

RWANDA / JUDGMENT

The Prosecutor v. Grégoire Ndahimana

ICTR-01-68-A

COURT

International Tribunal for Rwanda

DECIDED

16 December 2013

CASE / FILE NUMBER

ICTR-01-68-A

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IN THE APPEALS CHAMBER Before:

Judge Theodor Meron, Presiding Judge William H. Sekule Judge Arlette Ramaroson Judge Carmel Agius Judge Khalida Rachid Khan

Registrar:

Mr. Bongani Majola

Date:

16 December 2013

Grégoire NDAHIMANA

v.

THE PROSECUTOR

Case No. ICTR-01-68-A

SUMMARY OF APPEAL JUDGEMENT

Counsel for Grégoire Ndahimana:

Bharat B. Chadha

The Office of the Prosecutor:

Hassan Bubacar Jallow James J. Arguin Inneke Onsea Renifa Madenga Lydia Mugambe Jane Mukangira Leo Nwoye Sharifah Adong UNITED NATIONS TRIBUNAL PÉNAL International pour le Rwanda International Criminal Tribunal for Rwanda

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I. INTRODUCTION 1. In accordance with the Scheduling Order issued on 14 November 2013, the Appeals Chamber today delivers its Judgement in the case of Grégoire Ndahimana versus The Prosecutor. Mr. Grégoire Ndahimana (“Ndahimana”) and the Prosecution appealed against the Trial Judgement rendered in this case on 17 November 2011 by Trial Chamber II of the Tribunal and issued in writing on 18 January 2012. 2. The following is a summary of the findings of the Appeals Chamber. This summary does not constitute any part of the official and authoritative Judgement of the Appeals Chamber, which is rendered in writing and which will be distributed to the parties at the close of this hearing. In addition, not every issue discussed in the Judgement is addressed in this summary, which focuses on central issues. 3. Ndahimana was born in 1952 in Rukoko Sector, Kivumu Commune, Kibuye Prefecture, Rwanda. He was elected bourgmestre of Kivumu Commune in June 1993, a position he assumed in October 1993 and maintained until he left Rwanda in July 1994. Ndahimana was arrested in the Democratic Republic of the Congo in August 2009 and transferred to the Tribunal’s detention facility in Arusha, Tanzania, in September 2009. 4. Ndahimana was charged with genocide and crimes against humanity in connection with his role in the events at the parish of Nyange of the commune of Kivumu in Rwanda on 15 and 16 April 1994, when assailants attacked and eventually demolished the church of Nyange, thus causing the deaths of thousands of Tutsi civilians who had sought refuge in the church. The Trial Chamber found that almost all of these Tutsi refugees were killed as a result of the destruction of the church on 16 April 1994. 5. The Trial Chamber, by majority, found Ndahimana guilty of genocide and extermination as a crime against humanity: - as a superior, pursuant to Article 6(3) of the Statute of the Tribunal (“Statute”), for failing to punish his subordinates from the communal police for their role in the killings perpetrated on 15 April 1994 at Nyange Church; and - pursuant to Article 6(1) of the Statute, for aiding and abetting by tacit approval the killings perpetrated at Nyange Church on 16 April 1994. The Trial Chamber sentenced Ndahimana to 15 years of imprisonment.

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II. THE APPEALS 6. Ndahimana has presented 11 grounds of appeal challenging his convictions and sentence. He requests that the Appeals Chamber quash his convictions and sentence, acquit him, and order his immediate release. The Prosecution opposes Ndahimana's appeal in its entirety. 7. The Prosecution has presented six grounds of appeal challenging some of the Trial Chamber's findings and the sentence imposed on Ndahimana. Ndahimana opposes the Prosecution's appeal in its entirety. A. Alleged Violations of Right to Present Evidence (Ndahimana Ground 1) 8. In his First Ground of Appeal, Ndahimana submits that the Trial Chamber violated Article 20 of the Statute by denying him the right to present material witnesses and produce evidence of a witness under Rule 92bis of the Rules of Procedure and Evidence of the Tribunal ("Rules"). 9. The Appeals Chamber finds that Ndahimana has failed to demonstrate that the Trial Chamber abused its discretion or violated his fair trial rights in this regard. Accordingly, the Appeals Chamber dismisses Ndahimana's First Ground of Appeal in its entirety. B. Alleged Errors Relating to Ndahimana's Responsibility for the Killings Perpetrated at Nyange Church on 15 April 1994

