ICTR-2001-64-A
07 July 2006
(1797/H - 1668/H)

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UNITED NATIONS
NATIONS UNIES

**Tribunal pénal international pour le Rwanda**
**International Criminal Tribunal for Rwanda**

**IN THE APPEALS CHAMBER**

**Before:** **Judge Mohamed Shahabuddeen, Presiding**
**Judge Mehmet Güney**
**Judge Liu Daqun**
**Judge Theodor Meron**
**Judge Wolfgang Schomburg**

**Registrar:** **Mr. Adama Dieng**

***Judgement of:*** ***7 July 2006***

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**SYLVESTRE GACUMBITSI**

**v.**

**THE PROSECUTOR**

***Case No. ICTR-2001-64-A***

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# JUDGEMENT

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**The Office of the Prosecutor:**

Mr. Hassan Bubacar Jallow
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1796/H

# CONTENTS


**I. INTRODUCTION** ..... 1

A. BACKGROUND ..... 1
B. THE APPEALS ..... 2
C. STANDARDS OF APPELLATE REVIEW ..... 3

**II. THE APPEAL OF SYLVESTRE GACUMBITSI** ..... 5

A. INTERLOCUTORY DECISIONS (GROUND OF APPEAL 1) ..... 5
1. Decision on the Indictment ..... 5
2. Decisions of 28 July 2003 and 28 August 2003 ..... 6
(a) Decision of 28 July 2003 ..... 7
(b) Decision of 28 August 2003 ..... 8
3. Decision of 1 August 2003 ..... 9
4. Decisions of 11 and 18 November 2003 ..... 10
B. GENOCIDE (GROUND OF APPEAL 2) ..... 14
1. Legal Characterization of the *Mens Rea* Element of the Crime of Genocide ..... 14
2. Specificity of the Indictment in Respect of the Murder of Mr. Murefu ..... 17
3. Assessment of the Evidence Supporting the Genocide Conviction ..... 23
(a) Alleged Errors Pertaining to Witness TAW ..... 23
(b) Credibility of Witness TBH ..... 27
(c) Credibility of Witnesses TAS, TBI, TBJ, and TBK ..... 28
(d) Alleged Factual Errors Concerning the Attacks at Nyarubuye Parish ..... 29
(e) Conclusion ..... 30
C. CRIMES AGAINST HUMANITY: EXTERMINATION (GROUND OF APPEAL 3) ..... 31
1. The Requisite Intent for the Crime of Extermination ..... 31
2. Victims Named in the Indictment ..... 33
3. Factual Basis for the Conviction ..... 33
D. CRIMES AGAINST HUMANITY: RAPE (GROUND OF APPEAL 4) ..... 37
1. Were the Rapes Part of a Widespread or Systematic Attack? ..... 37
2. Assessment of the Evidence ..... 38
E. SENTENCING (GROUND OF APPEAL 5) ..... 40

**III. THE APPEAL OF THE PROSECUTION** ..... 41

A. MURDER AS A CRIME AGAINST HUMANITY (GROUND OF APPEAL 2) ..... 41
1. Alleged Errors in Not Finding that the Appellant Ordered the Murder of Marie and Béatrice ..... 41
2. Alleged Failure to Consider Other Modes of Liability ..... 42
B. RESPONSIBILITY FOR RAPES COMMITTED IN RUSUMO COMMUNE (GROUND OF APPEAL 3) ..... 45
1. Instigation ..... 45
(a) Legal Requirements for Instigation ..... 45
(b) Evidence Supporting Instigation ..... 46
(i) The Rape of Witness TAS ..... 46
(ii) The Rapes of Witness TAP and her Mother ..... 47
(iii) The Rapes Recounted by Witness TAO ..... 48
2. Other Modes of Liability under Article 6(1) of the Statute ..... 49
3. Article 6(3) Liability ..... 49
C. ELEMENTS OF RAPE AS A CRIME AGAINST HUMANITY (GROUND OF APPEAL 4) ..... 52
D. JOINT CRIMINAL ENTERPRISE (GROUND OF APPEAL 5) ..... 55
1. Applicable Law Concerning the Pleading of Joint Criminal Enterprise ..... 55
2. Allegations in the Indictment ..... 57
3. Whether Defects in the Indictment were Cured ..... 60

