ¹⁸⁷⁶ T. 9 September 2009, pp. 26-27, 39. ¹⁸⁷⁷ Order for Disclosure of UNDF Inventory List (TC), 11 September 2009. ¹⁸⁷⁸ Decision on the Defence Motion for Certification to Appeal the Trial

Chamber's Decision on the Extremely Urgent Defence Motion for a Stay of the Proceedings (TC), 16 September 2009. The Chamber concluded that an immediate resolution by the Appeals Chamber was not necessary because the Trial Chamber had not issued a final decision on the issues underlying the Impugned Decision. Decision on the Defence Motion for Certification to Appeal the Trial Chamber's Decision on the Extremely Urgent Defence Motion for a Stay of the Proceedings (TC), 16 September 2009, para. 13. 1879 Decision on the Defence Motion for Certification to Appeal the Trial Chamber's Oral Decisions of 31 August 2009 (TC), 17 September 2009, para. 16. 1880 Decision on the Defence Motion for Certification to Appeal the Trial Chamber's Oral Decisions of 31 August 2009 (TC), 17 September 2009, para. 20. 1881 Decision on the Defence Motion for Certification to Appeal the Trial Chamber's Oral Decisions of 31 August 2009 (TC), 17 September 2009.

Page 180

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

177 725. On 17 September 2009, the Prosecution withdrew Witness CNI pursuant to Rule 73 bis(E) of the Rules and closed its case against the Accused.1882 The Chamber held a status conference the same day to prepare for the Defence case.1883 The Chamber issued a Scheduling Order on 28 September 2009, instructing the Defence to present its case between 18 January 2010 and 12 February 2010.1884 726. On 24 September 2009, the Defence filed a motion pursuant to Rule 98 bis, requesting that the Chamber acquit the Accused of allegations contained within paragraphs 11 and 16 of the Amended Indictment.1885 The Chamber denied the motion on 9 October 2009.1886 727. On 24 September 2009, the Prosecution filed its "Further Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure," indicating that it had continued its search for the documents requested by the Defence but that it had not located any laissez-passers or other travel documents pertaining to the Accused.1887 728. On 29 September 2009, the Prosecution filed a motion requesting formal notice of the Accused's proposed alibi defence.1888 The Defence filed a "Provisional Formal Notice of Alibi" on 30 September 2009 but indicated that it anticipated adding additional witnesses as evidence became available.1889 729. On 1 October 2009, the Prosecution filed a response to the Defence's Provisional Formal Notice of Alibi, submitting that the Defence had failed to comply with its disclosure obligations under Rule 67(A)(ii)(a).1890 On 19 October 2009, the Trial Chamber ordered the Defence to confidentially disclose to the Prosecution by 6 November 2009, the names, current location, including the country and city of residence, and addresses in April 1994, including the préfecture, commune, secteur and cellule, of all witnesses upon whom it intended to rely to establish the Accused's alibi.1891 730. On 19 October 2009, the Trial Chamber denied a Prosecution motion for site visits in the Republic of Rwanda, finding that it would only be in a position to determine the usefulness of a site visit at the conclusion of the Defence case.1892 731. On 30 October 2009, the Trial Chamber denied the Defence "Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused," finding that there was no

basis for ordering disclosure of the requested items as it had not been established that the laissez- passers were in the custody or control of the Prosecution.¹⁸⁹³

1882 T. 17 September 2009, p. 39. 1883 T. 17 September 2009, pp. 1-6 (Status Conference). 1884 Scheduling Order Following the Status Conference Held on 17 September 2009 (TC), 28 September 2009. 1885 Motion for Acquittal Pursuant to Rule 98 bis, filed on 24 September 2009. 1886 Decision on the Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis (TC), 9 October 2009. 1887 Prosecutor's Further Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure, filed on 24 September 2009. 1888 Prosecutor's Motion for the Disclosure of the Particulars of the Alibi of the Accused Gaspard Kanyarukiga, Rules 67(A)(ii)(a), filed on 29 September 2009. 1889 Provisional Formal Notice of Alibi (Rule 67(A)(ii)(a) of the Rules of Procedure and Evidence), filed on 30 September 2009. 1890 Prosecutor's Response (sic) Provisional Formal Notice of Alibi, Rules 67(A)(ii)(a), filed on 1 October 2009. 1891 Decision on Prosecution Motion for Alibi Particulars (TC), 19 October 2009. 1892 Decision on the Prosecution Motion for Site Visits (TC), 19 October 2009. 1893 Decision on Defence Motion for Disclosure and Return of Exculpatory Documents Seised from the Accused (TC), 30 October 2009.