1. Ndahimana's Responsibility Pursuant to Article 6(3) of the Statute (Ndahimana Grounds 2-5) 10. In his Second through Fifth Grounds of Appeal, Ndahimana submits that the Trial Chamber erred in convicting him as a superior pursuant to Article 6(3) of the Statute for the role of policemen of Kivumu Commune in the attack against Nyange Church and the killings of Tutsi refugees on 15 April 1994. In particular, Ndahimana contends that the Trial Chamber erred in its findings with regard to: (i) the participation of communal policemen in the 15 April 1994 attack; (ii) his effective control over the communal policemen; (iii) his constructive knowledge of their crimes; and (iv) his failure to prevent or punish their criminal conduct. 11. The Appeals Chamber rejects all of Ndahimana's challenges in this regard and affirms the Trial Chamber's findings. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's conclusion that Ndahimana is responsible as a superior for genocide and extermination as a crime against humanity pursuant to Article 6(3) of the Statute in relation to the killings perpetrated at

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Nyange Church on 15 April 1994. The Appeals Chamber therefore dismisses Ndahimana's Second through Fifth Grounds of Appeal in their entirety.

2. Ndahimana's Responsibility Pursuant to Article 6(1) of the Statute (Prosecution Grounds 1 & 2) 12. In its First and Second Grounds of Appeal, the Prosecution submits that the Trial Chamber erred in acquitting Ndahimana under Article 6(1) of the Statute for the 15 April attack on Nyange Church based on its finding that Ndahimana had an alibi for the whole morning of that day. The Prosecution requests that the Appeals Chamber find Ndahimana guilty of genocide and extermination as a crime against humanity pursuant to Article 6(1) of the Statute based on his participation in a meeting held in the morning of 15 April 1994, at which the 15 April attack on Nyange Church was allegedly planned. 13. The Appeals

Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in accepting Ndahimana's alibi for the morning of 15 April 1994 or in assessing the Prosecution evidence in this regard. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's decision not to hold Ndahimana responsible pursuant to Article 6(1) of the Statute for the 15 April attack on Nyange Church. The Appeals Chamber therefore dismisses the Prosecution's First and Second Grounds of Appeal in their entirety. C. Alleged Errors Relating to Ndahimana's Responsibility for the Killings Perpetrated at Nyange Church on 16 April 1994

1. Ndahimana's Presence at Nyange Parish on 16 April 1994 (Ndahimana Grounds 6, 7, & 10 in part) 14. In his Sixth, Seventh and Tenth Grounds of Appeal, in part, Ndahimana submits that the Trial Chamber erred in rejecting his alibi for 16 April 1994 and in finding that he participated in the meeting held in the morning of 16 April 1994, at which the decision to destroy Nyange Church to kill the Tutsi refugees inside was taken. Ndahimana also contends that the Trial Chamber erred in finding that he was present during the destruction of the church on 16 April 1994 and the killings perpetrated that day. 15. The Appeals Chamber finds that Ndahimana has failed to demonstrate an error in the Trial Chamber's conclusions in this respect. Accordingly, the Appeals Chamber dismisses Ndahimana's Sixth and Seventh Grounds of Appeal in their entirety, as well as the relevant part of his Tenth Ground of Appeal.

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2. Ndahimana's Responsibility for Aiding and Abetting the Killings (Ndahimana Grounds 8 & 9) 16. In his Eighth and Ninth Grounds of Appeal, Ndahimana submits that the Trial Chamber erred in finding that he aided and abetted the killings perpetrated at Nyange Church on 16 April 1994, as the actus reus and mens rea requirements for aiding and abetting were not proven beyond reasonable doubt. 17. The Appeals Chamber finds that Ndahimana has failed to demonstrate that the Trial Chamber erred in concluding that his conduct constituted the actus reus of aiding and abetting by tacit approval the 16 April killings at Nyange Church. Likewise, the Appeals Chamber finds no error in the Trial Chamber's conclusion that the only reasonable inference available from the evidence was that Ndahimana possessed the requisite mens rea to be held responsible for aiding and abetting. Accordingly, the Appeals Chamber concludes that Ndahimana has failed to demonstrate that the Trial Chamber erred in holding him liable for aiding and abetting the 16 April killings by tacit approval, and dismisses Ndahimana's Eighth and Ninth Grounds of Appeal in their entirety.
3. Ndahimana's Responsibility for Participation in a Joint Criminal Enterprise (Prosecution Grounds 3 & 4) 18. In its Third and Fourth Grounds of Appeal, the Prosecution submits that the Trial Chamber erred in finding that Ndahimana did not possess the requisite intent to be convicted of committing genocide and extermination as a crime against humanity through participation in a joint criminal enterprise. In particular, the Prosecution challenges the Trial Chamber's findings that:

- (i) Ndahimana's presence at Nyange Church on 16 April 1994 might have been motivated by duress; and (ii) Ndahimana did not share the intent of the other members of the joint criminal enterprise to exterminate the Tutsis of Kivumu Commune. The Prosecution requests that the Appeals Chamber find Ndahimana guilty under Article 6(1) of the Statute for committing genocide and extermination as a crime against humanity as a participant in a joint criminal enterprise. 19. The Appeals Chamber finds no merit in the parties' submissions regarding duress as a special defence. However, in the absence of credible evidence that Ndahimana was under threat against his life during the period in question, the Appeals Chamber finds that the Trial Chamber erred in concluding that Ndahimana's presence at Nyange Church on 16 April 1994 might have been motivated by duress.

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20. The Appeals Chamber also finds that the Trial Chamber erred in failing to conclude that the only reasonable inference to be drawn from the evidence was that the drinks shared after the destruction of Nyange Church between Ndahimana and members of the joint criminal enterprise were shared to toast the ultimate success of the plan to kill the Tutsi refugees. 21. In light of these findings, and considering the evidence on Ndahimana's conduct in April 1994 accepted by the Trial Chamber, the Appeals Chamber fails to see any conclusion that could reasonably be reached from the totality of the evidence, other than that Ndahimana shared the requisite specific intent of the other members of the joint criminal enterprise to exterminate the Tutsis of Kivumu Commune to destroy them as a group. Based on this conclusion and the Trial Chamber's findings on Ndahimana's conduct on 16 April 1994, the Appeals Chamber finds that the Trial Chamber erred in failing to hold Ndahimana responsible pursuant to Article 6(1) of the Statute for committing the killings of 16 April 1994 at Nyange Church through his participation in the joint criminal enterprise. 22. Accordingly, the Appeals Chamber grants the Prosecution's Third and Fourth Grounds of Appeal and finds Ndahimana responsible pursuant to Article 6(1) of the Statute for committing genocide and extermination as a crime against humanity through participation in a joint criminal enterprise based on his conduct on 16 April 1994. Noting that Ndahimana was convicted for aiding and abetting genocide and extermination as a crime against humanity based on the same conduct, the Appeals Chamber holds that committing through participation in a joint criminal enterprise most appropriately reflects the full scope of his criminal conduct in relation to the 16 April events.
4. Ndahimana's Responsibility Pursuant to Article 6(3) of the Statute (Prosecution Ground 5) 23. In its Fifth Ground of Appeal, the Prosecution submits that the Trial Chamber erred in not finding Ndahimana guilty as a superior pursuant to Article 6(3) of the Statute for failing to punish Adrien Niyitegeka, his subordinate from the communal police, for aiding and abetting the killings at Nyange Parish on 16 April 1994. It requests that the Appeals Chamber set aside Ndahimana's acquittal as a superior in relation to these killings, find him guilty on this basis, and take this finding of guilt into account as an aggravating factor in the determination of his sentence. 24. The Appeals Chamber finds that the Prosecution has not

demonstrated that the Trial Chamber erred in not finding Ndahimana responsible pursuant to Article 6(3) of the Statute in connection with the killings at Nyange Church on 16 April 1994. Accordingly, the Appeals Chamber dismisses the Prosecution's Fifth Ground of Appeal in its entirety.

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D. Alleged Errors Relating to the Crime of Extermination (Ndahimana Ground 10 in part) 25. Under his Tenth Ground of Appeal, in part, Ndahimana challenges his conviction for extermination as a crime against humanity. In particular, Ndahimana submits that the Trial Chamber erred in convicting him of extermination as a crime against humanity in the absence of proof of the requisite mens rea. 26. The Appeals Chamber finds no merit in Ndahimana's submissions and dismisses this remaining part of Ndahimana's Tenth Ground of Appeal. E. Alleged Errors in Relation to Sentencing

