

MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE NO.: MICT-12-29-A

AUGUSTIN NGIRABATWARE

v.

THE PROSECUTOR  
OF THE TRIBUNAL

MONDAY, 30 JUNE 2014  
0930H  
APPEALS HEARING

Before the Judges:

Judge Theodor Meron, Presiding  
Judge Bakone Justice Moloto  
Judge Christoph Flügge  
Judge Burton Hall  
Judge Liu Daqun

For the Registry:

Ms. Ana Maria Fernandez de Soto  
Ms. Xheni Shehu

For the Prosecution:

Mr. James Arguin  
Ms. Inneke Onsea  
Mr. Takeh Sendze  
Ms. Chelsea Fewkes  
Mr. Leo Nwoye  
Ms. Amy Barber  
Ms. Sharifah Adong

For the Accused Augustin Ngirabatware:

Ms. Mylène Dimitri  
Mr. Guénaël Mettraux  
Mr. Deogratias Sebureze

Court Reporter:

Ms. Deirdre O'Mahony

## PROCEEDINGS

1

2

3 MR. PRESIDENT:

4 Good morning.

5

6 Madam Registrar, will you please call the case.

7 MS. SHEHU:

8 Good morning, Your Honours.

9

10 This is case number MICT-12-29-A, in the matter of Augustin Ngirabatware versus the Prosecutor,  
11 sitting in open session today, Monday, 30 June 2014 for an appeals hearing.

12 MR. PRESIDENT:

13 Thank you, Registrar.

14

15 Mr. Ngirabatware, can you follow the proceedings in a language you understand?

16 APPELLANT NGIRABATWARE:

17 *(Microphone not activated)* Mr. President.

18 MR. PRESIDENT:

19 Thank you.

20

21 The appearances of the parties, Counsel for Mr. Ngirabatware.

22 MS. DIMITRI:

23 Good morning, Mr. President. Good morning, Your Honour.

24

25 Good morning to the Prosecution.

26

27 I am Mylène Dimitri, lead counsel for Mr. Ngirabatware. This morning I am accompanied by my  
28 co-counsel Mr. Guénaël Mettraux on my left, and our legal assistant Dr. Deogratias Sebureze on my  
29 right. We wish you a very good morning.

30 MR. PRESIDENT:

31 Thank you, Mrs. Dimitri.

32

33 Prosecution.

34 MR. ARGUIN:

35 Good morning, Your Honour. And may it please the Chamber.

36

37 Appearing today on behalf of the prosecution are Dr. Inneke Onsea, Takeh Sendze, Chelsea Fewkes,

1 Leo Nwoye, Amy Barber, Sharifah Adong, and myself James Arguin.

2 MR. PRESIDENT:

3 Thank you very much.

4

5 Ngirabatware has filed an appeal against the judgment, pronounced on 20 December 2012 and issued  
6 in writing on 21 February 2013, by Trial Chamber II of the ICTR. In accordance with the scheduling  
7 order issued on 16 June 2014, the Appeals Chamber will hear today Mr. Ngirabatware's appeal against  
8 the trial judgment.

9

10 The case concerns the criminal responsibility of Mr. Ngirabatware who served as Rwandan Minister of  
11 Planning in 1994. The Trial Chamber found Mr. Ngirabatware guilty of committing direct and public  
12 incitement to commit genocide based on his speech at a roadblock on the Cyanika-Gisa road in  
13 Nyamyumba *commune* on 22 February 1994. The Trial Chamber also found Mr. Ngirabatware guilty of  
14 instigating and aiding and abetting genocide based on his role in distributing weapons and his  
15 statements at two roadblocks in Nyamyumba *commune* on 7 April 1994. The Trial Chamber also  
16 convicted Mr. Ngirabatware, under the extended form of joint criminal enterprise liability, of rape as a  
17 crime against humanity based on the rape of Chantal Murazemariya by members of the *Interahamwe*.  
18 The Trial Chamber sentenced Mr. Ngirabatware to a single term of 35 years' imprisonment.

19

20 Mr. Ngirabatware advances seven grounds of appeal. He requests the Appeals Chamber to overturn  
21 each of his convictions and enter a judgement of acquittal or, in the alternative, to reduce his sentence  
22 to time served. The Prosecution responds that Mr. Ngirabatware's appeal should be dismissed in its  
23 entirety.

24

25 I will now summarise the manner in which we will proceed.

26

27 I would like to remind the parties that the appeal process is not a trial *de novo* and the parties must  
28 refrain from repeating their case as presented at trial. The arguments must be limited to alleged errors  
29 of law which invalidate the trial judgement or alleged errors of fact which occasion a miscarriage of  
30 justice.

31

32 Throughout the hearing, counsel may argue the grounds of appeal in any order they consider suitable  
33 for their presentations. Parties shall present their submissions in a precise, clear, and concise manner  
34 and should also provide precise references for materials supporting their oral arguments. The Judges,  
35 of course, may interrupt the parties at any time to ask questions, or they may ask questions following  
36 each party's submissions or at the end of the hearing.

37

1 The Appeals Chamber is familiar with the briefs and I would therefore urge the parties not to repeat  
2 verbatim or to summarise extensively the written arguments.

3

4 I would also like to remind the parties to be particularly careful not to reveal any information that could  
5 identify a protected witness.

6

7 As set out in the scheduling order, this hearing will proceed as follows: First, we shall hear the  
8 submissions from Mr. Ngirabatware's counsel for one hour. Then the Prosecution will respond for one  
9 hour. After a pause of 20 minutes, Mr. Ngirabatware's counsel will have 30 minutes to reply to the  
10 Prosecution response, followed by brief optional personal remarks by Mr. Ngirabatware.

11

12 Having stated the manner in which we will proceed, I would like now to invite counsel for  
13 Mr. Ngirabatware to present his appeal.

14

15 Counsel for Mr. Ngirabatware.

16 MS. DIMITRI:

17 Thank you, Mr. President.

18

19 This morning I will start by addressing you with ground five, which relates to the conviction for direct  
20 and public incitement to commit genocide. If I may, Mr. President, I'm just going to walk towards  
21 Exhibit P. 7, which you can see in front of you. And I will, after that, go to the projector and address you  
22 in relation to Exhibit P. 6 (S10).

23

24 You will note that you have a binder before you, we gave the same binder to the Prosecution; so you  
25 have a reduced format in tab 2.1 of Exhibit P. 7.

26

27 So I hope you can hear me well. I'm going to start (*microphone not activated*)

28 MR. PRESIDENT:

29 Try to speak to the microphone.

30 MS. DIMITRI:

31 I'm going to use this one.

32 THE ENGLISH INTERPRETER:

33 Mr. President, may counsel be requested to use a microphone that is switched on. Thank you.

34 MS. DIMITRI:

35 So I'm going to start by addressing you on ground five.

36

37 This is Exhibit P. 7 which was filed by the Prosecution's investigator. It was an exhibit showing the

1 alleged roadblocks in the Nyamyumba *commune*. I will concentrate on this part here, which relate to  
2 the so-called Cyanika-Gisa roadblock in Nyamyumba *commune*.

3

4 You will see in your tab 2.1 and 2.2 there is an extract of this part of Exhibit P. 7. This extract is an  
5 exhibit; it's Exhibit P. 6 (S10). It was filed by the Prosecution during the examination-in-chief of the  
6 Prosecution's investigator. So you will see this page on your screen, Mr. President, Exhibit P. 6 (S10).

7

8 Now, the Prosecution alleges that the indictment was quite clear, as well as the post-indictment  
9 disclosure, on where the roadblock, the so-called Cyanika-Gisa roadblock at the custom office in  
10 Nyamyumba *commune*, where the roadblock was located.

11

12 You will notice that we gave you a red pen. Since the Prosecution says that the roadblock was quite  
13 clear from the indictment, we will invite you to attempt to put an X where you think the roadblock was,  
14 according to what is said in the indictment; namely, at the custom office on the Cyanika-Gisa tarred  
15 road in Nyamyumba *commune*.

16

17 If you put an X anywhere on this map, we submit that you were wrong, because, first of all, you have  
18 here according to the site visit (*microphone not activated*)

19 THE ENGLISH INTERPRETER:

20 Mr. President, counsel cannot be heard, and therefore the interpretation cannot be effectively done.

21 Thank you.

22 MS. DIMITRI:

23 You will see here, according to the site visit, it's the border between the Nyamyumba *commune* and the  
24 Rubavu *commune*. So any X that's put on this road is wrong, factually incorrect, according to the  
25 indictment.

26

27 The indictment also refers to a custom border. According to the site visit that was conducted by the  
28 Trial Chamber and the parties, the custom border is somewhere in this direction about five -- between  
29 five and eight kilometres away. So again if you want to put your X close to the custom border you  
30 cannot put your X on Exhibit (S10) the way it's shown.

31

32 You will have in tab 2.3 the annotation that I just made on the map.

33

34 Now, during the Prosecution's case and during the site visit we referred to what was so-called the  
35 "Restaurant Gisa." You can also find it on Exhibit P. 6. The Restaurant Gisa is approximately here.

36

37 And we also during the trial as well as during the appeals proceeding refer to the road leading to Kiroji,

1 so it's the exact same, according to the transcripts and what's in evidence, the Kiroji road and the  
2 Kabilizi road are the same, and this was also done during the site visit.

3

4 So, as I said, according to the indictment any X put on that map would be incorrect, because, first of all,  
5 there is no custom office in Nyamyumba *commune*, there is no Cyanika in Nyamyumba *commune*, and  
6 there is no Gisa in Nyamyumba *commune*.

7

8 Now, according to the revised pre-trial brief, which was filed together with Exhibit (S10), the so-called  
9 roadblock was located at the junction here of Kabilizi road and the tarmac road from Kigali to Gisenyi.

10

11 According to the summary of Witness ANAN, which is one of the witnesses that the Trial Chamber used  
12 to convict Mr. Ngirabatware on direct and public incitement, according to the summary in the pre-trial  
13 brief of Witness ANAN, as well as the notes taken by the Prosecution and that were disclosed recently  
14 during the appeals proceedings, the roadblock was at the custom office, so somewhere between five  
15 and eight kilometres in this direction.

16

17 According to the Prosecution's motion for leave to vary its witness list and add Witness ANAT, who was  
18 also used to convict Mr. Ngirabatware of direct and public incitement, the roadblock was located here,  
19 in Cyanika. According to Witness ANAO and ANAS, who were both used to somehow corroborate  
20 according to the Trial Chamber, the witnesses that were used to convict Mr. Ngirabatware, the  
21 roadblock was located at the intersection of the Kabilizi-Kiroji road and the tarmac, so the roadblock  
22 according to them was here.

23

24 However, Witness ANAS specified that this roadblock was never manned and never appeared in  
25 February 1994, that it was, rather, created after April 1994.

26

27 According to the Prosecution's motion for a site visit, they had the intention to show us the custom  
28 border, which again is five to eight kilometres in this direction. And according to their closing brief, to  
29 the Prosecution's closing brief, the roadblock was here in Cyanika. During the site visit, surprisingly,  
30 the Prosecution indicated, and you can also find that in the site visit report filed by the Trial Chamber,  
31 stated that there was no roadblock here, and that the roadblock was here. According to Witness ANAN  
32 and ANAT, the Prosecution submission was that the roadblock was in Cyanika.

33

34 So, as you can see, there was nothing clear, there was nothing consistent. It was all very confusing,  
35 because that roadblock kept moving. And surprisingly, the Appeals Prosecution at paragraph 268 and  
36 279 of the respondent's brief are now saying that the roadblock is at the intersection of the Kiroji road  
37 and the Kigali-Gisenyi tarmac road. So they are now denying what the Prosecution during the trial

1 phase indicated.

2

3 And not only that, the Witnesses ANAN and ANAT testified, according to the Trial Chamber and the  
4 Prosecution, that the roadblock was in Cyanika, so the Appeals Prosecution is now stating that the  
5 roadblock was here, where you have no evidence of any direct and public incitement, whatsoever.

6

7 So, in conclusion, the Defence submits two major points. First, the indictment was never clear; there  
8 was never any consistent, clear, and timely disclosure by the Prosecution. And second, the Appeal's  
9 Prosecution position is at a location where there is no evidence.

10 MR. PRESIDENT:

11 Counsel, my distinguished colleague Judge Moloto would like to ask you a question.

12

13 Judge Moloto.

14 JUDGE MOLOTO:

15 Ma'am, what is the distance between the junction of Kabilizi road and the Kigali road to  
16 Cyanika Centre?

17 MS. DIMITRI:

18 Thank you, Judge. I was supposed to address this, but it slipped my mind.

19

20 During the site visit they calculated the distance between the Gisa Centre and the Cyanika Centre to  
21 more than one kilometre.

22 JUDGE MOLOTO:

23 Thank you.

24 MS. DIMITRI:

25 The problem is that the site visit did not have any recording, nor was there any court reporter  
26 transcribing what was said and done during the site visit, despite the request, the specific request made  
27 by the Defence team. So you will see in the pre-site visit submissions we specifically asked for  
28 recordings and court reporters, but it wasn't done.

29 JUDGE MOLOTO:

30 Are the parties agreed about the distance?

31 MS. DIMITRI:

32 Yes. I was not at the site visit, but I'm told, yes, the parties agreed.

33 JUDGE MOLOTO:

34 It's one and a half kilometres.

35 MS. DIMITRI:

36 Yes. As well as the registrar, because it's the registry who calculated the distance at the site visit,  
37 because we have asked for this distance to be calculated and it was more than one kilometre.