Page 181

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

178 732. On 6 November 2009, the Defence confidentially filed witness particulars for 19 potential alibi witnesses, including five of the eight witnesses identified in the Notice of Alibi.¹⁸⁹⁴ The Defence reiterated its intention to add or remove witnesses as its investigations unfolded.¹⁸⁹⁵ On 10 November 2009, the Prosecution filed a "Rejoinder to 'Defense Alibi Witness Particulars,'" arguing that the Defence had not complied with the Chamber's decision of 19 October 2009 or Rule 67(A)(ii)(a) of the Rules.¹⁸⁹⁶ On 26 November 2009, the Trial Chamber granted in part a Prosecution motion for further alibi particulars and ordered the Defence to provide additional details and clarify discrepancies between its two prior submissions.¹⁸⁹⁷ The Defence filed the requested information on 1 December 2009.¹⁸⁹⁸ 733. On 20 November 2009, the Trial Chamber granted a Defence motion for certification to appeal the Trial Chamber's 30 October 2009 decision on the Defence motion for disclosure and return of the alleged laissez-passers.¹⁸⁹⁹ 734. On 18 December 2009, the Defence filed its Pre-Defence Brief along with Personal Identification Sheets for 31 protected witnesses.¹⁹⁰⁰ 735. On 7 January 2010, the Trial Chamber granted a Defence motion for the transfer of detained Witness KG44 to the United Nations Detention Facility in Arusha.¹⁹⁰¹ The Chamber also ordered the Defence to disclose witness identifying information missing from the Personal Identification Sheets filed on 18 December 2009.¹⁹⁰² 736. On 12 January 2010, the Defence filed an extremely urgent motion under Rule 66(B) of the Rules for disclosure of documents material to the preparation of the Defence case.¹⁹⁰³ The Defence requested disclosure of any documents related to its witnesses that were or might come into the possession of the Prosecution.¹⁹⁰⁴ 737. On 13 January 2010, the Trial Chamber denied a Defence

motion for video-link testimony.¹⁹⁰⁵ On 19 January 2010, the Defence filed a motion for certification to appeal the decision of the Trial Chamber, arguing that the Chamber had applied the wrong legal standard in denying the Defence motion for video-link testimony.¹⁹⁰⁶ On 22 January 2010, the Defence filed a confidential motion for reconsideration of the Chamber's decision, arguing that new facts had been discovered since the Chamber's decision and that the Trial Chamber applied the wrong legal

1894 Defense Alibi Witnesses Particulars (TC), filed on 6 November 2009, Annex. 1895 Defense Alibi Witnesses Particulars (TC), filed on 6 November 2009, para. 3. 1896 Prosecutor's Rejoinder to 'Defense Alibi Witness Particulars,' filed on 10 November 2009. 1897 Decision on Prosecution Request for Further Alibi Particulars (TC), 26 November 2009. 1898 Further Defence Alibi Witnesses Particulars, filed on 1 December 2009. 1899 Decision on the Defence Motion for Certification to Appeal the Trial Chamber's Decision of 30 October 2009 (TC), 20 November 2009. 1900 Pre-Defence Brief, filed on 18 December 2009; Confidential Personal Identification Sheets, filed on 18 December 2009. 1901 Decision on the Extremely Urgent Defence Motion for an Order for the Transfer of Detained Witness KG44 (TC), 7 January 2010. 1902 Decision on the Prosecution Motion for Disclosure of Defence Witness Particulars (TC), 7 January 2010. 1903 Extremely Urgent Motion for Disclosure of Documents Material to the Preparation of the Defence Case, filed on 12 January 2010. 1904 Extremely Urgent Motion for Disclosure of Documents Material to the Preparation of the Defence Case, filed on 12 January 2010. 1905 Decision on the Extremely Urgent Defence Motion for Witness KG15 to Testify by Means of Video-Link (TC), 13 January 2010. 1906 Motion for Certification to Appeal the Trial Chamber's 13 January 2010 Decision on Video-Link Testimony, filed on 19 January 2010, paras. 1-4.