1795/H

E. AUTHORITY FOR ORDERING (GROUND OF APPEAL 6) ..... 63
1. Alleged Error of Law ..... 63
2. Alleged Error of Fact ..... 64
F. SENTENCING (GROUND OF APPEAL 1) ..... 66
1. The Appellant's Use of the Communal Police ..... 66
2. The Appellant's Formal Status as a Superior ..... 66
3. The Appellant's Prior Good Character, Accomplishments, and Relationships with Tutsis .. 67
4. Alleged Irrelevant Factors in Mitigation ..... 68
5. Gravity of the Crimes and Degree of Criminal Culpability ..... 69
6. Implications of the Appeals Chamber's Findings on the Sentence ..... 71

**IV. DISPOSITION ..... 73**

**V. SEPARATE OPINION OF JUDGE SHAHABUDDEEN ..... 75**

A. PRELIMINARY ..... 75
B. THE INDICTMENT WAS NOT DEFECTIVE AS IT STOOD ..... 76
C. IF THERE WAS ANY DEFECT IN THE INDICTMENT CONCERNING MR MUREFU, IT WAS CURED SO AS TO MAKE EVIDENCE OF HIS KILLING ADMISSIBLE ..... 77
D. THE TRIAL CHAMBER MADE OTHER FINDINGS OF FACT WHICH SHOWED THAT THE APPELLANT COMMITTED GENOCIDE ..... 80
E. IN ANY EVENT, THE APPELLANT WAS RESPONSIBLE FOR GENOCIDE THROUGH GROUP CRIMINALITY ..... 83
1. Joint Criminal Enterprise ..... 83
2. Co-perpetratorship ..... 87
F. AIDING AND ABETTING THE MURDER OF TENANTS ..... 90
G. CONCLUSION ..... 93

**VI. JOINT SEPARATE OPINION OF JUDGES LIU AND MERON ..... 95**

**VII. SEPARATE OPINION OF JUDGE SCHOMBURG ON THE CRIMINAL RESPONSIBILITY OF THE APPELLANT FOR COMMITTING GENOCIDE ..... 100**

A. INTRODUCTION ..... 100
B. DOES COMMITTING REFER GENERALLY TO THE DIRECT AND PHYSICAL PERPETRATION OF THE CRIME BY THE OFFENDER? ..... 100
C. GENERAL REMARKS ON THE PLEADING OF "COMMITTING" GENOCIDE ..... 101
D. THE CRIMINAL RESPONSIBILITY OF THE APPELLANT FOR "COMMITTING" GENOCIDE BASED ON HIS KILLING OF MR. MUREFU ..... 104
E. THE CRIMINAL RESPONSIBILITY FOR "COMMITTING" IN GENERAL ..... 104
F. CONCLUSION ..... 109

**VIII. PARTIALLY DISSENTING OPINION OF JUDGE GÜNEY ..... 111**

A. "COMMITTING" GENOCIDE ..... 111
B. AIDING AND ABETTING THE MURDERS OF MARIE AND BÉATRICE ..... 113

**IX. PARTIALLY DISSENTING OPINION OF JUDGE MERON ..... 116**

**X. ANNEX A: PROCEDURAL BACKGROUND ..... 117**

A. NOTICE OF APPEAL AND BRIEFS ..... 117
1. Prosecution's Appeal ..... 117
2. Appellant's Appeal ..... 117
B. ASSIGNMENT OF JUDGES ..... 118
C. MOTIONS TO ADMIT ADDITIONAL EVIDENCE AND RELATED MOTIONS ..... 118
D. HEARING OF THE APPEALS ..... 119