1 JUDGE MOLOTO:

2 Thank you, Ma'am.

3 MR. PRESIDENT:

4 Please proceed.

5 MS. DIMITRI:

6 Thank you, Mr. President.

7

8 I just want to finish with one point. If you look at Exhibit (S10), P. 6 (S10) you will see that it's -- the last  
9 sentence indicates that there was no roadblock on Cyanika. So the pre-trial brief which was filed with  
10 Exhibit P. 6 (S10) is now saying that wherever these witnesses testified; namely, that there was a  
11 roadblock on Cyanika, the pre-trial brief indicated that there was no roadblock on Cyanika. And you  
12 can see it quite clearly from Exhibit P. 6 (S10) that you have in your binder in tab 2.2.

13

14 My co-counsel will now address you on the credibility issues related to ground five. Thank you.

15 MR. METTRAUX:

16 Good morning, Mr. President. Good morning, Your Honours.

17

18 The Appeals Chamber of course is not the second trier of fact. Your role, Your Honour, is to verify that  
19 the relevant legal standards were applied correctly and that the evidence was evaluated in a  
20 reasonable manner.

21

22 The evidence in this case, Your Honour, was this: The Prosecution called two convicted *génocidaires*  
23 who had spent time in prison together and who "remembered" this alleged incident more than a decade  
24 after it happened. What we know of these two individuals, ANAT and ANAN as well is that they wrote  
25 their statements together.

26

27 And this is what one of them, ANAT, has said about this process of writing statements *à quatre mains*.

28 This is the transcript of the 17th of March 2010, at page 55 and 56 and you can find it under tab 3.3 of  
29 your binder.

30

31 He said this:

32

33 "Since I started my testimony against Augustin Ngirabatware in 2005, and let me say I did so in Gisenyi  
34 province before the public prosecutor, and I did so together with ANAN, and he was the one who  
35 recorded in the documents what I told him regarding allegations against Augustin Ngirabatware, as the  
36 prosecutor of Gisenyi province had requested us."

37



1 And he goes on to add this:

2

3 "After concluding my statement, the prosecutor in Gisenyi province forwarded the file to the prosecutor  
4 general in Kigali. I did not know whether ANAN came to say whatever. But be that as it may, whatever  
5 he may have said, it simply means that he has relied on the indictment which we prepared and which  
6 was forwarded to the prosecutor general in Kigali."

7

8 What we know as well about these witnesses that the Trial Chamber relied upon as witnesses of truth  
9 and that the Prosecutor here advances as reliable and credible witness is ANAT conceded to have  
10 provided false information to the local prosecution authority. We know also that at the time when he  
11 gave his testimony here in this courtroom his appeal against his genocide conviction was pending.

12

13 And so that Your Honour know who these witnesses are that the Prosecutor and the Trial Chamber  
14 relied upon as witnesses of truth, ANAT confessed to having forced a young man to have sexual  
15 intercourse with his dying mother before they killed him.

16

17 As for ANAN, the other witnesses of truth of the prosecution, he confessed to having killed seven  
18 children.

19

20 Now, for the Defence we called our client. We also brought two United Nation military observers, as  
21 well as a local *gendarme* and a Gacaca judge who lived nearby the area and would pass by the area in  
22 question every day on his way to church. All of them testified to the same fact; namely, that there had  
23 been no roadblock in that location at the time and that they had never heard of or never seen of an  
24 incident described by ANAN and ANAT.

25

26 Now, of course Your Honour owe the Trial Chamber an amount of respect and discretion for the factual  
27 findings of the Trial Chamber. But the discretion that we owe to a Trial Chamber is limited by a number  
28 of safeguards which protect the accused and which in this case we submit the Trial Chamber  
29 disregarded completely.

30

31 Let me stop on three of those fundamental safeguards that are binding on any Trial Chamber:

32

33 The first one is the requirement that a Chamber should consider all of the evidence without disregarding  
34 any and that where it decides to set aside or to reject certain evidence the Trial Chamber will have to  
35 provide its reasons for doing so.

36

37 Now, the most important piece of evidence that we brought to this case was the testimony of our client.

1 The Chamber was of course aware of that evidence, as is apparent from paragraph 245 to 247 where  
2 the Chamber summarises the evidence of our client. However, you will find nothing in the judgement  
3 explaining to you or telling you why the Chamber felt it could reject the detailed evidence of our client  
4 about his whereabouts on the 23rd, on the 24th, on the 25th or why the Chamber considered that he  
5 could not be trusted in relation to any part of that evidence, nor does the Trial Chamber tell you why  
6 they could prefer the evidence of two vicious *génocidaires* to that of our client. That first safeguard,  
7 Your Honour, is gone and violated.

8

9 The second safeguard that limits the discretion of a Trial Chamber is that a Trial Chamber is required to  
10 present the evidence as was presented to the Court in an undistorted fashion. We've given you, and  
11 we won't repeat those instances, a number of examples in our brief, in our appeal brief at paragraph  
12 250 to 254 where the Trial Chamber distorted the record of the proceedings.

13

14 Here, Your Honour, we have time for one example:

15

16 The Trial Chamber in this case had to explain how two United Nation observers who were active in that  
17 very area, as well as their five colleagues, how one local *gendarmes* and his 36 colleagues who were  
18 active and competent to monitor the area, how a local citizen and Gacaca judge who was walking  
19 through that area at the time could have missed an incident, a demonstration, which according to ANAN  
20 had lasted a whole week and involved hundreds of people. The Chamber had to explain how all these  
21 people could never have seen; never have heard of an incident of that sort.

22

23 So what the Chamber did at paragraph 316 and 318 is instead of presenting the evidence as it was, a  
24 one-week incident and that lasted an entire week and involved a hundred person, they describe that  
25 incident as something that suddenly erupted one mid-afternoon and that the witnesses could have  
26 missed.

27

28 But that, with respect, Your Honour, was not the evidence of ANAN. And for good measure and to add  
29 insult to injury, at paragraph 315 the Chamber suggest that the witnesses of the Defence, in particular  
30 the two UN observers, had somehow conceded to the fact that they could have missed this  
31 demonstration.

32

33 I'll invite Your Honour to look at tab 3.5 to 3.8 where we've put the evidence which the Chamber  
34 suggest constitute a concession on the part of these witnesses that they could have missed this  
35 demonstration.

36

37 And as Your Honour will see once you have read this evidence we are millions of miles from a

1 concession. And I will just read to you one example of that. This is Witness Auili, a UN observer, and  
2 that's the transcript of 21st of February 2012, paragraph -- or page, rather, 16. It's tab 3.6 of your  
3 binder, and that's what Auili testified to:

4

5 "Q. Were you aware, either through seeing or hearing, about a minister coming to deliver a speech  
6 inciting hatred against the Tutsis to about a hundred people who were gathered very close to that  
7 crossroad in February 1994?

8 "A. Our office was not far from that intersection manned by soldiers. Such an event could not have  
9 occurred unnoticed, that is -- " *...(microphones overlapping)*

10 ENGLISH INTERPRETER:

11 Mr. President, if counsel is reading may he slow down so that he can be interpreted appropriately.

12 Thank you.

13 MR. METTRAUX:

14 *(Microphone not activated)* I'll try to slow down:

15

16 "Q. Now, on that basis, to your recollection, did such an event take place? To your knowledge.

17 "A. If it was held secretly or clandestinely, yes. But if it was held publicly, then no. I don't remember  
18 such a thing occurring."

19

20 That, with respect, Your Honour is not someone conceding to the possibility that he missed such an  
21 event. And that event, Your Honour, we submit only existed in the wicked mind of ANAN and no  
22 reasonable trier of fact could regard that evidence and the other evidence we put in your binder as  
23 suggesting that the witnesses had conceded to anything of that sort; second safeguard done and gone.

24

25 The third major safeguard that we want to bring your attention to that constrain the discretion of the  
26 Trial Chamber, is the requirement that the Chamber must consider the evidence as a whole; not  
27 piecemeal, not in a compartmentalised fashion. We have mentioned quite a few examples in our brief,  
28 we will only mention one here.

29

30 Paragraph 309 of your judgement, of the trial judgement, the Chamber dismissed the suggestion by the  
31 Defence that ANAN and ANAT had colluded and fabricated their evidence and/or were contaminated in  
32 relation to the evidence. And the Chamber said that this suggestion was "speculative." And it said this  
33 at paragraph 309:

34

35 "... the testimony of Witness ANAT hints at the possibility that the testimony of Witness ANAN may be  
36 tainted because of his exposure to the statement of Witness ANAT."

37

1 But the suggestion, Your Honour, of collusion and contamination that was advanced by the Defence  
2 was about more than the fact that these two people had written their statement together. In fact, there  
3 were a large number of factors that bolstered and corroborated the suggestion of contamination and  
4 collusion. One of them, they had spent time together in prison, thereby giving them an opportunity to  
5 talk about their story. Both of them remembered the story more than a decade after the event. At the  
6 time of testifying here, one of the witnesses, ANAT, had his appeal pending against his conviction,  
7 thereby providing him a motive to ...*(microphones overlapping)*

8 MR. PRESIDENT:

9 Mr. Guénaël, may I interrupt you for a second?

10 MR. METTRAUX:

11 Of course, Your Honour.

12 MR. PRESIDENT:

13 Can we explore a little bit more this question of tainting? You have suggested several times that the  
14 evidence was composed, written together. According to the testimonies in the trial, if I remember  
15 correctly, which I think the trial court accepted, Witness ANAT, A-N-A-T, dictated the contents of his  
16 statement to the other witness on the ground that the other witness had better, more legible  
17 handwriting.

18

19 What is however particularly important, is it not, that the Trial Chamber did consider this question of  
20 tainting? And in so doing, it reached a conclusion that there were significant differences in the  
21 testimonies of the two witnesses, which in the view of the Trial Chamber precluded the conclusion of  
22 tainting. Could you comment on that?

23 MR. METTRAUX:

24 Yes, Your Honour, and I'm grateful for this.

25

26 I think this is the second point, if I may, that the Chamber did wrong. The first one is the one I've just  
27 touched upon, which is the failure of the Chamber to take into consideration the entirety of the evidence  
28 that was relevant to establishing whether or not a suggestion of collusion and/or contamination was  
29 sufficiently credible to be accepted.

30

31 The second matter that the Trial Chamber did wrong, in our submission, is the one on which  
32 Your Honour has put the finger on, which is paragraph 309 of the judgement where the Chamber says,  
33 well, because there are differences between the testimony and the statements of the two witnesses  
34 this -- and I use the word of the Trial Chamber -- "precludes tainting."

35

36 Well, that defies two things, Your Honour. One is logic; that will mean that the testimonies of two  
37 truthful witnesses would have perfectly matching versions because what they say is the truth would be

1 more suspect to collusion than the evidence of two lying witnesses who would make -- would make  
2 mistake about their account. There is no grounding in logic in what the Chamber says, but there is also  
3 no grounding in law and in jurisprudence.

4

5 In *Renzaho* this Appeals Chamber at paragraph 246 specifically said -- 246 specifically said that the  
6 existence of differences between two witnesses was inconclusive either way, whether as evidence of  
7 collusion or as evidence of the contrary. The Chamber said not a word about jurisprudence on that  
8 point.

9

10 Now, and I will finish here, Your Honour, with another reference to your case law, which is again  
11 *Renzaho* paragraph 240, and there is quite a bit of jurisprudence on that point, that a Trial Chamber  
12 does not fulfil its requirement or its obligation to be reasonable and to act with caution just by saying  
13 that it will do so. It will comply with that obligation by acting in such a way.

14

15 In this particular case, Your Honour, we have a Chamber that accepted uncritically the version of two  
16 *génocidaires*, created out of it an incident that no one, no one ever heard of, had seen, or otherwise  
17 witnessed. They explained away and excused every discrepancy between these two witnesses,  
18 however material these discrepancies were. They refrained from confronting the evidence of these two  
19 individuals to the corroborated account of our witnesses, and in particular they failed to confront the  
20 evidence of these two persons to the evidence of our client here. In our submission, Your Honour, this  
21 was plainly unreasonable and a violation of all relevant standards.

22

23 And if I may I will give back the floor for a moment to Ms. Dimitri.

24 MR. PRESIDENT:

25 Ms. Dimitri, please proceed.

26 MS. DIMITRI:

27 Thank you, Mr. President.

28

29 Just to conclude on ground five; as my colleague Dr. Mettraux stated, there were many distortions  
30 made by the Trial Chamber. And the final distortion made was also in relation to the notice in the  
31 indictment. You will recall the small exercise I made with you at the beginning of my address. You can  
32 also take that same exhibit, P. 6 (S10), and attempt to put an X where the roadblock was located  
33 according to the judgement. And the judgement specifically says that the roadblock was located on the  
34 Cyanika-Gisa tarred road in Nyamyumba *commune*. Again, there is no such a road in the Nyamyumba  
35 *commune*.

36

37 And the distortion of the Trial Chamber went as far as stating in paragraph 305 of the judgement that all

1 the witnesses described the same roadblock no matter what name they used to refer to it. This is  
2 incorrect. As I stated at the beginning, Witness ANAO and ANAS specifically located that roadblock at  
3 the Gisa Centre. ANAN and ANAT put that roadblock at the Cyanika Centre. ANAS specified that  
4 there was no roadblock before April 1994, and this event relates to February 1994. So the Chamber  
5 had to distort the evidence to come to the conclusion that the four witnesses were referring to the same  
6 location, but when the Chamber concludes for direct and public incitement you cannot take  
7 the Chamber's statement and locate that roadblock on any map whatsoever.

8

9 I will now address you on ground one and two. I'll be very brief on ground one, Mr. President,  
10 Your Honour.

11

12 The Prosecution states that we never made any timely objection in relation to the COTAGIRWA -- the  
13 COTAGIRWA-Gitsimbi roadblock incident and in relation to the testimony of Witness ANAM who spoke  
14 about the so-called attack on Safari Nyambwega.