Page 182

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

179 standard in deciding the original Defence motion.¹⁹⁰⁷ On 29 January 2010, the Chamber issued a decision denying reconsideration but granting the Defence request for video-link testimony on the basis that the motion constituted a new application.¹⁹⁰⁸ On 3 February 2010, the Chamber denied the Defence request for certification to appeal.¹⁹⁰⁹ 738. On 15 January 2010, the Trial Chamber issued a decision on the 18 December 2009 Defence motion for a stay of proceedings or exclusion of evidence.¹⁹¹⁰ The Chamber granted the Defence request for exclusion of Witness CBN's evidence that the Accused was at a roadblock on 13 and 14 April 1994 and Witness CNJ's evidence that the Accused went to get a bulldozer with a member of the interahamwe.¹⁹¹¹ The Chamber also reserved until the judgement its decision on whether to exclude evidence of various meetings allegedly attended by the Accused.¹⁹¹² The Chamber denied the remainder of the motion.¹⁹¹³ On 9 February 2010, the Trial Chamber granted in part a Defence motion for certification to appeal the Chamber's 15 January 2010 decision on the motion for stay of proceedings or exclusion of evidence.¹⁹¹⁴ 739. The Defence began its case on 18 January 2010.¹⁹¹⁵ In an oral motion the same day, the Defence repeated its request for

disclosure of documents under Rule 66(B).¹⁹¹⁶ The Defence further argued that some of the requested documents, particularly statements made by witnesses to the Prosecution, were exculpatory and therefore subject to the disclosure requirements of Rule 68(A).¹⁹¹⁷ Arguing that the Prosecution's failure to disclose these documents had irreparably harmed the Defence's ability to prepare its case, the Defence moved the Chamber for a stay of the proceedings.¹⁹¹⁸ In the alternative, the Defence requested that its case be postponed until the Prosecution had disclosed all of the requested materials.¹⁹¹⁹ 740. On 18 January 2010, the Trial Chamber rendered an oral decision denying the Defence request for a stay of the proceedings or a postponement of the Defence case.¹⁹²⁰ The Chamber further ordered the Prosecution to disclose the statement made by Defence Witness Grégoire Ndahimana; to search for the statement allegedly given by Witness KG37 in connection with the Seromba trial; to contact Rwandan authorities regarding evidence given by Witness KG37 in judicial proceedings in Rwanda and to meet with the Defence to inspect documents in the custody or control of the Prosecution.¹⁹²¹

1907 Motion for Reconsideration of the Trial Chamber's 13 January 2010 Decision on Video-Link Testimony, filed on 22 January 2010. 1908 Decision on the Defence Motion for Reconsideration of the Chamber's 13 January 2010 Decision on Video-Link Testimony (TC), 29 January 2010. 1909 Decision on the Defence Motion for Certification to Appeal the Chamber's Decision on Video-Link Testimony (TC), 3 February 2010. 1910 Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010. 1911 Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010. 1912 Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010, para. 17. 1913 Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010. 1914 Decision on Defence Motion for Certification to Appeal the Trial Chamber's 15 January 2010 Decision on Stay of Proceedings or Exclusion of Evidence (TC), 9 February 2010. 1915 T. 18 January 2010, p. 2. 1916 T. 18 January 2010, pp. 3-9. 1917 T. 18 January 2010, pp. 3-9. 1918 T. 18 January 2010, p. 9. 1919 T. 18 January 2010, p. 9. 1920 T. 18 January 2010, p. 16. 1921 T. 18 January 2010, p. 16.

Page 183

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

180 741. After calling 23 witnesses over 14 trial days, the Defence closed the evidence portion of its case on 11 February 2010.¹⁹²² 742. On 12 February 2010, the Chamber held a status conference to hear submissions on the possibility of a site visit in Rwanda and to schedule the filing of closing briefs and closing arguments.¹⁹²³ In its Scheduling Order issued on 17 February 2010,¹⁹²⁴ the Chamber ordered that a site visit occur during the second half of April 2010.¹⁹²⁵ The Chamber further ordered the Parties to file their closing briefs no later than 7 May 2010 and to present their closing arguments on 20 May 2010.¹⁹²⁶ 743. On 19 February 2010, the Appeals Chamber dismissed Kanyarukiga's appeal of the Trial Chamber's decision on disclosure and

return of exculpatory documents allegedly seized from the Accused.¹⁹²⁷ 744. On 3 March 2010, the Trial Chamber issued a supplemental decision regarding the Chamber's site visit in Rwanda and the itinerary of sites to be visited.¹⁹²⁸ The Trial Chamber issued a corrigendum to this supplemental decision on 31 March 2010.¹⁹²⁹ 745. On 23 March 2010, the Appeals Chamber dismissed Kanyarukiga's interlocutory appeal from the Trial Chamber's 15 January 2010 decision on the Defence motion for exclusion of evidence outside the scope of the indictment.¹⁹³⁰ 746. On 16 April 2010, the Trial Chamber rescheduled closing arguments to 24 May 2010.¹⁹³¹ 747. From 19 April 2010 to 21 April 2010, the Trial Chamber undertook a site visit to Rwanda.¹⁹³² On 4 May 2010, the Defence filed an extremely urgent motion requesting that the record from the site visit be admitted into evidence.¹⁹³³ On 5 May 2010, the Trial Chamber issued an interim order with respect to the Defence's extremely urgent motion,¹⁹³⁴ and on 7 May 2010, the Trial Chamber issued a decision admitting the records from the site visit into evidence.¹⁹³⁵