**XI. ANNEX B: CITED MATERIALS/DEFINED TERMS ..... 120**

1794/H

A. JURISPRUDENCE ..... 120
1. ICTR ..... 120
2. ICTY ..... 122
B. DEFINED TERMS AND ABBREVIATIONS ..... 125

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of appeals by Sylvestre Gacumbitsi ("Appellant") and the Prosecution against the Judgement rendered by Trial Chamber III on 17 June 2004 in the case of *The Prosecutor v. Sylvestre Gacumbitsi* ("Trial Judgement").[1]

# I. INTRODUCTION

## A. Background

2. The Appellant, Sylvestre Gacumbitsi, was born in 1943 in Kigina Sector, Rusumo Commune, Kibungo Prefecture, Rwanda.[2] The Appellant was *bourgmestre* of Rusumo Commune in April 1994, a position he had held since 1983.[3] As such, he was the highest-ranking local administrative official.[4]

3. The Appellant was tried on the basis of an indictment dated 20 June 2001 ("Indictment"), which charged him with individual criminal responsibility for certain crimes committed against the Tutsi population of Kibungo Prefecture between 6 and 30 April 1994.[5] The Trial Chamber found the Appellant guilty of genocide (Count 1),[6] and dismissed the alternative charge of complicity in genocide (Count 2).[7] It also convicted him of extermination and rape as crimes against humanity (Counts 3 and 5, respectively),[8] but acquitted him of murder as a crime against humanity (Count 4).[9] It imposed a single sentence of thirty years' imprisonment.[10]

[1] For ease of reference, two annexes are appended to this Judgement: Annex A: Procedural Background, Annex B: Cited Materials/Defined Terms.
[2] Trial Judgement, para. 5.
[3] Trial Judgement, para. 6.
[4] Trial Judgement, para. 241.
[5] With respect to one incident, the expulsion of some of the Appellant's tenants, the temporal scope of the Indictment extends through June 1994.
[6] Trial Judgement, paras. 293, 334.
[7] Trial Judgement, paras. 295, 334.
[8] Trial Judgement, paras. 316, 333, 334.
[9] Trial Judgement, paras. 320, 334.
[10] Trial Judgement, para. 356.

## B. The Appeals

4. The Appellant appeals his convictions and challenges his sentence.[11] He divides his allegations of error into five categories; the Appeals Chamber will refer to these as "grounds of appeal" and the specific alleged errors as "sub-grounds". The Appellant alleges errors in certain interlocutory decisions of the Trial Chamber (Ground 1); and errors relating to his convictions for genocide, extermination as a crime against humanity, and rape as a crime against humanity (Grounds 2, 3, and 4, respectively). The Appellant submits that his sentence should be reduced to fifteen years in the event that his convictions are not quashed on appeal (Ground 5). The Prosecution responds that all grounds of appeal raised by the Appellant should be dismissed.[12]

5. The Prosecution presents six grounds of appeal.[13] It avers that the Trial Chamber erred in various respects in sentencing (Ground 1), in acquitting the Appellant of murder as a crime against humanity (Ground 2), in failing to find him criminally responsible for certain rapes (Ground 3), in its enunciation of the elements of rape (Ground 4), in refusing to consider joint criminal enterprise ("JCE") as a mode of liability because it had not been pleaded adequately in the Indictment (Ground 5), and in holding that the Appellant lacked authority to order participants in the attack in Rusumo Commune other than communal policemen (Ground 6). The Appellant objects to all grounds of appeal raised by the Prosecution, except Ground 4 (elements of rape), with respect to which the Appellant does not take a position.[14]

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[11] Notice of Appeal, filed confidentially in French on 20 July 2004 ("Gacumbitsi Notice of Appeal"); Appellant's Brief, filed in French originally on 30 September 2004 but returned as deficient and filed again on 4 October 2004 ("Gacumbitsi Appeal Brief"); Brief in Reply, filed in French on 1 April 2005 ("Gacumbitsi Reply"). It should be noted that, pursuant to an order of the Pre-Appeal Judge dated 24 March 2005, the Appellant was to file his reply no later than 29 March 2005. Order, 24 March 2005. The reply was thus filed late. The Appellant did not attempt to show good cause for this delay. Nevertheless, the Prosecution did not object to the Gacumbitsi Reply on this basis. Considering the concrete circumstances present in this instance, and in the interest of justice, the Appeals Chamber will take into account the submissions made in the reply. The Appeals Chamber emphasizes, however, that it proceeds in this manner exceptionally, and that this exception should not be interpreted to suggest that filing deadlines will not be strictly enforced in other cases.