1. Ndahimana's Sentencing Appeal (Ndahimana Ground 11) 27. In his Eleventh Ground of Appeal, Ndahimana challenges the Trial Chamber's assessment of: (i) certain mitigating circumstances; (ii) the aggravating factors; and (iii) the degree of his participation in the crimes. He contends that, as a result of these errors, the Trial Chamber imposed an "unreasonably harsh" sentence. 28. The Appeals Chamber dismisses Ndahimana's submissions regarding sentencing and, accordingly, dismisses his Eleventh Ground of Appeal in its entirety.
2. Prosecution's Sentencing Appeal (Prosecution Ground 6) 29. In its Sixth Ground of Appeal, the Prosecution challenges the Trial Chamber's assessment of mitigating factors and submits that the Trial Chamber abused its discretion by imposing a sentence that was manifestly inadequate. The Prosecution requests that the Appeals Chamber impose a sentence of life imprisonment or, in the alternative, a substantially longer term of imprisonment. 30. The Appeals Chamber recalls its prior conclusion that the Trial Chamber erred in finding that Ndahimana did not possess genocidal intent and that his presence at Nyange Church on 16 April 1994 might have been motivated by duress. Accordingly, the Appeals Chamber finds that these factors cannot be considered in mitigation of his sentence. 31. The Appeals Chamber also considers that the Trial Chamber erred in taking into account Ndahimana's affiliation with an allegedly moderate political party, the external perception of Ndahimana's political views, and the alleged influence of other authorities of Kivumu Commune for mitigation purposes. This part of the Prosecution's Sixth Ground of Appeal is therefore granted.

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32. Considering that the re-characterisation of Ndahimana's criminal responsibility for the killings of 16 April 1994 as that of a participant in a joint criminal enterprise calls for a reconsideration of the sentence, the Appeals Chamber dismisses the Prosecution's remaining submissions related to the inadequacy of the sentence as moot.
3. Impact of the Appeals Chamber's Findings 33. The Appeals Chamber has affirmed Ndahimana's convictions pursuant to Article 6(3) of the Statute for genocide and extermination as a crime against humanity for failing to punish his subordinates from the communal police for the killings perpetrated on 15 April 1994 at Nyange Church. The Appeals Chamber has also concluded that Ndahimana's responsibility in relation to the killings perpetrated on 16 April 1994 was more appropriately described as that of a participant in a joint criminal enterprise rather than as that of an aider and abettor. In addition, the Appeals Chamber has found that the Trial Chamber erred in taking into account in mitigation of Ndahimana's sentence the findings that he may have acted under duress and that he did not have genocidal intent as well as his membership in a moderate political party and the influence of other authorities of Kivumu Commune. 34. The Appeals Chamber recalls that thousands of Tutsis had gone to Nyange Church to take refuge where they were subsequently attacked by crowds of assailants whose specific intent was to destroy them as a group. These attacks resulted in the death of most of the refugees. Ndahimana not only failed to punish his subordinates for participating in the killings, but also significantly contributed to the killings by his acts and deeds, sharing the perpetrators' genocidal intent. Having considered the extraordinary gravity of the crimes for which Ndahimana is being convicted, the form and degree of his participation in these crimes, as well as the appropriate mitigating and aggravating circumstances, the Appeals Chamber sets aside Ndahimana's sentence of 15 years of imprisonment and sentences him to a term of 25 years of imprisonment.

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III. DISPOSITION For the foregoing reasons, THE APPEALS CHAMBER, PURSUANT to Article 24 of the Statute and Rule 118 of the Rules; NOTING the written submissions of the parties and their oral arguments presented at the appeal hearing on 6 May 2013; SITTING in open session; DISMISSES Ndahimana's appeal in all respects; GRANTS the Prosecution's Third and Fourth Grounds of Appeal, SETS ASIDE the finding that Ndahimana is responsible under Article 6(1) of the Statute for aiding and abetting genocide and extermination as a crime against humanity for his role in the killings of Tutsi refugees at Nyange Church on 16 April 1994, and FINDS him responsible under Article 6(1) of the Statute in relation to these killings for committing genocide and extermination as a crime against humanity through participation in a joint criminal enterprise; GRANTS, in part, the Prosecution's Sixth Ground of Appeal and FINDS that the Trial Chamber erred in taking into account in mitigation of Ndahimana's sentence that Ndahimana may have been acting under duress and did not have genocidal intent, his membership in a

moderate political party, and the influence of other authorities of Kivumu Commune; DISMISSES the Prosecution's appeal in all other respects; AFFIRMS Ndahimana's convictions for genocide and extermination as a crime against humanity pursuant to Article 6(3) of the Statute in relation to the killings of Tutsi refugees perpetrated at Nyange Church on 15 April 1994; SETS ASIDE the sentence of 15 years imposed on Ndahimana by the Trial Chamber, and IMPOSES a sentence of 25 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 11 August 2009; RULES that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules; and

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

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