1922 T. 11 February 2010, p. 10. 1923 T. 12 February 2010, p. 1 (Status Conference). 1924 Scheduling Order following the Status Conference held on 12 February 2010 (TC), 17 February 2010. 1925 Scheduling Order following the Status Conference held on 12 February 2010 (TC), 17 February 2010, Order I. 1926 Scheduling Order following the Status Conference held on 12 February 2010 (TC), 17 February 2010, Orders III, V. 1927 Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents (AC), 19 February 2010. 1928 Supplemental Decision Regarding the Site Visit in Rwanda and Itinerary of Sites to be Visited (TC), 3 March 2010. 1929 Corrigendum to the Supplemental Decision Regarding the Site Visit in Rwanda and Itinerary of Sites to be Visited Dated 3 March 2010 (TC), 31 March 2010. 1930 Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence (AC), 23 March 2010. 1931 Order Rescheduling Closing Arguments, 16 April 2010. 1932 See Scheduling Order following the Status Conference held on 12 February 2010 (TC), 17 February 2010, Order I, Supplemental Decision Regarding the Site Visit in Rwanda and Itinerary of Sites to be Visited (TC), 3 March 2010 and Corrigendum to the Supplemental Decision Regarding the Site Visit in Rwanda and Itinerary of Sites to be Visited Dated 3 March 2010 (TC), 31 March 2010. 1933 Defence Extremely Urgent Motion for Admission into Evidence of Records Made during the Site Visit in Rwanda, 4 May 2010. 1934 Interim Order Regarding the Extremely Urgent Defence Motion for Admission into Evidence of Records Made during the Site Visit in Rwanda, 5 May 2010. 1935 Decision on the Extremely Urgent Defence Motion for Admission into Evidence of Records Made during the Site Visit in Rwanda, 7 May 2010.

Page 184

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

181 748. On 7 May 2010, the Trial Chamber granted a joint request from the Parties and postponed the filing date for closing briefs to 11 May 2010.¹⁹³⁶ On 11 May 2010, the Parties submitted their closing briefs¹⁹³⁷ and on 24 May 2010, the Trial Chamber heard the Parties' closing arguments.¹⁹³⁸ On the same day, the Prosecution filed a corrigendum to its final

brief.¹⁹³⁹ 5. Further Proceedings 749. On 4 June 2010, the Prosecution filed a further corrigendum to its Final Trial Brief, purporting to correct some errors in the brief itself and many errors in the footnotes.¹⁹⁴⁰ 750. On 9 June 2010, the Defence filed a response to the Prosecutor's corrigendum objecting to the filing of a further corrigendum because it was out of time and noting further inaccuracies in the corrections the Prosecution purported to make.¹⁹⁴¹ The Defence requested that the Chamber reject the Prosecution's corrigendum or, in the alternative, allow the Defence an opportunity to respond to any errors in this corrigendum, should the Chamber accept it.¹⁹⁴² 751. On 11 June 2010, the Prosecution filed a reply to the Defence response,¹⁹⁴³ and subsequently, on 14 June 2010, the Defence filed a rejoinder to this reply.¹⁹⁴⁴ 752. On 18 June 2010, the Trial Chamber issued an order with regard to the filing of the Prosecution's corrigendum.¹⁹⁴⁵ In its order, the Chamber accepted the filing of the corrigendum, and allowed the Defence to respond to the corrigendum and ordered the Defence to confine itself to any errors or inaccuracies it identified in that document.¹⁹⁴⁶ 753. On 25 June 2010, the Defence filed its response to the Prosecution's corrigendum in accordance with the Chamber's 18 June 2010 order.¹⁹⁴⁷ In this response, the Defence dealt with a number of the corrections contained in the Prosecutor's corrigendum in detail. 754. On 14 October 2010, the Trial Chamber issued a scheduling order which notified the Parties that the oral summary of the Judgement would be read at 10.00 a.m. on 1 November 2010.¹⁹⁴⁸ The oral summary was read on this date. 755. On 9 November 2010, the written judgement was issued by the Trial Chamber.