15

16 Now, just for you to understand, before the trial started the indictment, the pre-trial brief, the statements  
17 that were disclosed together with the pre-trial brief, even the opening statement of Counsel Kapaya who  
18 was the lead counsel for the Prosecution team at the time. Everything was in relation to the  
19 Prosecution's theory that our client attended a Butare meeting in February 1994 in which he discussed  
20 with others the killing of Tutsis and in which they created a list of a hundred Tutsis to be eliminated, to  
21 be killed. Among that list the Prosecution's allegation and theory at the time was that our client was  
22 responsible indirectly for the death of Safari and Thérèse because he specifically asked for these  
23 names to be put on the list of a hundred Tutsis to be eliminated. This was the Prosecution's theory.

24

25 During the trial they maintained that theory and they somehow changed in their closing brief. You will  
26 find in tab 4.1 all the notice given by the Prosecution team specifying that the alleged contribution of  
27 Mr. Ngirabatware to the death of Thérèse and Safari were because those names were put on that list of  
28 a hundred Tutsis to be eliminated during the Butare meeting in February 1994.

29

30 If you're familiar with the case record, you will realise that after the Prosecution closed its case they  
31 never called any witness to testify on the so-called Butare meeting, and that allegation was dropped  
32 from the Prosecution's case.

33

34 Now, the Prosecution also states that we never objected to this. When the Prosecution filed its pre-trial  
35 brief at one point the Defence requested the pre-trial brief to refer to the witnesses, the Prosecution  
36 witnesses. We wanted to know which witness will testify in relation to which paragraph, and the  
37 Trial Chamber ordered the Prosecution to do so.

1 So the Prosecution filed a revised pre-trial brief in which he related Witness ANAM on paragraph 32 of  
2 the indictment. And paragraph 32 of the indictment was the famous Butare meeting where the list of  
3 Tutsis was drawn up. We objected to this in a procedure called "objection to the revised pre-trial brief"  
4 and we said, "What is the relation between Witness ANAM and paragraph 32?" And the Prosecution  
5 again sent the Defence in a complete different direction, because today they are claiming that  
6 Witness ANAM could testify on the distribution of weapon on the 7th April 1994 linking the distribution of  
7 weapon allegedly made by Mr. Ngirabatware to the attack on Safari and Thérèse.

8  
9 So before the trial we said, "Why are you linking Witness ANAM to paragraph 32 of the indictment?"  
10 And they specifically said that Witness ANAM would testify on the death of Safari who was marked for  
11 death as indicated in paragraph 32 of the indictment. She was going to testify and link the list of Tutsis  
12 to be eliminated in the Butare meeting, and that was the relation between ANAM and Safari.

13  
14 Now, the Prosecution says that nevertheless we never objected to any vagueness of paragraph 16,  
15 because today the Trial Chamber uses paragraph 16 on which ANAM was never supposed to testify  
16 on. They used paragraph 16 to convict Mr. Ngirabatware and they used ANAM together with  
17 paragraph 16. We objected on many occasion. We objected before the trial in the motion where we  
18 specifically stated that paragraph 16 was very vague in terms of dates. We objected again during the  
19 course of the trial. You will find all these references in annex to our appeals brief. We objected again  
20 during the course of the trial to the vagueness in date, location, victims and perpetrators in relation to  
21 paragraph 16. We objected in our closing brief, because the Prosecution's closing brief and the  
22 Defence closing brief were filed simultaneously, and in our closing brief we again objected to the  
23 vagueness of paragraph 16 of the indictment. We specified that the date, the location, the victims and  
24 the perpetrators were vague and were not indicated.

25  
26 When we read the Prosecution's closing brief and realised that now they were linking Witness ANAM,  
27 the first attack on Safari, and paragraph 16 of the indictment, we stood up during the oral arguments  
28 and we objected to this, saying that this was not the theory of the prosecution and that Witness ANAM  
29 was never supposed to testify on that and that we were never charged with the first attack made on  
30 Safari. We were charged with his death that had occurred apparently a few weeks after or a dozen of  
31 days after the attack and that our contribution to the death was that we had put his name on a list of  
32 Tutsis during a meeting in February 1994 in Butare.

33  
34 Nevertheless, the Trial Chamber never stated in the judgement that any of these objections were  
35 untimely. The Trial Chamber, rather, indicated that they did not want to consider these objections  
36 again. So either the Trial Chamber did not want to consider these objections because it had assessed  
37 that the Defence had already objected to this, which means that the Defence objection was not

1 untimely, as the Prosecution is now trying to say, or the Trial Chamber failed to assess our objections in  
2 our closing brief and in the previous motions that we had filed, and it was required to do so, it was  
3 required to address our objections.

4 MR. PRESIDENT:

5 Ms. Dimitri, could I ask you to come back for a moment to the question of the roadblock and from a  
6 different perspective? In your appeal brief you argued -- and I realise that your objection is much  
7 broader and I am cognisant of that -- that the incitement, if any, was of a private, not a public character,  
8 and that the Court made an error in the distinction it made between this case and the case of  
9 *Kalimanzira, Nahimana*.

10

11 Could you make your point on that clear?

12 MS. DIMITRI:

13 Yes, Mr. President. Thank you for your question.

14

15 I respectfully submit that a direct and public incitement has to be made to the public. No matter the  
16 amount of people gathered at a roadblock, we have to look at the type of people to whom the  
17 incitement is made. So if you have -- and I believe that this is my understanding of *Kalimanzira*, is that  
18 if the people to whom the alleged incitement is made are all people manning the roadblock, all  
19 *Interahamwes*, this is not the public. The incitement has to be made to reach the public, a type of  
20 people from every category, not a specific category of people, then, in my opinion, it does not qualify as  
21 public.

22 MR. PRESIDENT:

23 *(Microphones overlapping)*... Ngirabatware wasn't it the case that in fact the speech addressed not only  
24 people manning the roadblock, but also the crowd much larger than that which was around?

25 MS. DIMITRI:

26 Well, respectfully, Mr. President, this is where we disagree with the Trial Chamber, because if you look  
27 at the transcript -- and I think we put specific references in the appeals brief -- the witnesses, and if I  
28 remember correctly Witness ANAT specifically said he addressed those blocking the road.

29

30 Witness ANAN went further than that and said he addressed Honoré Ndayamiyemensi, one person.  
31 He did not address the public, he did not address whoever was standing close to the roadblock doing  
32 whatever or not manning the roadblock. According to ANAN he addressed Honoré Ndayamiyemensi.  
33 According to ANAT he addressed the people blocking the road.

34

35 I hope it answers your question, Mr. President.

36 MR. PRESIDENT:

37 So you quite disagree with the finding of the Trial Chamber on that?



1 MS. DIMITRI:

2 Yes. I do, Mr. President.

3 MR. PRESIDENT:

4 Thank you.

5

6 Judge Moloto.

7 JUDGE MOLOTO:

8 Did I understand you properly that no evidence was led at trial on the Butare meeting?

9 MS. DIMITRI:

10 Not at all, Judge. Not at all.

11 JUDGE MOLOTO:

12 Thank you.

13 MS. DIMITRI:

14 Now, just to finish on ground one, Your Honours.

15

16 The Trial Chamber also convicted us for the death of Dismas and Nzabanita. I just want to say briefly  
17 because we're running out of time that there was never any timely disclosure by the Prosecution. The  
18 Prosecution claims that they notified us that we were charged with the killing of Dismas and Nzabanita,  
19 when in the middle of the trial they disclosed to us a confession made by Witness ANAO.

20

21 First of all, this is not timely. Second of all, you cannot expect from an accused to look in hundreds of  
22 pages of disclosure and say, "Oh, I think I'll be charged with this." They should have notified us. And  
23 second of all, you can see it quite clearly in the closing brief and the oral arguments, because as I said  
24 the closing brief were filed simultaneously. When we realised that all of a sudden they were charging  
25 us with the death of Dismas and Nzabanita, our next occasion, opportunity to object was during the oral  
26 argument. So we stood up and we said, "Well, this is not timely. You never notified us that we would  
27 be charged in relation to these killings."

28

29 And furthermore, when you read the testimony of Witness ANAO who testified on the death of Dismas  
30 and Nzabanita who says, "I killed them. I didn't kill them." Who refused to confess, when you read his  
31 testimony, no matter the contradictions, he never links in any manner whatsoever the killing of  
32 Nzabanita and Dismas to our client. The question was not even asked in examination-in-chief by the  
33 Prosecution.

34

35 If I may, I will now address you on ground two, very briefly. I'll be very brief.

36

37 So, first of all, the Prosecution says that there was no reverse of the burden of proof made by the

1 Trial Chamber. When you read the judgement I beg to differ. I mean, the paragraph of the judgements  
2 are quite clear, you can take one or two sentences, they're all in our appeals brief, but when the  
3 Trial Chamber comes to the conclusion, and I quote, "That the evidence does not demon -- "  
4 ...*(microphones overlapping)*

5 MR. PRESIDENT:

6 May we have the paragraph, please?

7 MS. DIMITRI:

8 Yes, Mr. President. I am sorry. It is paragraph 676 of the judgement.

9

10 So in paragraph 676 the Trial Chamber at the present end of the paragraph states that:

11

12 "... the Chamber observes that the evidence does not demonstrate that it was impossible to travel from  
13 Kigali to Nyamyumba *commune*."

14

15 That's the burden we have.

16

17 And again, in paragraph 675, the Trial Chamber finishes -- it's the last phrase of the paragraph:

18

19 "... the Chamber doubts -- doubts that Ngirabatware was at the PGC on 7 April 1994."

20

21 So clearly we had to convince them that we were at the PGC in Kigali rather than raising a reasonable  
22 doubt that we were in Gisenyi.

23

24 In our brief you also -- there is quite a big chapter on how the Chamber compartmentalised the  
25 evidence and didn't look at the evidence as a whole. And how the Trial Chamber took witness per  
26 witness and assessed their credibility without looking at the overall evidence. So I just want to give you  
27 two examples, because we're running out of time.

28

29 The first one, the first negative consequence of this assessment made by the Trial Chamber who looks  
30 at the evidence witness per witness is Witness Byilingiro. So he is a Defence witness, an alibi Defence  
31 witness who testified that he saw Mr. Ngirabatware arriving at the Presidential Guard camp in the  
32 evening of April 6, and who stayed there until himself, Mr. Byilingiro left the premises, so he testified on  
33 Mr. Ngirabatware's alibi.

34

35 The Trial Chamber concludes that they have doubt that Mr. Byilingiro was at the Presidential Guard  
36 camp. This is at paragraph 668 of the judgement. The Trial Chamber says:

37

1 "... the Chamber doubts that Byilingiro was present at the Presidential Guard camp."

2

3 Now, this paragraph 668 is the only paragraph where the Trial Chamber assesses the credibility of  
4 Byilingiro. At no point will you see whether or not the Trial Chamber discussed if Byilingiro was  
5 corroborated by other witnesses. And we respectfully submit that when you want to look at the  
6 evidence as a whole it's part of what you have to do as a Trial Chamber.

7

8 There was Witness Winnie Musabeyezu who was corroborating the presence of Byilingiro. The  
9 Trial Chamber does not discuss that.

10

11 Mr. Ngirabatware himself who testified corroborated the presence of Byilingiro at the Presidential Guard  
12 camp. The Trial Chamber doesn't discuss that. The Trial Chamber ends this paragraph by saying that  
13 because of two contradictions in Mr. Byilingiro's testimony they doubt that he was at the  
14 Presidential Guard camp on the 7th of April.

15

16 Now, the same error is made, and I'll give you another example, on the phone call, the phone call that  
17 our client made to alibi Witness DWAN-7. So the evidence is the following: around 1 pm in the  
18 afternoon of April 7 our client states, and he testified, that he called Mr. DWAN-7, who's an EU  
19 representative, and he stated that he was trying to find refuge at this house because his house was in  
20 Kigali and there was an attack at the Presidential Guard camp. DWAN-7 testified to the same effect  
21 and testified that Mr. Ngirabatware called him from Kigali, and DWAN-7 had made a statement in 1999  
22 or in 2000 to that effect, so 10 years before the indictment, saying, "He called me in the afternoon of  
23 April 7."

24

25 Now, what the Chamber does to reject the testimony of DWAN-7 is that it states that there is no direct --  
26 and this is at paragraph 673 -- the Chamber states in the second line of paragraph 673 that:

27

28 "There is no direct evidence on the record to show that Ngirabatware indeed called Witness DWAN-7  
29 from the PGC, the Presidential Guard camp, or Kigali in the afternoon of 7 April 1994."

30

31 This is incorrect. And again this is a consequence of not looking at the evidence as a whole. There is  
32 direct evidence that he called from the PGC in Kigali. You have Witness Winnie Musabeyezu, you  
33 have Mr. Ngirabatware himself, they both stated that the phone call was directly made by the PGC.

34 They both corroborated Witness DWAN-7. I will stop here with my ...*(microphones overlapping)*

35 MR. PRESIDENT:

36 Judge Moloto.

37

1 JUDGE MOLOTO:

2 Is this the phone call in which one of the people talking on the phone says he heard gunshots  
3 somewhere?

4 MS. DIMITRI:

5 Yes. Yes, Judge. It is.

6 JUDGE MOLOTO:

7 My question about that is: In the whole of the area where the war was taking place, was that place the  
8 only place where gunshots were being fired?

9 MS. DIMITRI:

10 According to the evidence, Judge, on 7 April the evidence on the record states that where there were  
11 gunshots it was in Kigali. There is no evidence on the record to show that in the afternoon of April 7  
12 there were several gunshots or bombing outside Kigali. So I'm relying on the evidence only. And the  
13 question was put to some witnesses whether or not there were several gunshots being heard in  
14 Gisenyi, and the answer was no.