[12] Respondent's Brief, filed on 12 November 2004 ("Prosecution Response").

[13] Prosecution's Amended Notice of Appeal, filed on 16 December 2004 pursuant to the Appeals Chamber's *Décision relative à la requête du Procureur en modification de son acte d'appel*, issued on 15 December 2004 ("Prosecution Notice of Appeal"); Appellant's Brief, filed on 28 September 2004 ("Prosecution Appeal Brief"); Prosecution's Reply to Defence's Response, filed on 19 January 2005 ("Prosecution Reply").

[14] Respondent's Brief, filed confidentially in French on 10 January 2005 ("Gacumbitsi Response"). Because the French translation of the Prosecution Appeal Brief was communicated to the Defence only on 1 December 2004, notwithstanding its being filed on 17 November 2004, *see* Gacumbitsi Response, para. 31, the Appeals Chamber considers that there was good cause for the delay in the filing of the Response Brief beyond the forty days allowed by Rule 112 of the Rules. The Appeals Chamber notes that in its reply, the Prosecution did not argue that the Gacumbitsi Response was untimely.

## C. Standards of Appellate Review

6. The Appeals Chamber now recalls some of the applicable standards of appellate review pursuant to Article 24 of the Statute of the Tribunal ("Statute"). The Appeals Chamber reviews only errors of law which invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.

7. As regards errors of law, the Appeals Chamber has recently stated:

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

8. As regards errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber.

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[16]

9. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[17] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may immediately be dismissed by the Appeals Chamber and need not be considered on the merits.[18]

10. In order for the Appeals Chamber to assess the appealing party's arguments, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is being made.[19] Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."[20] Finally, the Appeals Chamber has inherent

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[15] *Ntakirutimana* Appeal Judgement, para. 11 (internal citations omitted). *See also, e.g., Kamuhanda* Appeal Judgement, para. 6; *Niyitegeka* Appeal Judgement, para. 7.

[16] *Krstić* Appeal Judgement, para. 40 (internal citations omitted). *See also, e.g., Kamuhanda* Appeal Judgement, para. 7; *Kajelijeli* Appeal Judgement, para. 5; *Ntakirutimana* Appeal Judgement, para. 12.

[17] *See, e.g., Kamuhanda* Appeal Judgement, para. 8; *Kajelijeli* Appeal Judgement, para. 6; *Ntakirutimana* Appeal Judgement, para. 13.

[18] *See, e.g., Kamuhanda* Appeal Judgement, para. 8; *Kajelijeli* Appeal Judgement, para. 6; *Ntakirutimana* Appeal Judgement, para. 13.

[19] Practice Direction on Formal Requirements for Appeals from Judgement, para. 4(b). *See also Kamuhanda* Appeal Judgement, para. 9; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10.

[20] *Vasiljević* Appeal Judgement, para. 12. *See also, e.g., Kamuhanda* Appeal Judgement, para. 9; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10.

discretion in selecting which submissions merit a detailed reasoned opinion in writing and will dismiss arguments which are evidently unfounded without providing detailed reasoning.[21]

[21] *See, e.g.*, *Kamuhanda* Appeal Judgement, para. 10; *Kajelijeli* Appeal Judgement, para. 8; *Niyitegeka* Appeal Judgement, para. 11.