¹⁹³⁶ Order to Postpone Filing Date for Closing Briefs, 7 May 2010. ¹⁹³⁷ Prosecutor's Final Trial Brief, 11 May 2010, Defence Final Brief, 11 May 2010. ¹⁹³⁸ T. 24 May 2010. ¹⁹³⁹ Corrigendum to Prosecutor's Final Brief, filed electronically on 21 May 2010, hardcopy filed on 24 May 2010. ¹⁹⁴⁰ Corrigendum to Prosecutor's Final Trial Brief, filed on 4 June 2010 (Prosecutor's Corrigendum). ¹⁹⁴¹ Confidential Defence Response to the 4 June 2010 [Second] Corrigendum to the Prosecutor's Final Brief, filed on 9 June 2010. ¹⁹⁴² Confidential Defence Response to the 4 June 2010 [Second] Corrigendum to the Prosecutor's Final Brief, filed on 9 June 2010, para. 7. ¹⁹⁴³ Prosecutor's Reply to Defence Response to the Prosecution Corrigendum, filed on 11 June 2010. ¹⁹⁴⁴ Defence Rejoinder to the Prosecutor's Reply to the Defence Response to the Prosecution Corrigendum, filed on 14 June 2010. ¹⁹⁴⁵ Order Regarding Corrigendum to Prosecutor's Final Trial Brief, 18 June 2010. ¹⁹⁴⁶ Order Regarding Corrigendum, para. 9. ¹⁹⁴⁷ Confidential Defence Submissions Regarding Errors or Inaccuracies in the 4 June 2010 Corrigendum to the Prosecutor's Final Trial Brief (pursuant to the Trial Chamber Order of 18 June 2010), filed on 25 June 2010. ¹⁹⁴⁸ Scheduling Order for Delivery of Judgement, 14 October 2010.

Page 185

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

ANNEX B: DEFINED TERMS AND JURISPRUDENCE 1. List of Defined Terms, Acronyms and Abbreviations¹⁹⁴⁹

Chamber (or Trial Chamber) Trial Chamber II of the International Criminal Tribunal for Rwanda, composed of Judges Taghrid Hikmet, Presiding, Seon Ki Park and Joseph Masanche CARITAS International Confederation of Catholic Organizations for Charitable and Social Action CODEKOKI Cooperation for the Development of Kivumu Commune, a building in Nyange Trading Centre which housed the local cooperative society CS Closed Session Defence Final Brief The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T, Defence Final Brief, filed on 11 May 2010 ESM École Supérieure Militaire (Military Academy in Kigali) ICTY International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by Security Council resolution 927 of 25 May 1993 IPJ Inspector of Judicial Police (Amended) Indictment The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-02-78, Amended Indictment, filed on 14 November 2007 JCE Joint Criminal Enterprise Judgement of Acquittal The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T, Decision on the Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis (TC), 9 October 2009 MRND Mouvement révolutionnaire national pour le développement (National Revolutionary Movement for Development) Prosecution Closing Brief The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T, The Prosecutor's Final Trial Brief, filed on 4 May 2010 Prosecution Pre-Trial Brief The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-I, The Prosecutor's Pre-Trial Brief, filed on 4 May 2009

¹⁹⁴⁹ According to Rule 2(B), of the Rules, the masculine shall include the feminine and the singular the plural, and vice- versa.

Page 186

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

183 RPF Rwandan Patriotic Front Rules Rules of Procedure and Evidence of the Tribunal, adopted pursuant to Article 14 of the Statute Statute The Statute of the Tribunal adopted by Security Council Resolution 955 of 8 November 1994 T. Transcript of the Trial Chamber hearings (English Version) 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, established by Security Council resolution 955 of 8 November 1994

2. Jurisprudence 2.1. ICTR AKAYESU The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998 ("Akayesu, Judgement (TC)") The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement (AC), 1 June 2001 ("Akayesu, Judgement (AC)") BAGARAGAZA The Prosecutor v. Michel Bagaragaza, Case No. ICTR-05-86-S,

Sentencing Judgement (TC), 17 November 2009 (“Bagaragaza, Sentencing Judgement (TC)”) BAGOSORA ET AL. The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005 (“Bagosora et al., 98 bis Decision”) The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006 The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-T, Judgement and Sentence (TC), 18 December 2008, (“Bagosora et al., Judgement (TC)”)