15 JUDGE MOLOTO:

16 Thank you.

17 MS. DIMITRI:

18 Now the last subject on which I would like to address you on is again on ground two, which is the alibi.

19

20 The other effect of not looking at the evidence as a whole is that, to put you in context, the Defence filed  
21 a notice of alibi saying we were in Kigali between 6 April and 12 April. Now, the evidence on the record  
22 is that on April 6 in the evening up to 8th April before lunch, Mr. Ngirabatware was at the  
23 Presidential Guard camp in Kigali.

24

25 The evidence on the record is that he left his house in Kigali after a phone call made between him and  
26 Mr. Mugiraneza, that they left together in a convoy to the Presidential Guard camp. And you have  
27 Witness Winnie Musabeyezu who testifies on that; you have Witness DWAN-122 who testified that  
28 Mr. Mugiraneza arrived, they left together, that they were escorted by a military vehicle and that they  
29 were going to the Presidential Guard camp. You have Mr. Ngirabatware himself who testifies to that  
30 effect.

31

32 Now, the Chamber decided, and it specifically says so, that it will limit its assessment of the alibi to  
33 April 7 and April 8. However, April 6 was relevant, because it somehow gave some support to the alibi.  
34 It's -- you know, we didn't pick a date, we had a story. He left his home with Mugiraneza, went to the  
35 Presidential Guard camp, arrived around midnight, and then you had some other witnesses who says,  
36 like Byilingiro and Bongwa, "Yes. We remember he arrived around 12 or 1 am, or around 11 -- after  
37 11 pm." It was all -- it was a story. There was no interruption. So April 6 was relevant, but

1 the Chamber remains silent. We do not know whether or not they believe Mr. Ngirabatware's alibi on  
2 April 6, and it's relevant to decide whether or not he had the time to travel between Kigali and Gisenyi, if  
3 he did so, at what time? When did he leave? Did he leave in the morning of April 7? Because there's  
4 no evidence that anyone saw him leaving the PGC. So did they believe the portion of April 6 when he  
5 arrived at the Presidential Guard camp? And if they did, up to what point do they stop believing the  
6 alibi? We don't know. The Chamber is silent on that.

7

8 Same thing for April 8, we do not know which part of April 8 the Trial Chamber believes. All we know is  
9 that they believed the alibi that he arrived between 11 and 12 at the French Embassy, together with  
10 Witness Winnie Musabeyezu. The transcript of the telegrams from the French Embassy are also used  
11 by the Trial Chamber to make that assessment because the French Embassy telegram specifically  
12 states that he was together with his wife, kids and Witness Musabeyezu and her husband.

13

14 Now, do they believe the first part? Because Musabeyezu said, "We left the PGC in the morning of  
15 April 8 and we went together at the French Embassy." And the documents and the evidence says and  
16 the Chamber believes that he arrived there with Musabeyezu at the French Embassy. There is no  
17 evidence that he went with Musabeyezu to Gisenyi to distribute weapons. There is no evidence that he  
18 went back from Gisenyi to Kigali, went to the Presidential Guard camp, picked her up and brought her  
19 to the French Embassy. All this was relevant. They are all relevant considerations; they were part of  
20 the evidence that were supporting the alibi. But the Trial Chamber remains silent. The Trial Chamber  
21 only states that they do not believe April 7, that they believe that he travelled from Kigali to Gisenyi. We  
22 don't know when, we don't know how long he stayed in Gisenyi, we don't know how he left the  
23 Presidential Guard camp, when he left the Presidential Guard camp, because according to us it's only  
24 April 7 that the Chamber did not believe, not April 6. They don't say anything on April 6, and that was  
25 important. And that, we submit, is part of what the Trial Chamber was required to do.

26

27 I will now give the floor back to Mr. Mettraux and hope that he has sufficient time.

28 MR. PRESIDENT:

29 He will note that you have something like three minutes.

30 MR. METTRAUX:

31 I will do the best with three minutes, Your Honour, and I'll take you directly to paragraph 815 of the  
32 judgement, and that's a paragraph which I will read to you, because it shows the erroneous, we submit,  
33 approach of the Trial Chamber in the way it's considered the evidence and why that has distorted its  
34 findings.

35

36 The Trial Chamber said this:

37

1 "Before turning to the evidence of other witnesses, the Chamber observes that both Witness ANAE and  
2 Witness ANAM provided credible, reliable and compelling accounts that Ngirabatware distributed  
3 weapons at roadblocks on 7 April 1994."  
4

5 So what you have here, Your Honour, is a Trial Chamber that makes preliminary findings in relation to  
6 both the credibility and reliability of the critical witnesses in the case before having considered any other  
7 evidence. This is wrong; this is an error of law, this is an error of fact.  
8

9 But the Chamber goes further, as is apparent from that paragraph they make a finding about the  
10 incident itself based on their evidence alone. Again, this is wrong. What it does in practice,  
11 Your Honour, is it completely changed the nature of the evidential process. The evidential process is  
12 not about whether the evidence as a whole raised a reasonable doubt about any fact material to the  
13 Prosecution case. It becomes a game, Your Honour, of measuring the evidence that we brought  
14 forward against the already believed account of these two witnesses. And from the point of view of the  
15 burden of proof it means we have to raise a reasonable doubt in the mind that's already made of the  
16 Trial Chamber that they were wrong. We have to unconvince them.  
17

18 From the point of view of the Trial Chamber -- and I will go very fast and finish in my three minutes --  
19 but from the point of view of the Trial Chamber what it means, Your Honour, is you have to explain  
20 away all of the evidence that would contradict this mind that is already made.  
21

22 They have used three strategies for doing so, and I will just have time for the first one, because it's the  
23 most serious one. The Chamber invented evidence. They made things up to reject evidence. I'll give  
24 you one example: ANAE, ANAM had put ANAO, a prosecution witness at the roadblock participating in  
25 the alleged distribution of weapons. ANAO was believed in every incriminating respect by the  
26 Trial Chamber. He was disbelieved only in relation to one element of his evidence; namely, when he  
27 denied having been present at that location at that time. What the Trial Chamber says as a reason for  
28 disregarding his evidence is, "Well, he might have reason to put himself out of the picture." There was  
29 no evidence of that, Your Honour, of him wanting to put himself out of the picture. The Prosecution  
30 never put such a proposition to him under Rule 90(G)(ii) as it was required. In fact, the Prosecution  
31 until the end of the case relied upon this witness as a witness of truth and to this day does so. The  
32 impugning of that witness was done solely, exclusively by the Trial Chamber and without any evidence  
33 to support it.  
34

35 Your Honour, I think I've used my three minutes and I will sit down now. Thank you.

36 MR. PRESIDENT:

37 I really appreciate the fact that the Defence stuck to the time allotted to them.

1 And we will now turn to the Prosecutor for one hour.

2 MS. DIMITRI:

3 Mr. President, if I may, while the Prosecution is distributing documents, I just want to give you  
4 references.

5 MR. PRESIDENT:

6 I will withdraw the compliment that I gave you.

7 MS. DIMITRI:

8 Because you asked me a question about the public, the people at the roadblock, I just want to give you  
9 a specific transcript reference to what I said. So when I said that Witness ANAN specified that he  
10 spoke to Honoré, it's 1st February 2010, page 36.

11

12 And when I said that Witness ANAT said that he spoke to the people blocking the road, it's 16 March  
13 2010, page 67.

14

15 And I apologise to my colleague.

16 MR. PRESIDENT:

17 Thank you. We will take a note of that.

18

19 Please proceed.

20 MS ONSEA:

21 Good morning, Your Honours. My name is Inneke Onsea.

22

23 To provide you with a road map of our submissions today I will first address you on Ngirabatware's  
24 grounds one, three and four; his conviction for genocide and rape under JCE III liability.

25

26 Takeh Sendze will then make submissions on ground five, relating to his conviction for incitement to  
27 commit genocide; and ground two, which relates with alibi which the Chamber found not to be credible.

28

29 And Chelsea Fewkes will then deal with his challenges against the indictment.

30

31 First ground one, Your Honours.

32

33 The Chamber correctly found that Ngirabatware gave weapons to killers in Nyamyumba. He told them  
34 to use the weapons to kill Tutsis because he did not want to see any Tutsi anymore. Ngirabatware  
35 thereby substantially contributed to killings and attacks in Nyamyumba.

36 I will now go through a chronology of the facts, Your Honours, based on the Chamber's findings and the  
37 evidence. These facts will show that Ngirabatware's genocide conviction should be affirmed.

1 As a minister of the Rwandan government Ngirabatware was one of the most important men in the  
2 country; he could do anything he wanted. In his native *commune*, Nyamyumba, his word was law.

3  
4 Several witnesses described him as being like a god, an idol, and an "opinion leader".

5  
6 No one would dare to publicly contradict what Ngirabatware said. In fact, he himself conceded,  
7 Your Honours, that he was a figure of authority in Gisenyi. Judgement paragraph 86 and footnote 132;  
8 13 October 2009, pages 27, 29; 19 October 2009, pages 38 to 39; and 9 February 2010, page 37.

9  
10 I'm going to use a presentation now, Your Honours, which should be on your screen and which shows  
11 that Ngirabatware was at the top of the hierarchy in Nyamyumba, and in fact he could order anyone in  
12 the *commune*.

13  
14 Under Ngirabatware, Your Honours, was Bagango, and he was the *Interahamwe* leader of Nyamyumba  
15 *commune* and at the same time *bourgmestre*.

16  
17 Bagango took Ngirabatware's orders and was his right-hand man. Witnesses testified that Bagango  
18 was a cruel killer. He was known for racist anti-Tutsi speeches long before the genocide. Nine October  
19 2009, pages 27 to 28; 25 January 2010, page 52; 4 March 2010, page 70.

20  
21 He was already an *Interahamwe* leader when the *Interahamwe* attacked and raped in 1992, 1993 the  
22 Tutsi Bagogwes.

23  
24 Ngirabatware knew Bagango since childhood and was his neighbour. He frequently praised him at  
25 meetings. And this is at 13 October 2009, page 27; 16 March 2010, page 69; and judgement 145, 210  
26 and 215.

27  
28 Under Bagango in the hierarchy was *conseiller* Simpunga, and he was the leader of the *Interahamwe* in  
29 Rushubi *secteur* where he was *conseiller*. Also Simpunga took orders from Ngirabatware and he was  
30 involved in the distribution of weapons on 7 April; judgement 802, 869, 1315 and footnote 1597.

31  
32 But Ngirabatware was not limited to this chain of command, Your Honours. Rather, he could directly  
33 order anyone in the *commune*. In fact, the evidence was that people would do anything the authorities  
34 asked, including to commit murder. 25 January 2010, page 36; 16 February 2010, page 7.

35 Even before the genocide, Ngirabatware and his old friend and right-hand man Bagango, frequently  
36 appeared at meetings where they gave racist anti-Tutsi speeches. Sometimes they distributed guns  
37 and grenades together.



1 In 1993, at the Nyamyumba *commune* office Ngirabatware said that the Tutsis and their spouses were  
2 accomplices of the enemy.

3

4 Ngirabatware also asked about the ongoing Bagogwe massacre, and I will come back to that later.  
5 Judgement paragraph 1309.

6

7 In January 1994, at the Nyamyumba *commune* office Ngirabatware congratulated Bagango for fighting  
8 Tutsis. Judgement paragraph 1310.

9

10 In February 1994, at the Cyanika-Gisa roadblock Ngirabatware told his audience that they should -- that  
11 Tutsis should be killed. Judgement 319, 1366 to 1370.

12

13 Around the same time, at the ELECTROGAZ roadblock, he told his audience to set up more roadblocks  
14 so Tutsis could not escape; judgement 299, 1361.

15

16 In early 1994, at Umuganda Stadium, Ngirabatware said that the Tutsis and their spouses collaborated  
17 with the enemy; judgement paragraph 448.

18

19 Also in early 1994, at the Kanyabuhombo school, Ngirabatware gave a hateful speech and praised  
20 Bagango and the *Interahamwe*. Bagango distributed rifles and grenades after that meeting; judgement  
21 215, 1311.

22

23 In March 1994, at Gatunda school, Ngirabatware made clear that the Tutsis should leave; judgement  
24 413, 1312.

25

26 And finally, shortly before 6 April, Ngirabatware promised weapons to 600 to 800 *Interahamwe*. Six  
27 cartons of grenades and boxes with guns were then distributed at the Gitsimbi-COTAGIRWA roadblock  
28 in the presence of Bagango; judgement 488, 1313.

29

30 It is this powerful man, Your Honours, full of ethnic hatred who went to Nyamyumba on 7 April 1994 to  
31 kick-start the genocide.

32

33 The killings had already started in Nyamyumba, but for Ngirabatware the killings went too slow. He  
34 therefore came to the roadblocks and he demanded Bagango and the *Interahamwe* to kill more  
35 effectively. He gave them machetes, firearms and grenades. Judgement 869 to 870, 876; 15 March  
36 2010, page 81.

37

1 Your Honours, I'm going to use now another presentation and it's based on Exhibit P. 7. And that is  
2 also the exhibit that the Defence used.

3

4 This is Exhibit P. 7 and these are the two roadblocks in question. This is an enlargement of P. 7  
5 showing the two roadblocks. The roadblocks are in fact very close together, only a hundred metres  
6 apart. Judgement footnote 1058.

7

8 Both roadblocks are in Rushubi *secteur* where Simpunga was a *conseiller* and the *Interahamwe* leader;  
9 P. 6 (S2) and P. 6 (S3); judgement 802.