Page 187

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

184 BIKINDI The Prosecutor v. Simon Bikindi, Case No. ICTR-01-72-T, Judgement (TC), 2 December 2008 (“Bikindi, Judgement (TC)”) Simon Bikindi v. The Prosecutor, Case No. ICTR-01-72-A, Judgement (AC), 18 March 2010 (“Bikindi, Judgement (AC)”) GACUMBITSI The Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-T, Judgement (TC), 17 June 2004 (“Gacumbitsi, Judgement (TC)”) Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006 (“Gacumbitsi, Judgement (AC)”) KAJELIJELI The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence (TC), 1 December 2003 (“Kajelijeli, Judgement (TC)”) Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-A, Judgment (AC) 23 May 2005 (“Kajelijeli, Judgement (AC)”) KALIMANZIRA Callixte Kalimanzira v. The Prosecutor, Case No. ICTR-05-88-A, Judgement (AC), 20 October 2010 (“Kalimanzira, Judgement (AC)”) KAMBANDA The Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence (TC), 4 September 1998 (“Kambanda, Judgement (TC)”) KAMUHANDA The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54A-T, Judgement and Sentence (TC), 22 January 2004 (“Kamuhanda, Judgement (TC)”) KAREMERA ET AL. The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, Case No. ICTR- 98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006 KARERA The Prosecutor v. François Karera, Case No. ICTR-01-74-T, Judgement and Sentence (TC), 7 December 2007 (“Karera, Judgement (TC)”) François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement (AC), 2 February 2009 (“Karera, Judgement (AC)”)

Page 188

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

185 KAYISHEMA AND RUZINDANA The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgement (TC), 21 May 1999 (“Kayishema and Ruzindana, Judgement (TC)”) The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Sentence (TC), 21 May 1999 (“Kayishema and Ruzindana, Sentence (TC)”) The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons) (AC), 1 June 2001 (“Kayishema and Ruzindana, Judgement (AC)”) MPAMBARA The Prosecutor v. Jean Mpambara, Case No. ICTR-01-65-T, Judgement (TC), 11 September 2006 (“Mpambara, Judgement (TC)”) MUHIMANA The Prosecutor v. Mikaeli Muhimana, Case No. ICTR-95-1B-T, Judgement and Sentence (TC), 28 April 2005 (“Muhimana, Judgement (TC)”) Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement (AC), 21 May 2007 (“Muhimana, Judgement (AC)”) MUSEMA The Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement and Sentence (TC), 27 January 2000 (“Musema, Judgement (TC)”) Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement (AC), 16 November 2001 (“Musema, Judgement (AC)”) MUVUNYI The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005 The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-2000-55A-T, Judgement and Sentence (TC), 12 September 2006 (“Muvunyi, Judgement (TC)”) Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-2000-55A-A, Judgement (AC), 29 August 2008 (“Muvunyi, Judgement (AC)”) NAHIMANA ET AL. The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, Case No. ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003 (“Nahimana et al., Judgement (TC)”) Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007 (“Nahimana et al., Judgement (AC)”)

Page 189

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

186 NCHAMIHIGO The Prosecutor v. Siméon Nchamihigo, Case No. ICTR-01-63-T, Judgement and Sentence (TC), 12 November 2008 (“Nchamihigo, Judgement (TC)”) Siméon Nchamihigo v. The Prosecutor, Case No. ICTR-2001-63-A, Judgement (AC), 18 March 2010 (“Nchamihigo, Judgement (AC)”) NDINDABAHIZI The Prosecutor v. Emmanuel Ndindabahizi, Case No. ICTR-2001-71-I, Judgement and Sentence (TC), 15 July 2004 (“Ndindabahizi, Judgement (TC)”) Emmanuel Ndindabahizi v. The Prosecutor, Case No. ICTR-01-71-A, Judgement (AC), 16 January 2007 (“Ndindabahizi, Judgement (AC)”) NIYITEGEKA The Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence (TC), 16 May 2003 (“Niyitegeka, Judgement (TC)”) Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004 (“Niyitegeka, Judgement (AC)”) NTAGERURA ET AL. The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004 (“Ntagerura et al., Judgement (TC)”) The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006 (“Ntagerura et al., Judgement (AC)”) NTAKIRUTIMANA The Prosecutor v. Elizaphan

Ntakirutimana and Gérard Ntakirutimana, Case Nos. ICTR-96-10-T and ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts (TC), 22 November 2001 The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case Nos. ICTR-96-10-T and ICTR-96-17-T, Judgement and Sentence (TC), 21 February 2003 ("Ntakirutimana and Ntakirutimana, Judgement (TC)") The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004 ("Ntakirutimana and Ntakirutimana, Judgement (AC)") NTAWUKULILYAYO The Prosecutor v. Dominique Ntawukulilyayo, Case No. ICTR-05-82-T, Judgement and Sentence (TC), 3 August 2010 ("Ntawukulilyayo, Judgement and Sentence (TC)")

Page 190

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

187 RUGAMBARARA The Prosecutor v. Juvénal Rugambarara, Case No. ICTR-00-59-T, Sentencing Judgement (TC), 16 November 2007 ("Rugambarara, Judgement (TC)") RUGGIU The Prosecutor v. Georges Ruggiu, Case No. ICTR-97-32-I, Judgement and Sentence (TC), 1 June 2000 ("Ruggiu, Judgement (TC)") RUKUNDO The Prosecutor v. Emmanuel Rukundo, Case No. ICTR-2001-70-T, Judgement (TC), 27 February 2009 ("Rukundo, Judgement (TC)") Emmanuel Rukundo v. The Prosecutor v., Case No. ICTR-2001-70-A, Judgement (AC), 20 October 2010 ("Rukundo, Judgement (AC)") RUTAGANDA The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3-T, Judgement (TC), 6 December 1999 ("Rutaganda, Judgement (TC)") Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003 ("Rutaganda, Judgement (AC)") SEMANZA The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003, ("Semanza, Judgement and Sentence (TC)") Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement (AC), 20 May 2005, ("Semanza, Judgement (AC)") SEROMBA The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Judgement (AC), 12 March 2008 ("Seromba, Judgement (AC)") The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-I, Judgement (TC), 13 December 2006 ("Seromba, Judgement (TC)") SERUSHAGO Omar Serushago v. The Prosecutor, Case No. ICTR-98-39-A, Reasons for Judgement (AC), 6 April 2000 ("Serushago, Judgement (AC)") SETAKO The Prosecutor v. Ephrem Setako, Case No. ICTR-04-81-T, Judgement and Sentence (TC), 25 February 2010 ("Setako, Judgement (TC)")

Page 191

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

188 SIMBA Aloys Simba v. The Prosecutor, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction (AC), 29 July 2004 The Prosecutor v. Aloys Simba, Case No ICTR-01-76-T, Judgement and Sentence, 13 December 2005 ("Simba, Judgement (TC)") Aloys

Simba v. The Prosecutor, Case No. ICTR-01-76-A, Judgement (AC), 27 November 2007 (“Simba, Judgement (AC)”) ZIGIRANYIRAZO Protais Zigiranyirazo v. The Prosecutor, Case No. ICTR-01-73-A, Judgement (AC), 16 November 2009 (“Zigiranyirazo, Judgement (AC)”) 2.2. ICTY ALEKSOVSKI The Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence (AC), 16 February 1999 BANOVIĆ The Prosecutor v. Predrag Banović, Case No. IT-02-65/1-S, Sentencing Judgement (TC), 28 October 2003 (“Banović, Sentencing Judgement (TC)”) BLAGOJEVIĆ The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, Judgement (TC), 17 January 2005 (“Blagojević, Judgement (TC)”) The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement (AC), 9 May 2007 (“Blagojević, Judgement (AC)”) BLAŠKIĆ The Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement (AC), 29 July 2004 (“Blaškić, Judgement (AC)”) BRĐANIN The Prosecutor v. Radoslav Brđanin and Momir Talić, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (TC), 26 June 2001 The Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement (TC), 1 September 2004 (“Brđanin, Judgement (TC)”) The Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement (AC), 3 April 2007 (“Brđanin, Judgement (AC)”)

Page 192

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

189 ČELEBIĆI The Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka “Pavo”), Hazim Delić and Esad Landžo (aka “Zenga”), Case No. IT-96-21-A, Judgement (AC), 20 February 2001 (“Delalić et al. (Čelebići case), Judgement (AC)”) DERONJIĆ The Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-S, Sentencing Judgement (TC), 30 March 2004 (“Deronjić Sentencing Judgement (TC)”) GALIĆ The Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement (AC), 30 November 2006 (“Galić, Judgement (AC)”) JELISIĆ The Prosecutor v. Goran Jelisić, Case No. IT-95-10-T, Judgement (TC), 14 December 1999 (“Jelisić, Judgement (TC)”) The Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement (AC), 5 July 2001 (“Jelisić, Judgement (AC)”) JOKIĆ The Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-S, Sentencing Judgement (TC), 18 March 2004 (“Jokić, Sentencing Judgement (TC)”) KORDIĆ & ČERKEZ The Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement (AC), 17 December 2004 (“Kordić and Čerkez, Judgement (AC)”) The Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Judgement (TC), 26 February 2001 (“Kordić and Čerkez, Judgement (TC)”) KRAJIŠNIK The Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-PT, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis (TC), 28 February 2003 The Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement (AC), 17 March 2009 (“Krajišnik, Judgement (AC)”) KRNOJELAC The Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgement (TC), 15 March 2002 (“Krnojelac, Judgement (TC)”) The Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement (AC), 17 September 2003 (“Krnojelac, Judgement (AC)”)