10

11 Ngirabatware's first weapon distribution: He first went to the *Petit Bruxelles* roadblock. People present  
12 at the roadblock included Hassan Tubaramure. Bagango and Simpunga also arrived. Ngirabatware  
13 had come with a truck full of machetes. He said, "These are the weapons. I have brought them. I  
14 would not want to see any Tutsi alive in *Bruxelles*."

15

16 Ten machetes were offloaded from the truck and given to Bagango. Bagango then gave them to  
17 Simpunga who kept one for himself and the others were distributed among his *Interahamwe*.

18

19 The rest of the machetes were then brought to *Bourgmestre* Bagango's house which was near the  
20 Gitsimbi-COTAGIRWA roadblock and offloaded there by *Interahamwe* Hassan Tubaramure. Bagango  
21 said that he would distribute the weapons in other *secteurs*. These weapons were meant for killing.  
22 Judgement 710, 869; 20 October 2009, page 40.

23

24 Later that day Ngirabatware returned to the *Bruxelles* roadblock with two cars full of guns and  
25 grenades –

26 MR. PRESIDENT:

27 (*Microphone not activated*)

28 MS. ONSEA:

29 Yes. Later that day Ngirabatware returned to *Bruxelles* roadblock with two cars full of guns and  
30 grenades. Boxes with weapons were offloaded and given to the *Interahamwe*.

31

32 Ngirabatware reprimanded the *Interahamwe* for only pretending to work and said that he brought  
33 weapons because he did not want to see Tutsis anymore.

34 Ngirabatware demanded that Safari be killed. *Interahamwe* present at the roadblock, Murazemungu  
35 and Juma, immediately left for Safari's house, together with other *Interahamwe*.

36

37 And I will come back to that later.

1 MR. PRESIDENT:

2 Excuse me, Counsel, your mention of footnote 1058, and the distance of about 100 metres between the  
3 roadblocks.

4 MS ONSEA:

5 Footnote?

6 MR. PRESIDENT:

7 1058 which you mentioned a few minutes ago, the Defence mentioned that --

8 MS ONSEA:

9 It refers to the site visit report, Your Honour.

10 MR. PRESIDENT:

11 Sorry?

12 MS. ONSEA:

13 It refers to the site visit report and it is stated in the site visit report that the distance between the two  
14 roadblocks was 100 metres.

15 MR. PRESIDENT:

16 Is this the same situation about the -- which Defence described as being more than 1000 metres. It's  
17 not? You are speaking about a different one?

18 MS ONSEA:

19 I'm now speaking about the difference between *Petit Bruxelles* roadblock and Gitsimbi-COTAGIRWA  
20 roadblock.

21 MR. PRESIDENT:

22 So there is no conflict between the ...*(microphones overlapping)*

23 MS ONSEA:

24 No. There is no conflict.

25 MR. PRESIDENT:

26 Thank you.

27 MS ONSEA:

28 Defence was talking about the roadblock where the incitement took place.

29 MR. PRESIDENT:

30 Very good. I just wanted on the record to ...*(microphones overlapping)*

31 MS ONSEA:

32 The Gitsimbi-COTAGIRWA roadblock.

33 MR. PRESIDENT:

34 You are discussing different.

35 MS ONSEA:

36 Yes. I'm now dealing with Ngirabatware's conviction for genocide.

37 From *Petit Bruxelles* roadblock where the second weapon distribution took place, Your Honour,

1 Ngirabatware drove to the Gitsimbi-COTAGIRWA roadblock, which, as I just said, was only 100 metres  
2 apart. People present at the roadblock included *Bourgmestre* Bagango, ANAO and  
3 Hassan Tubaramure.

4

5 Ngirabatware said that weapons from his car should be offloaded on Bagango's car and the weapons  
6 were offloaded from Ngirabatware's car to Bagango's car.

7

8 Ngirabatware said again that he brought weapons because he did not want to see any Tutsi anymore.  
9 He ordered *Bourgmestre* Bagango to work well and he repeated the call for the killing of Safari. And  
10 this is at judgement 879, 881 -- I'm sorry, Your Honours, judgement 715 to 716, 840, 870, 1304, 1336.

11

12 All roadblocks were manned by dangerous and notorious killers who would implement Ngirabatware's  
13 genocidal instructions. And this is at judgement 879, 881, 1375.

14

15 Contrary to the Defence claims, Your Honours, Ngirabatware's acts substantially contributed to the  
16 attacks and killings in Nyamyumba *commune*.

17

18 In paragraphs 877 to 881 of the judgement, the Chamber referred to many examples. I will just  
19 highlight a few of them here.

20

21 One of the most immediate consequences of Ngirabatware's acts was the attack and killing of Safari.  
22 *Interahamwe* who were involved in attacking and killing Safari are *Interahamwe* leader Bagango,  
23 Hassan Tubaramure, Murazemungu and Juma, all of whom had been at roadblocks where  
24 Ngirabatware had said that the Tutsis should die.

25

26 They attacked Safari almost immediately after Ngirabatware's instigation, badly wounded him and left  
27 him for dead. A few days later Bagango found Safari in a hospital and had him finally killed.

28 Judgement paragraph 710 to 717; 839, footnote 1118; 6 October 2009, page 66; 25 January 2010,  
29 pages 45, 50 to 51.

30

31 While there was evidence that Safari was already attacked in the morning, and in fact the Defence  
32 makes much of this, it was ultimately the attack cutting his leg and ear and his murder by Bagango that  
33 occurred after Ngirabatware's instigation.

34

35 ANAO: ANAO manned the Gitsimbi-COTAGIRWA roadblock. ANAO in fact admitted to killing  
36 Nzabanita only hours after Ngirabatware's instigation on 7 April.

37 Félix Niyoniringiye, who also manned the Gitsimbi-COTAGIRWA roadblock, he killed Mukarugambwa

1 only hours after Ngirabatware's instigation in the evening of 7 April. But not only -- the references are  
2 judgement paragraph 824, footnote 1118; 6 October 2009, page 66; 23 June 2011, page 31; D23C;  
3 16 February 2010, page 4 and judgement 935, 943, footnote 1599.

4

5 But not only the *Interahamwe* from the roadblocks where Ngirabatware spoke joined the killings, but  
6 also Ngirabatware's right-hand man, Bagango, as of 7 April followed Ngirabatware's call to work well.  
7 He gathered *Interahamwe* and started the killing spree.

8

9 AFS testified that on 9 April Bagango's *Interahamwe* attacked and killed the Tutsis living at Muhingo;  
10 2 March 2010, page 24.

11

12 ANAU testified that Bagango was involved in the killing of Babonampoze, Karekezi and Blaise.  
13 Judgement footnote 1597.

14

15 ANAJ testified that Bagango offered a reward on his head; 8 October 2009, page 18 to 19.

16

17 On 10 April, Bagango distributed grenades and threatened AFS because of his Tutsi wife.  
18 Subsequently, *Interahamwe* attacked AFS. Judgement 860, 867, 877; 4 March 2010, page 62.

19

20 ANAM testified that Bagango would distribute grenades, guns and machetes to *Interahamwe* which  
21 were used to kill Tutsis, and this is at transcript 25 January 2010, page 52.

22

23 Indeed, Your Honours, Bagango was one of the most notorious killers in the Nyamyumba *secteur* and  
24 he was imprisoned to life sentence for genocide and other crimes and he was sentenced in six of the 12  
25 *secteurs* of Nyamyumba. He is imprisoned at Gisenyi. Nine February 2010, pages 51 to 52, 55;  
26 13 October 2009, page 33; and 8 December 2010, page 27.

27

28 On the basis of these facts, Your Honours, the Chamber reasonably found that Ngirabatware  
29 substantially contributed to the attacks and killings in Nyamyumba *commune*. He kick-started the  
30 genocide by coming with truckloads full of weapons and by reprimanding the *Interahamwe* for not  
31 working fast enough.

32

33 The killers immediately responded and attacked and murdered Safari. Other *Interahamwe* from the  
34 roadblocks where Ngirabatware had spoken also joined killings. Judgement 839 to 840, 870 to 871,  
35 881.

36

37 Ngirabatware is also linked to the killings through his old friend and right-hand man Bagango, who went

1 on a killing spree in Nyamyumba after Ngirabatware told him to work well.

2

3 The Chamber was reasonable to conclude that Ngirabatware's decided intervention by bringing the  
4 trucks of weapons and his words substantially contributed to the ensuing massacres led by Bagango  
5 and others.

6

7 Therefore, Ngirabatware's challenges to his conviction fail. His argument that there was no direct  
8 evidence as to where exactly the machetes, the guns and the grenades were used misses the point,  
9 because this is a circumstantial case, Your Honours, no direct evidence was required.

10

11 Ngirabatware has not shown why the Chamber was not entitled to infer that the truckloads of weapons  
12 accompanied by the repeated demands for killings instigated and aided and abetted the killings in  
13 Nyamyumba *secteur*.

14

15 Unless you have any questions, Your Honours, I will proceed with grounds three and four.

16 MR. PRESIDENT:

17 Please proceed.

18 MS ONSEA:

19 The Chamber correctly convicted Ngirabatware under JCE III for the repeated rape of  
20 Chantal Murazemariya carried out by *Interahamwe* Juma and Makuze. Judgement paragraph 1393.

21

22 Both Juma and Makuze manned the Gitsimbi-COTAGIRWA roadblock. Both were under the authority  
23 of Bagango. Both were involved in the attack of Safari and both were searching for Tutsis when they  
24 encountered Chantal Murazemariya, attacked her and raped her repeatedly; judgement paragraph 972,  
25 981, 1321 to 1322, footnote 1599.

26

27 The Chamber was reasonable to find that all the requirements for JCE III liability were met.

28

29 Plurality of persons: Ngirabatware, Juma, Makuze and others.

30

31 The contribution to the JCE: Ngirabatware provided weapons at the roadblocks and he made  
32 instigating remarks. Juma and Makuze were involved in attacks and they were looking for Tutsis.  
33 Juma's and Makuze's conduct also showed that they shared Ngirabatware's explicitly stated common  
34 purpose to exterminate the Tutsis and intent to exterminate the Tutsis; judgement paragraph 1305,  
35 1322.

36

37 And while the Chamber's findings of intent to exterminate were not explicit, implicit findings are

1 permissible, Your Honours. *Karera* appeals judgement paragraph 318; *Ndindiliyimana* appeals  
2 judgement paragraph 263; Prosecution response brief paragraph 193.

3

4 In the course of the execution of the JCE to exterminate, Juma and Makuze were looking for Tutsis,  
5 encountered Chantal Murazemariya and raped her repeatedly.

6

7 The commission of rape by JCE members was also foreseeable to Ngirabatware and he knew of the  
8 substantial possibility that rapes would occur.

9

10 The Chamber was reasonable to infer that the rape of Chantal Murazemariya was foreseeable for  
11 Ngirabatware. And this for two reasons, first of all, it was common sense that rapes would occur in  
12 Nyamyumba. If women and girls are stripped of all rights and protection, if they are left to the mercy of  
13 bands of genocidal killers who act with full impunity, then it's not only possible but is virtually certain that  
14 some of these women and girls will be raped. And since Ngirabatware himself demanded for mass  
15 murder he was aware of the circumstances that rendered rape possible. Judgement paragraphs 1387  
16 to 1388.

17

18 Moreover, the Chamber also reasonably inferred that Ngirabatware knew of the rapes that were  
19 committed during the previous 1992, 1993 massacres of the Bagogwe Tutsis. And this is at judgement  
20 paragraph 1389.

21

22 Your Honours, unless you have further questions this would conclude my submissions on grounds  
23 three and four.

24 MR. PRESIDENT:

25 Judge Liu.

26 JUDGE LIU:

27 Thank you, Mr. President.

28

29 I have a question to the counsel: That on page 15 of the indictment it is alleged that the joint purpose  
30 of the joint criminal enterprise was the extermination of the Tutsi civilian populations. But the  
31 Trial Chamber acquitted the appellant of the crime of extermination under Count 5; at the same time  
32 convicted him for the rapes and the joint criminal enterprise three. My question is that: I wonder  
33 whether the appellant was still a member of the joint criminal enterprise for the extermination of the  
34 Tutsi civilian populations? Thank you.

35 MS ONSEA:

36 Well, Your Honour, Ngirabatware was not convicted under the charge of extermination because of  
37 pleading issues. The Chamber found that the weapon distribution which was pleaded under

1 paragraph 50 and which set as date mid-April was not proven.

2

3 Now, for a JCE III the commonly intended crime does not need to be executed, so extermination, but in  
4 this case we say that there was evidence of lots of mass killings. The commonly intended crime need  
5 not succeed so long as a foreseeable crime succeeds. And that is *Brđanin* appeals judgement,  
6 paragraphs 430 to 431.

7

8 Does that answer your question?

9

10 So although he was not convicted for extermination it was still possible for the Chamber to find him  
11 responsible under JCE III for rape as a foreseeable consequence of a JCE to exterminate.

12 JUDGE LIU:

13 Would you please indicate the specific paragraph in the trial judgement -- well, the Trial Chamber  
14 convicted him as a member of the JCE? And you may come back at -- leave your station.

15 MS ONSEA:

16 Yes. I will give you the paragraph references later with respect to his acquittal for extermination and the  
17 reasons therefore, and with respect to his conviction for JCE III for rape as a foreseeable consequence  
18 of a JCE to exterminate.

19 JUDGE LIU:

20 Thank you. Thank you very much.

21 MR. PRESIDENT:

22 I have a follow-up question on this complex of issues.

23

24 Could you discuss the legal standard used by the Trial Chamber to determine that Ngirabaware had  
25 the requisite *mens rea* for the crime of rape as a crime against humanity under the extended form of  
26 joint criminal enterprise?

27

28 And related to that, why do you believe that the evidence on which the Trial Chamber relied was  
29 sufficient to establish that the rape of Chantal was foreseeable to Ngirabaware?

30

31 Thank you.

32 MS ONSEA:

33 Well, Your Honours, what you have to establish under JCE III is that rape was substantially foreseeable  
34 to Ngirabaware. And in *Đorđević* the Appeals Chamber has said -- and I'm just going to make sure  
35 that I give you the right reference -- *Đorđević* paragraph 922; namely, that you have to look at the  
36 circumstances in which the rapes take place. And second, that Ngirabaware knew of the rapes  
37 committed during the -- that were going to be committed.



1 Now, first of all, the only reasonable consequence, in our submission, is that rapes would occur in  
2 Nyamyumba; that the environment was such in which rapes would occur. These were mass killings  
3 and during the mass killings it is foreseeable to Ngirabatware that the rapes would occur. And he  
4 himself demanded that the mass murder of Tutsis, that he was aware of the circumstances that renders  
5 rape possible.

6

7 And moreover, at the time he knew that rapes had already been committed during the Bagogwe  
8 massacres in 1992 and 1993. In fact, at that time Tutsis in Nyamyumba *commune* were raped by  
9 *Interahamwe* under the leadership of Ngirabatware's old friend and *de facto* subordinate Bagango.

10

11 He also publicly discussed these massacres, Your Honours, at meetings and he actively sought  
12 information about it. Under these circumstances it was foreseeable to Ngirabatware that the rapes  
13 would be committed again. They were committed previously and they would be committed again in a  
14 new situation.

15 MR. PRESIDENT:

16 Thank you.

17

18 And Judge Moloto.

19 JUDGE MOLOTO:

20 I'm trying to follow your argument, Counsel. I get a little bit confused.

21

22 You say it was reasonably consequential that rape would occur. That phrase suggests to me an  
23 objective standard, an objective test. And you seem to move from that reasonable consequence  
24 standard to say, therefore, it was subjectively apparent to the appellant that rapes would occur. And  
25 the only reason that sort of approximate -- the subjective test being the previous rapes that took place  
26 somewhere.

27

28 I'm not hearing you say there was evidence on the record that he knew about those, and what evidence  
29 that is, if any.

30 MS ONSEA:

31 Are you talking about the rapes that happened in 1992, 1993?

32 JUDGE MOLOTO:

33 I'm talking about the rape that he is charged with.

34 MS ONSEA:

35 Well, first of all, there is evidence on the record that rapes occurred during the Bagogwe massacres in  
36 1992, 1993, and we are saying that because he knew of these massacres, because he was on the  
37 ground actively seeking information --

1 JUDGE MOLOTO:

2 No. My question is: How did he know? What is the evidence that shows that he knew?

3 MS ONSEA:

4 Well this is a reasonable inference, Your Honour.

5 JUDGE MOLOTO:

6 That's the objective standard.

7 MS. ONSEA:

8 Yes.

9 JUDGE MOLOTO:

10 Is that the test? Is the test objective or subjective?

11 MS ONSEA:

12 The test is, Your Honours, that it was substantially foreseeable for him that rapes would occur.

13 JUDGE MOLOTO:

14 Substantial foreseeability.

15 MS. ONSEA:

16 Yes.

17 JUDGE MOLOTO:

18 Is that objective or subjective, according to you?

19 MS ONSEA:

20 Well, Your Honours, it is subjective, but you have to look at the surrounding circumstances, and in this

21 case --

22 JUDGE MOLOTO:

23 How is it subjective? How do you attribute this knowledge specifically to appellant?

24 MS ONSEA:

25 We have to prove that he knew that it was reasonably foreseeable that rapes would occur.

26 JUDGE MOLOTO:

27 Do you have to prove that he was aware that it was reasonably foreseeable or do you have to prove

28 that he was aware that rape would occur?

29 MS ONSEA:

30 We have to prove that it was reasonably foreseeable that rapes would occur, Your Honours.

31 JUDGE MOLOTO:

32 Thank you. I understand the position of the prosecution.

33 MS ONSEA:

34 So now I pass over to Takeh Sendze.

35 MR. PRESIDENT:

36 Counsel.

37

1 MR SENDZE:

2 Yes. Good morning, Your Honours.

3

4 Under ground five of Ngirabatware's appeal he has claimed that the Chamber erred in finding that the  
5 public element of the crime of direct and public incitement was established.

6

7 Your Honours, the Chamber correctly found at paragraph 1367 that this element was established.

8

9 The evidence on the record is the following: The evidence established that Ngirabatware's inciting  
10 statement was directed at and intended for an audience of 150 to 250 people who had converged in at  
11 the Cyanika-Gisa roadblock in the context of a public -- large-scale public demonstration, and it was not  
12 limited to those manning the roadblock.

13

14 The record testimony of ANAN at pages -- sorry, 1 February 2010, pages 33 to 37; and ANAT's  
15 testimony of 16 March 2010 at page 67.

16

17 Ngirabatware has claimed today that ANAN and ANAT testified that the statement was only made to  
18 those manning the roadblock. That is not the record, Your Honours.

19

20 ANAN's testimony of 1st February 2010 at page 37, precisely at lines 16 to 19, is evident from the  
21 question asked: "About how many youths did Ngirabatware speak to?" ANAN responded: "I would  
22 say between 150 to 250 youths."

23

24 And even ANAT, whom the Defence claimed testified that Ngirabatware spoke to those blocking the  
25 roadblock, his testimony was given in the context of this public demonstration and he said they were  
26 blocking the roadblock -- they were blocking the road, he didn't say they were manning the roadblock.  
27 And that is the testimony of 16 February 2010, page 67, lines 34 to 37. They were blocking the road,  
28 and that is what a demonstration does, Your Honours.

29

30 Moving on, Your Honours, Ngirabatware's claim that the Chamber abused its discretion in assessing  
31 the witness credibility is also false. For example, the Chamber reasonably found at paragraphs 305,  
32 306 and 318 that Prosecution Witnesses ANAN and ANAT were credible because they gave first-hand  
33 testimony.

34 MR. PRESIDENT:

35 Excuse me, Counsel, supposing that all of the number that you have mentioned consisted only of  
36 people who were manning or blocking the road, is there a certain magical number beyond which --  
37 which has become so great that even if these people were only manning the block beyond that number

1 we would regard this as -- the number as being large enough to speak of public, not on the private  
2 incitement?

3 MR SENDZE:

4 Your Honours, it is about the context in which a statement is delivered. There was a large-scale public  
5 demonstration going on. It was a public demonstration and it converged at the location of the  
6 roadblock.

7

8 Now, the number of 150 to 250 can give an indication of the public nature. But again, this roadblock  
9 was located in a public area. It was on the Kigali-Ruhengeri highway, there were no restrictions as to  
10 who could be present, and so the number, it's only one of those elements that can be relied upon to find  
11 the public element of the crime.

12

13 Thank you, Your Honours.

14

15 As I submitted, the Chamber reasonably relied on ANAN and ANAT because they corroborated each  
16 other on the material aspects of the allegation. They were both present at the Cyanika-Gisa roadblock,  
17 they testified to seeing Ngirabatware there. They testified to his inciting statement and they also  
18 testified to the presence of the crowd in the context of this demonstration.

19

20 Your Honours, the appellant has argued that the Witnesses ANAN and ANAT colluded. The Chamber  
21 was correct to find that this was only speculative. And, Your Honours, it is clear that the statement of  
22 ANAT which was recorded in 2005 by Witness ANAN -- and that is Exhibit D. 83 in this case -- did not  
23 even implicate the accused in the Cyanika-Gisa roadblock incident.

24

25 ANAN's own statement of 8th April, which is Exhibit D. 83 in this case, was written prior to ANAT's  
26 statement. And in that statement ANAN had already accused Ngirabatware or implicated him in these  
27 events. So the fact that he wrote ANAT's statement with his more legible handwriting did not even  
28 expose him to the information the Defence claim he was exposed to.

29

30 So, Your Honours, there really was no collusion between the witnesses, and the Chamber was  
31 reasonable to also find that the inconsistencies or the variations in their testimonies also discounted the  
32 possibility of collusion. And you have so accepted in your finding in *Gatete* at paragraph 86.

33

34 Your Honours, I will move on to address Defence witnesses: Mainly the appellant has claimed that  
35 the Chamber ignored or wrongly assessed the testimonies of UNAMIR Witnesses DWAN-114 and  
36 Aouili. Your Honours, at paragraphs 253 to 266 and 314 to 316 of the judgement, the Chamber  
37 considered their evidence and reasonably found it to be of little probative value, because of the

1 operational limitations placed on their ability to effectively carryout their mandate and observe events in  
2 Gisenyi in 1994.

3

4 Your Honours, this finding is supported by the testimony of Witness DWAN-114 who testified on the  
5 21st of February 2012, at page 4, and agreed that it was possible that the Cyanika-Gisa roadblock  
6 incident could have happened even though the UNAMIR observers did not witness it or hear about it.

7

8 He further agreed at page 11 of that transcript that their general ability to move around Gisenyi, their  
9 numerically small number of UNAMIR observers in Gisenyi, and their limited ability to communicate in  
10 Kinyarwanda hindered their ability to carry out their mission. So, Your Honours, the Chamber was  
11 reasonable to find at paragraph 318 that the limitations imposed on their ability to carry out their mission  
12 gave or rendered their evidence to be of very little probative value, and so when compared with the  
13 firsthand and credible testimonies of ANAN and ANAT the Chamber was reasonable to find and believe  
14 the Prosecution's evidence.

15

16 Your Honours, we would submit that ground five be dismissed because the Chamber did not commit  
17 any errors of law or fact when it found Ngirabatware guilty for the crime of direct and public incitement  
18 to commit genocide.

19

20 Moving on to ground two, Your Honours, the Trial Chamber correctly rejected Ngirabatware's alibi for  
21 7 April 1994. First, at judgement paragraph 685, it reasonably found based on the circumstances of  
22 this case that the late and piecemeal manner in which Ngirabatware filed his notice raised a high  
23 probability that his alibi notice was tailored to fit the Prosecution's case and therefore devoid of  
24 credibility.

25

26 Your Honours, having violated the provisions of Rule 67(A)(ii) and in spite of several Trial Chamber  
27 orders, specific information about Ngirabatware's alibi were only revealed after 17 prosecution  
28 witnesses had testified, including those witnesses who placed him in Nyamyumba on the  
29 7th of April 1994.

30

31 Your Honours have found in *Semanza* at paragraph 93 that a Chamber can reasonably rely on these  
32 circumstances to draw a negative inference on the credibility of alibi evidence.

33

34 Secondly, Your Honours, contrary to Ngirabatware's submissions, after thoroughly examining the  
35 individual and collective credibility of the witnesses, the Chamber reasonably found at judgement  
36 paragraphs 646 to 675 that the alibi witnesses were individually and collectively unreliable, especially  
37 because of the inconsistencies in their testimonies and the added consideration that they were

1 motivated to protect Ngirabatware because of their close personal and professional relationships.  
2 Your Honours, the Defence cited Witness Byilingiro, for example. But, Your Honour, this is a witness  
3 who enjoyed a long-standing professional relationship with Ngirabatware. And before meeting with  
4 Defence counsel he had never before put himself at the Presidential Guard camp on the 7th April. It  
5 was only after meeting Defence counsel that he then alleged that he was at the Presidential Guard  
6 camp and saw Ngirabatware on the 7th of April. Your Honours, this witness is not reliable and should  
7 not be relied upon.

8  
9 Finally, Your Honours, the Trial Chamber also reasonably found at judgement paragraph 661 that  
10 based on the evidence, including its own observations during its site visit, even if Ngirabatware was in  
11 Kigali on 7 April 1994 it was feasible for him to have travelled from Kigali to Gisenyi and distributed  
12 weapons and be back in Kigali in the early afternoon of the 8th of April.

13  
14 So, Your Honours, basically ground two of Ngirabatware's appeal should be dismissed because again  
15 he has not demonstrated any errors in the Trial Chamber's findings.

16  
17 If there are no other questions, Your Honours, I will give the floor to my colleague Chelsea Fewkes to  
18 address you on the indictment issues.

19 MR. PRESIDENT:

20 Judge Moloto.

21 JUDGE MOLOTO:

22 Is it the Prosecution's position that Ngirabatware's presence at Gisenyi is proved because of the  
23 feasibility that he could go there and go back to the Presidential Guard, or is it based on the fact that he  
24 did do so?

25 MR SENDZE:

26 Your Honours, it is based on the fact that he did do so, and the Chamber relied on the testimonies of  
27 Prosecution Witnesses ANAE, ANAM and ANAL.

28  
29 The feasibility of travel was only raised to address the issue of alibi, so the conviction stands on its own  
30 based on the Prosecution evidence from ANAE, ANAM and ANAL which the Chamber relied upon to  
31 make the conviction.

32  
33 Thank you.

34 MR. PRESIDENT:

35 Thank you.

36

37 You may proceed.

1 MS FEWKES:

2 Good morning, Your Honours.

3

4 The Trial Chamber rejected Ngirabatware's claims that the indictment was defective as general and  
5 unsubstantiated. At paragraph 27 it found that he benefited from an effective and well-planned trial  
6 strategy that demonstrated his complete understanding of the Prosecution's case.

7

8 This approach was consistent with Appeals Chamber jurisprudence such as *Simba* appeal judgement  
9 paragraph 64 that an accused's conduct at trial can establish sufficient notice.

10

11 Moreover, many of the claims he makes on appeal are simply afterthoughts that were not raised at the  
12 appropriate time in pre-trial proceedings in accordance with Rule 72(A).