Page 193

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

190 KRSTIĆ The Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement (TC), 2 August 2001 (“Krstić, Judgement (TC)”) The Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement (AC), 19 April 2004 (“Krstić, Judgement (AC)”) KUNARAC The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement (TC), 22 February 2001 (“Kunarac et al., Judgement (TC)”) KUPREŠKIĆ ET AL. The Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement (AC), 23 October 2001 (“Kupreskić et al., Judgement (AC)”) KVOČKA ET AL. The Prosecutor v. Miroslav Kvočka, Mlađo Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT- 98-30/1-A, Judgement (AC), 28 February 2005 (“Kvočka et al., Judgement (AC)”) MILOŠEVIĆ, DRAGOMIR The Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals against Trial Chamber’s Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecution’s Catalogue of Agreed Facts (AC), 26 June 2007 The Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecution’s Catalogue of Agreed Facts with Dissenting Opinion of Judge Harhoff (TC), 10 April 2007 MILOŠEVIĆ, SLOBODAN The Prosecutor v. Slobodan Milošević, Case No. IT-02-54-AR73.5, Decision on the Prosecution’s Interlocutory Appeal Against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (AC), 28 October 2003 NALETILIĆ The Prosecutor v. Mladen Naletilić and Vinko Martinović, Case No. IT-98-34-A, Judgement (AC), 3 May 2006 (“Naletilić and Martinović, Judgement (AC)”) NIKOLIĆ The Prosecutor v. Dragan Nikolić, Case No. IT-94-2-S, Sentencing Judgement (TC), 18 December 2003 (“Nikolić, Sentencing Judgement (TC)”)

Page 194

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

191 MILUTINOVIĆ The Prosecutor v. Milan Milutinović, Nikola Šainović and Draguljub Ojdanić, Case No. IT-99-37- AR72, Decision on Draguljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise (AC), 21 May 2003 PLASVŠIĆ The Prosecutor v. Biljana Plavšić, Case Nos. IT-00-39 and 40/1-S, Sentencing Judgement (TC), 27 February 2003 (“Plavšić, Sentencing Judgement (TC)”) SIMIĆ The Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement (AC), 28 November 2006 (“Simić, Judgement (AC)”) STAKIĆ The Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Judgement (TC), 31 July 2003 (“Stakić, Judgement (TC)”) The Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement (AC), 22 March 2006 (“Stakić, Judgement (AC)”) STRUGAR The Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, Judgement (TC), 31 January 2005 (“Strugar, Judgement (TC)”) TADIĆ The Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement (AC), 15 July 1999 (“Tadić, Judgement (AC)”) VASILJEVIĆ The Prosecutor v. Mitar Vasiljević, Case No.

IT-98-32-A, Judgement (AC), 25 February 2004 (“Vasiljević, Judgement (AC)”) 3. Other Material Convention Relating to the Status of Refugees, adopted 28 July 1951, 189 U.N.T.S. 150. Protocol Relating to the Status of Refugees, adopted 31 January 1967, 606 U.N.T.S. 267 The Prosecutor v. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu, Case No. SCSL-2004-16-A, Judgement (SCSL AC), 22 February 2008 (“Brima, Judgement (SCSL AC)”) Organic Law No. 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990 [Rwanda], published in the Official Gazette of the Republic of Rwanda, Year 35, No. 17, 1 September 1996, as amended by Organic Law No. 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty [Rwanda].

Page 195

Judgement and Sentence 1 November 2010

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-T

192

ANNEX C: AMENDED INDICTMENT

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.amategeko.gov.rw/view/doc/8166/8457>

CASE PAGE <https://chat.esheria.ai/case-law/rwanda/Genocide-international-tribunal-for-rwanda-2012--6a3ea5223b1caa9129817fea>

Prepared on 12 October 2026 · Esheria