13

14 My submissions will be presented in three parts:

15

16 First I will address paragraph 16 which sufficiently pleaded Ngirabatware's aiding and abetting and  
17 instigation of genocide. Secondly, I will explain that Ngirabatware's responsibility under JCE III was  
18 properly pleaded. And finally I will demonstrate that paragraph 49 of the indictment adequately pleaded  
19 Ngirabatware's direct and public incitement to commit genocide.

20

21 Your Honours, paragraph 16 was not defective and Ngirabatware was convicted of exactly what was  
22 pleaded; namely, aiding and abetting and instigating genocide by distributing weapons in Nyamyumba  
23 *commune* in April 1994. At all times his Defence to this allegation was that he was never in  
24 Nyamyumba *commune* and he presented two alibis from 6 to 12 April and from 23 April to 23 May;  
25 Ngirabatware's pre-Defence brief paragraph 3(a).

26

27 His first claim relates to ANAM's evidence. This is not an indictment issue, but he claims that he was  
28 misled by the pre-trial brief in believing that ANAM and ANAE would testify to two different allegations  
29 whilst the Trial Chamber found only one. He was not misled. He knew early on in the trial that their  
30 evidence could be interpreted as recounting the same event, and in fact his Defence counsel said of  
31 these two witnesses that they saw, "Exactly the same thing, in the same timeline, in the same area,  
32 with the same people." 20 October 2009, pages 72 to 74.

33

34 He also knew that their evidence could be dated by the attack on Safari which he described as crucial  
35 and key to the evaluation of their evidence. That is the same citation as I have just provided.

36

37 His cross-examination established that both witnesses saw each other when they saw Safari's

1 wounded body after they had seen him distributing weapons. 20 October 2009, pages 66 to 68; 26  
2 January 2010, page 47.

3

4 And finally, he knew that Safari's attack occurred on 7 April and he called two witnesses to establish  
5 that date, DWAN-3 and DWAN-133.

6

7 And he suffered no prejudice in the Trial Chamber's finding that only one allegation was established  
8 and not two. He complains that the Trial Chamber did not accept the Prosecution's interpretation of the  
9 evidence, when the *Kanyarukiga* Appeals Chamber has stated at paragraph 124 that Trial Chambers  
10 will make their own factual findings irrespective of any characterisations advanced by the parties.

11

12 The only prejudice he alleges is that he called witnesses to support a mid-April distribution, as well as a  
13 7 April distribution. However, he had to call those witnesses in support of his alibi from 6 to 12 April;  
14 they were therefore relevant to the 7 April date as well as other allegations of mid-April offending  
15 contained in the indictment. The mere fact that he used resources defending against an allegation that  
16 was ultimately not proven is not impermissible prejudice. *Ntakirutimana* appeal judgement  
17 paragraph 43.

18

19 Your Honours, the pleading of April 1994 was a sufficiently concise date and the Chamber was entitled  
20 to find that ANAE and ANAM both testified to 7 April.

21

22 Ngirabatware's next challenge concerns the location of the Nyamyumba *commune* pleading. A similar  
23 pleading was upheld in *Rutaganda* at paragraph 304.

24

25 Moreover, he failed to challenge the specificity of this location prior to trial in accordance with  
26 Rule 72(A) and he did not object to this evidence contemporaneously. He called Defence witnesses  
27 who manned both the *Bruxelles* and the Gitsimbi-COTAGIRWA roadblocks during April 1994 who  
28 testified that they never saw him in the *commune* during the genocide, DWAN-9, DWAN-133,  
29 DWAN-147.

30

31 Your Honours, the indictment also properly pleaded the victims and the perpetrators. Where the mode  
32 of liability alleged is one of aiding and abetting or instigating, all that is required is the identification of  
33 the particular acts of the accused which form the basis of the charge. *Blaškić* appeal judgement  
34 paragraph 213.

35

36 In cases of non-physical commission, perpetrators and victims may be pleaded with less specificity.  
37 *Blaškić* appeal judgement paragraphs 210, 213. In this case both were pleaded by category.



1 And Ngirabatware's conduct at trial shows he did not require the names of the victims in order to  
2 prepare his Defence. He thoroughly cross-examined prosecution witnesses on the victims they  
3 identified without objecting to that evidence. The transcripts are provided in footnote 123 of the  
4 Prosecution's respondent's brief and 16 February 2010, pages 4 and 5; 18 February 2010, pages 69 to  
5 70 and 81 to 83.

6  
7 In his pre-Defence brief he listed DWAN-39 who would challenge any direct or indirect link between  
8 Ngirabatware and those who killed Safari, Mukarugambwa, Butitira and his children, Thérèse and  
9 Nzabanita; registry pagination 9081 to 9084.

10  
11 He knew that Safari's attack was relevant to the genocide allegation and he continued to defend against  
12 it. The witnesses he said he would have called had he known of his responsibility for these killings  
13 would have offered only hearsay or cumulative evidence to that already on the record.

14  
15 Similarly, the perpetrators were properly pleaded. This is another example of where Ngirabatware did  
16 not challenge the pleading in compliance with Rule 72(A) but waited until the trial was almost  
17 completed.

18  
19 The indictment was about Nyamyumba *commune* and *Interahamwe* militia from that location. This is  
20 clear, for example, from paragraph 18 that Bagango was the president of the Nyamyumba  
21 *Interahamwe*, and was further affirmed by the pre-trial brief which mentioned *Interahamwe* groups from  
22 Nyamyumba cellules. Once again, his Defence strategy shows that he understood the case. He called  
23 several *Interahamwe* who manned roadblocks in Nyamyumba *commune*, including two directly  
24 implicated in the weapons distribution, DWAN-71 and DWAN-4.

25  
26 Your Honours, to conclude this section of my submissions, Ngirabatware did not suffer any prejudice.  
27 The indictment was sufficiently specific and his conduct demonstrates that he fully understood the case.

28  
29 I'm going to use a PowerPoint for the next section of my submissions.

30 MR. PRESIDENT:

31 You know, Counsel, that you have about four minutes.

32 MS FEWKES:

33 Thank you, Mr. President.

34

35 I'm going to move directly to ground five of Ngirabatware's appeal which concerns the location of the  
36 roadblock of the direct and public incitement.

37

1 I'm sorry, Your Honours, my colleague will assist me.

2

3 Your Honours, Ngirabatware challenges the notice he received of the location for his conviction on  
4 direct and public incitement. He complains about minor differences between the indictment and the  
5 evidence, none of which have rendered the indictment defective. He raises three issues on appeal,  
6 none of which were challenged prior to trial, and the Trial Chamber found that Ngirabatware did not  
7 justify why he raised those matters at the very end of the trial. Judgement paragraph 227.

8

9 His first complaint is that the location of the *commune* was erroneously placed in Nyamyumba  
10 *commune* when in fact it was in neighbouring Rubavu *commune*.

11

12 However, this mistake was inconsequential, the indictment pleaded that the location of the roadblock  
13 was on the Cyanika-Gisa tarred road, which was an 800 to a thousand-metre stretch of the overland  
14 road that connected Gisenyi with Kigali. Paragraph 91 of Ngirabatware's reply brief uses that  
15 measurement.

16

17 The second issue he raises is in relation to the term "customs office" which was given to the roadblock.  
18 In the exhibit shown to you earlier by Defence counsel, (S10) of Exhibit P. 6 the Prosecution clearly  
19 indicated that the term "customs office " was a nickname given to that roadblock, because -- and I will  
20 read from that exhibit:

21

22 "They, *Interahamwe*, searched people in vehicles passing through Gisa roadblock just like a customs  
23 office."

24

25 Ngirabatware knew that there was no physical customs office at that location and that it was just a term  
26 of reference used by *Interahamwe*. He does not indicate how he suffered prejudice from these two  
27 evidential inconsistencies.

28

29 The final complaint he raises on appeal is that he did not know whether the location of his incitement  
30 was closer to Gisa or closer to Cyanika. He has not demonstrated how this would have shown him  
31 prejudice or why he waited until February 2012 to claim difficulty understanding the location of the  
32 demonstration. In fact, he called four witnesses to refute the allegation at that location, DWAN-49,  
33 Habinshuti, Aouili, DWAN-114.

34

35 To conclude, Your Honours, this was not a defective indictment. Ngirabatware understood and  
36 defended against the allegations.

37

1 Unless Your Honours have any further questions, that will mark the end of my submissions and the  
2 submissions on behalf of the prosecution.

3 MR. PRESIDENT:

4 There are no questions.

5

6 And thank you also, the Prosecution, for complying with the time limits.

7

8 As pointed out in the scheduling order we will now have a 20-minute break and we will reconvene at  
9 1203.

10

11 The Court will now rise.

12 *(Court recessed at 1145H)*

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1 (Court resumed at 1205H)

2 MR. PRESIDENT:

3 We will now have a reply by counsel for Mr. Ngirabatware of 30 minutes.

4 MS ONSEA:

5 I'm sorry, Your Honours.

6 MR. PRESIDENT:

7 Yes.

8 MS ONSEA:

9 Judge Liu also requested some references which I would still like to give him, if that's possible.

10

11 Judge Liu, to come back to your question, the judgement paragraphs in which the Chamber acquitted  
12 Ngirabatware of the extermination charge because of pleading issues are judgement paragraphs 885  
13 and 1387.

14

15 And the judgement paragraphs that the Chamber -- in which the Chamber convicted Ngirabatware as a  
16 member of the JCE to exterminate is judgement paragraph 1305 to 1307, 1322 to 1323.

17

18 Thank you.

19 MR. PRESIDENT:

20 Thank you.

21

22 We will now move to the Defence and you will have until 1235.

23

24 The Defence, please.

25 MS. DIMITRI:

26 Thank you, Mr. President.

27

28 I will again start with ground five, Mr. President, and direct and public incitement.

29

30 So to reply to what my colleague from the Prosecution side indicated, they said that Witness ANAN and  
31 Witness ANAT, the two witnesses used to convict Mr. Ngirabatware on direct and public incitement,  
32 corroborated each other and both indicated that they were each other present at the roadblock when  
33 they witnessed the alleged incitement.

34

35 And this, Mr. President, is wrong. Witness ANAT specifically said that Witness ANAN was not there.  
36 He even went further than that and said that ANAN never manned that roadblock because he was living  
37 way too far and that he never came in that area. And Witness ANAN is the Witness the Trial Chamber

1 states is -- we contest that, but nevertheless it's important in this context -- the Trial Chamber states  
2 that Witness ANAN was the chairman of the Gisenyi *préfecture Interahamwe*, so he was a well known  
3 figure. Then again, ANAT missed him that day, never saw him, says he wasn't there and never  
4 manned that roadblock. So there is no corroboration here on two witnesses that the Trial Chamber had  
5 to approach, we say it again, with caution.

6 JUDGE MOLOTO:

7 Can you please give us the citation on the transcript?

8 MS. DIMITRI:

9 Yes. Sure. In a minute, Judge Moloto, if you don't mind. Now, I will come back with the specific  
10 references.

11

12 On the notice issue which was addressed by another colleague from the Prosecution, again on ground  
13 five on the direct and public incitement, they say, and I paraphrase, that there was no prejudice  
14 regarding the custom office because the Exhibit (S10) says that it was not really a custom office, that it  
15 was an area where *Interahamwe* would stop people and ask them for their identity cards, so that we  
16 were well aware before the beginning of the trial that this so-called "Cyanika-Gisa roadblock" was not  
17 where there was a custom office.

18

19 Again, this is wrong. If you look in your tab, tab 1.4. And I'm now referring to the pre-trial brief, point 4  
20 of the summary of Witness ANAN. So this is before the trial, and before the trial Witness ANAN is the  
21 only witness who is going to testify on this allegation, and the notice we get is that Ngirabatware gave  
22 money, 30,000 francs to CDR party members who were at Gisenyi customs. Gisenyi customs,  
23 Your Honours, is more than six kilometres away. It's the indication in the direction that I showed you  
24 this morning on Exhibit (S10), P. 6 (S10).

25

26 So this was the theory of the prosecution at the beginning. It was again restated in Witness ANAN  
27 notes and it was again restated when the Prosecution before the site visit specifically requested to visit  
28 the Gisenyi custom. There was a reason. They asked to visit the Gisenyi custom because one of the  
29 pre-trial brief allegation was that that's where the direct and public incitement had occurred.

30

31 Prosecution states again on ground five that there was no prejudice to the Defence because we called  
32 witnesses to rebut the allegation on the direct and public incitement.

33

34 To say that there's no prejudice, it's too easy. When you look at the record, when you look at how a  
35 Defence team prepares investigations in practice; if you know exactly where the location is, you'll call  
36 witnesses who were living there, who had their house at the corner of that so-called roadblock. Your  
37 entire Defence strategy, you will conduct meaningful investigations if you're faced with a roadblock that

1 keeps to be a moving target. Your Defence will not be as efficient as if you have a clear notice this is  
2 where the roadblock was.

3

4 And finally on this issue, my learned friend from the Prosecution says that there was no collusion  
5 between ANAT and ANAN. He advanced a theory that ANAN had written his statement before ANAT  
6 wrote his statement because his statement was dated 2005. Well, let me just re-read what  
7 Witness ANAT says and it's quite obvious that there was at least some contamination between those  
8 two witnesses. And you will find this under tab 3.3:

9

10 "Since I started my testimony against Augustin Ngirabware in 2005, and let me say I did so in Gisenyi  
11 province before the public prosecution I did so together with ANAN, and he was the one who recorded  
12 in the documents what I told him regarding allegations against Ngirabware, as the prosecutor of  
13 Gisenyi had requested of us. I do not know whether ANAN came to say whatever. But be that as it  
14 may, whatever he may have said, it simply means that he has relied on the documents which we -- we  
15 prepared."

16

17 And this comes from a witness, ANAT, who says that ANAN never went to that roadblock.

18

19 And for the specific reference it's 17 -- for the reference you asked, Judge Moloto, 17 March 2010,  
20 page 56 to 59 -- page 56 and 59.

21 JUDGE MOLOTO:

22 Thank you.

23 MS. DIMITRI:

24 I will now address you on ground one and ground two:

25

26 First, just a short word on ground two on the alibi: My colleague says that the Chamber did not make  
27 any errors of law or errors of fact, that it was allowed to say that the alibi was fabricated and that, for  
28 example, Byilingiro, it was only after the Defence met with him.

29

30 Now, again, this is a consequence of not looking at the evidence as a whole. We did not have any  
31 specific indication that Mr. Ngirabware was at such-and-such place on the 7 April or on the 8th April.  
32 We filed a notice of alibi that covered an entire period.

33

34 Now, what is the Prosecution saying? That the Defence fabricated evidence on 7 April, specifically told  
35 the witnesses, "Fabricate your evidence on 7 April but not on 8," because on 8 they're believed, and it's  
36 the same witnesses. Same witnesses who testified on the 8th April, 9 April, they are found truthful by  
37 the Trial Chamber; the Trial Chamber believes that he was at the French Embassy. So these

1 witnesses came and fabricated evidence on the 7 April without knowing that this is the date where we  
2 were charging Mr. Ngirabatware, but did not fabricate on the 6 or on the 8 or the 9 or the 10? It's again  
3 a problem of looking at the evidence as a whole and the consequence of the Trial Chamber remaining  
4 silent on the 6, on the 9, 10, 11, on the other dates that somehow supported the alibi and the credibility  
5 of those alibi witnesses.

6

7 Now, on ground one, my colleague says that we were -- we never had any prejudice because we knew  
8 very well that it was 7 April. We knew what the witnesses were going to testify on. We knew that we  
9 were charged with the death of Safari, of Mukarugambwa, of Thérèse and that in any event we would  
10 have called witnesses who would testify on hearsay or who would have added corroboration. Again,  
11 this is wrong, for a few reasons.

12

13 The first is if you look at paragraph 32 of the indictment, the indictment specifically states that Thérèse,  
14 Safari, Mukarugambwa were killed because they were on a list of Tutsis to be eliminated and that the  
15 contribution of Mr. Ngirabatware was made in February 1994 at the Butare meeting.

16

17 Now, during the trial the Prosecution dropped that charge, changes theory, but we only find out in the  
18 Prosecution's closing brief. That's when for the first time they tell us, "Hey, you know what, we change  
19 our theory on Safari, Thérèse and Mukarugambwa and now this is what you are charged with. You are  
20 charged with their death and it's linked to paragraph 16." You may want to ask yourself: If they were  
21 able to put the name of these victims in paragraph 32 of the indictment, why did they not put these  
22 names in paragraph 16?

23

24 Now, they also state that we knew very well that it was the 7 of April and that we didn't have any  
25 prejudice. The Prosecution team -- at trial the Prosecution appeal team has a complete different  
26 approach.

27

28 The Prosecution trial team until the end of the trial stated on numerous occasions, and it's all in our  
29 brief, that Witness ANAM testified seeing our client on the 13 or 14th of April. We filed documentary  
30 evidence to rebut that, because she stated that he came with his wife and children. We filed  
31 documentary evidence from the French Embassy showing that the wife and children had fled the  
32 country; that they were sent to Bujumbura by the French Embassy.

33

34 Now the appeal team has a different allegation. They now choose to say, "No. No. Witness ANAM  
35 said she saw your client on 7 April." And they say, "You didn't have any prejudice. You would have  
36 called the same witness." Wrong. The Trial Chamber in the judgement says that it's true that on  
37 13, 14 April the family of Mr. Ngirabatware was not in Rwanda. But if we move the testimony and

1 distort the testimony of Witness ANAM to move her from 13 April to 7 April, now it's possible. It is  
2 possible for Mr. Ngirabatware's family to be in Gisenyi with him distributing weapons. Had I known that  
3 this was the position of the prosecution I would have called Mr. Ngirabatware's wife to come and testify  
4 and say that she never set foot in Gisenyi on 7 April.

5

6 Now, the Prosecution also states that there is a lot of evidence of killings by Bagango, that there was a  
7 lot of mass killings afterwards. There is not a single piece of evidence that any Tutsi in Nyamyumba  
8 *commune* was killed with a Kalashnikov or a grenade or a machete allegedly distributed by  
9 Mr. Ngirabatware.

10

11 She also states that Bagango was responsible for the killing of Safari and that's how it's linked to  
12 Mr. Ngirabatware's conviction for genocide under paragraph 16. Again, she's misstating the record;  
13 there is absolutely no evidence that Bagango killed himself Safari Nyambwega.

14

15 And finally before I give the floor to my learned colleague, the Prosecution state -- she referred to it a  
16 little bit, but you have to look again to paragraph 772 of the judgement, 732 and 788. The  
17 Trial Chamber believes two witnesses on the attack of Safari Nyambwega, DWAN-3 and ANAF, and  
18 these two witnesses say that Safari was attacked in the morning of 7 April. Now, the allegation and the  
19 conviction in relation to Mr. Ngirabatware is that he will have arrived and distributed weapons in Gisenyi  
20 after 2 pm, so therefore there is no link between the attack on Safari, there is no contribution with the  
21 attack that occurred in the morning and the so-called alleged distribution that would have occurred in  
22 the afternoon while he was, and we reiterate, in Kigali at the Presidential Guard camp.

23

24 I will now give the floor to my colleague. Thank you.

25 MR. METTRAUX:

26 Your Honours, there is a difference between an inference and a fertile imagination. For an inference  
27 you need evidence, albeit circumstantial. For your imagination, or fertile imagination you only need the  
28 willingness to use it.

29

30 Now, what the Prosecution here is proposing you should do is what the Trial Chamber did in relation to  
31 fundamental findings of facts, which is never mind the fact that there is no evidence on the record, use  
32 your imagination.

33

34 Example one, the Prosecutor suggested that there was evidence, albeit circumstantial, that some of the  
35 weapons allegedly distributed by our client were used for killings. That's Count 2, aiding and abetting  
36 and instigating. What evidence? There is no such evidence. What crime? What weapon? There is  
37 no such evidence, Your Honour. You can look at the record; there is nothing.



1 The second example that Judge Moloto queried about, the trips supposedly taken by our client in the  
2 Nyamyumba *commune* in April and in the Gisenyi area in February of 1994. The Chamber -- the  
3 Trial Chamber spends pages describing or discussing the roads taken, the time it would have taken  
4 Dr. Ngirabatware, the vehicles used, whether they would have been stopped at roadblocks or not.  
5 There is no evidence of those trips. This is the fruit of their imagination. What you have is our client,  
6 according to the Trial Chamber, who has the ability to teleport himself from one area to another and  
7 materialise in particular location. Where was he between those two times? Where was he? You won't  
8 know from the trial judgement.

9

10 Same thing with the submissions of my colleagues regarding the supposed foreseeability which  
11 eventually conceded is a subjective test. And that's of course correct; they had to establish that our  
12 client himself could have foreseen the commission of such crimes. What's the evidence of that?  
13 There's no evidence our client ever have had information about a rape being committed, having been  
14 committed anywhere. In fact, they never put that suggestion to him when he testified; if that had been  
15 their case that was their chance.

16

17 Another question that has been asked from the bench from Judge Moloto and Judge Liu was the issue  
18 of extermination. And of course the answer to your question, your Honour, is much simpler than the  
19 one the Prosecution was trying to give you. There is no conviction in relation to the core crime and it  
20 has nothing to do with an issue of pleading.

21

22 And I will read the paragraph in question; it's paragraph 1378 of the judgement, it says this:

23

24 "As addressed in the factual findings, the Prosecution has not established beyond reasonable doubt  
25 any of the allegations pleaded in support of this charge. The Chamber therefore finds that  
26 Ngirabatware has not -- not not been proven guilty of extermination as a crime against humanity insofar  
27 as he was charged with this crime."

28

29 In other words, Your Honour, there is no finding that the commission of the core crime was established.  
30 And I remind you, and of course you know it, this is not an inchoate offence. There is no finding either  
31 of the *actus reus* for this crime, and of course no finding of the *mens rea* for that crime. Therefore, in  
32 those circumstances, there was simply no possibility for the Trial Chamber to make a finding that a JCE  
33 with as its core crime and its goal the commission of extermination had been committed or could be  
34 committed.

35

36 Your Honour, this is all we have to say in reply today and we will simply indicate that because of the  
37 errors of law and the errors of facts that were committed by the Trial Chamber which invalidate the

1 judgement and resulted in mischarge of justice, we ask you to quash the conviction of our client, enter a  
2 verdict of acquittal, and we're grateful for your attention.

3 MR. PRESIDENT:

4 Thank you very much.

5

6 Any of my colleagues, questions?

7

8 Thank you very much, Counsel for the Defence.

9

10 And now, Mr. Ngirabatware, you have the possibility to make a statement, an optional statement, a  
11 personal statement of 10 minutes. Would you like to avail yourself of that possibility? You would  
12 please kindly observe the 10-minute limit. The floor is yours, Mr. Ngirabatware.

13 APPELLANT NGIRABATWARE:

14 Good afternoon, Mr. President. Good afternoon, Honourable Judges.

15

16 It's the first opportunity I have to personally address Your Honourable Court. It's a unique and very  
17 important moment for me. I thank you, Your Honours, for granting me this opportunity.

18

19 My Defence team has throughout the proceedings very competently demonstrated the lack of fairness  
20 in my case. The arguments presented by *Maitre* Dimitri and Dr. Mettraux are clear, focused and  
21 convincing. Your Honours, I think humbly that it will not be hard for you to draw the same conclusions  
22 than those outlined by my counsels. This is then a particular opportunity for me to address them, to  
23 address my sincere thanks to them, to my Defence team; also Mr. Deogratias who worked very  
24 tirelessly, because they knew undoubtedly that I am innocent, and they used to tell me that.

25

26 Your Honours, I would like to express my thanks also to all the Defence witnesses who came here to  
27 tell the Trial Chamber the truth. I thank particularly to those of the Tutsi ethnic group who came from  
28 Rwanda despite the serious threats they were facing and several measures taken against them in order  
29 to discourage them from coming to testify.

30

31 Mr. President, Honourable Judges, all the erroneous findings of the Trial Chamber's judgement have  
32 been crystal clear, rebutted in various Defence briefs we have submitted, as well as through the very  
33 brilliant pleadings made by *Maitre* Dimitri and Dr. Mettraux today. Then really I don't need to repeat  
34 them. I can just say that I am deeply sad to be convicted of crimes I never committed. I would like to  
35 add humbly that if really one looks closely and objectively in my behaviour and in my doings before and  
36 after April '94, nobody will find something bad. I did everything in my power for all citizens of Rwanda.  
37 I had no anti-Tutsi attitude, either in the ministries I am working in nor at the university where I was a

1 part-time lecturer in the same time.

2

3 In Rwanda from '92 up to April 1994 there was an abundant press and sound freedom of speech. I  
4 remember that it was written notably about discrimination on the basis of ethnic or political membership.  
5 No single newspaper or radio or television broadcast ever that stated that I had an anti-Tutsi attitude.  
6 Because I was sure that my attitude was beyond reproach as regards the killings and all the crimes  
7 committed in Rwanda in '94 I chose to testify in my case as the first witness. I was the first witness to  
8 go to the box there. I wanted to demonstrate that there was no need at all to fabricate the proof through  
9 the Defence witnesses. I spent 24 days in the box of witnesses and I answered straight out all the  
10 questions put to me by the Judges, the Bench, and the Prosecution. I avoid nothing. And despite the  
11 situation, the Chamber choose not to believe in my testimony, or merely the Chamber didn't explain me  
12 why they didn't believe me. This can be seen very easily in the judgement.

13

14 Honourable Judges, this was a very important unfairness I am suffering from because my testimony  
15 had to be given a due weight.

16

17 Mr. President, Honourable Judges, all this being said, I want just to tell you and all the persons who are  
18 hearing me now, that I have been and I am still greatly saddened by the Rwandan tragedy.

19

20 Mr. President, allow me to pay due respect to all the victims of the Rwandan genocide, whatever their  
21 ethnic origin or their political affiliation.

22

23 The seven years -- almost seven years that I have already so far spent in prison has been the most  
24 challenging of my life. However, Honourable Judges, I humbly trust to your wisdom and I sincerely  
25 hope that you will objectively consider the submissions made by my Defence team throughout the  
26 appeal pleadings, the briefs and the pleadings of today and I hope that ultimately you will declare me  
27 not guilty.

28

29 Mr. President, Honourable Judges, I thank you very much for hearing me.

30 MR. PRESIDENT:

31 Thank you, Mr. Ngirabatware.

32

33 This concludes the hearing of the appeal in this case.

34

35 Before we adjourn, I would like to take this moment to thank counsel for their work on this case.

36

37 I would also like to express my gratitude to the registry staff here in the courtroom who have so ably

1 facilitated our hearing today, and to the interpreters for their excellent assistance.

2

3 The Appeals Chamber will render its judgement in due course.

4

5 We are adjourned.

6 *(Court adjourned at 1235H)*

7 *(Pages 1 to 51 by Deirdre O'Mahony)*

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CERTIFICATE

I, Deirdre O'Mahony, Official Court Reporter for the Mechanism for International Criminal Tribunals, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand (*stenotype*) and thereafter transcribed by computer; that the foregoing pages contain a true and correct transcription of said proceedings to the best of my ability and understanding.

I further certify that I am not of counsel nor related to any of the parties to this cause and that I am in nowise interested in the result of said cause.

\_\_\_\_\_ Deirdre O'Mahony