# II. THE APPEAL OF SYLVESTRE GACUMBITSI

## A. Interlocutory Decisions (Ground of Appeal 1)

11. The Appellant challenges, on various grounds, a series of interlocutory decisions made by the Trial Chamber.[22] None of the errors he alleges was pleaded properly in his Notice of Appeal, which merely lists the decisions challenged and states, with respect to each one, that there is an "*erreur de droit [et/ou] de fait à développer*".[23] The notice thus fails to "indicate the substance of the alleged errors and the relief sought" as required by Rule 108 of the Tribunal's Rules of Procedure and Evidence ("Rules"). The Prosecution does not object to this failure, however. Instead it argues that the Appeal Brief itself suffers from similar shortcomings. In light of this, the Appeals Chamber will consider the Appellant's arguments as advanced in his Appeal Brief.[24]

### 1. Decision on the Indictment

12. The Appellant challenges a decision issued on 25 July 2002, in which the Trial Chamber, *inter alia*, rejected his argument that the dates specified in the Indictment were insufficiently specific.[25] He argues that references to acts committed "on or about" a certain date violated his rights under Article 20(4)(a) of the Statute.[26] He further contends that subsequent witness testimony specifying the dates did not cure this lack of notice.[27]

13. The Appeals Chamber finds that the Trial Chamber was reasonable in holding that the trial could proceed fairly on the basis of the Indictment as drafted. The dates of specific incidents alleged in the Indictment are for the most part provided with considerable precision,[28] and the use of the phrase "on or about", to which the Appellant objects, is not enough to undermine the notice that was given to the Appellant.

14. It is true that the dates included in paragraphs 32 and 33 of the Indictment ("On a date uncertain during April 1994") as well as in paragraph 36 ("On a date uncertain during April-June

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[22] Gacumbitsi Notice of Appeal, paras. 9-15.
[23] Gacumbitsi Notice of Appeal, paras. 9-15.
[24] The Appeals Chamber is only required to grant relief for a violation of the Rules where a party has objected in a timely manner and has suffered material prejudice. *See* Rule 5 of the Rules.
[25] Decision on Defence Motion to Amend Indictment and to Drop Certain Counts, filed on 25 July 2002 ("Decision on Indictment"), paras. 21, 22. *See Requête aux fins de modification de l'acte d'accusation et de retrait de certains chefs d'accusation*", filed on 26 November 2001 ("Motion on Indictment"). The Appeals Chamber will not consider the other aspects of the Decision on Indictment because the Appellant makes no specific argument against them.
[26] Gacumbitsi Appeal Brief, paras. 41, 42 ("*le «[...] ou vers [...] le [...]»*" in the French version). *See also* Gacumbitsi Reply, paras. 24-32.
[27] Gacumbitsi Appeal Brief, paras. 43, 44.
[28] *See, e.g.*, Indictment, paras. 5, 6, 7, 11, 12, 14, 15, 21, 38, 39. In each of these paragraphs the Indictment gives the exact date or range of two to three days during which each incident took place, but uses the expression "on or about", as in "on or about 15 April 1994".

1994") are even less specific. But none of the Appellant's convictions depended on the incidents described in these paragraphs, so any vagueness in this regard, even if constituting a defect, has not prejudiced him. The Trial Chamber held that the Prosecution had not proven the incidents described in paragraphs 32 and 33.[29] As to paragraph 36, it found that the Appellant had expelled his tenants, but held that he was not criminally responsible for their subsequent murder.[30] The Trial Chamber did mention this last incident as one indicator of the Appellant's *mens rea* for crimes against humanity.[31] The Appeals Chamber finds that this reference did not affect the verdict, as the other evidence of the Appellant's *mens rea* cited by the Trial Chamber was ample.[32] Furthermore, the Appellant does not contest the Trial Chamber's holding that the Pre-Trial Brief, which provided further details of the incident, cured any vagueness in paragraph 36 of the Indictment.[33]

15. Accordingly, this sub-ground of appeal is dismissed.

### 2. Decisions of 28 July 2003 and 28 August 2003

16. On 23 May and 10 July 2003, the President of the Tribunal ("President") held two informal conferences with the parties to determine the starting date of the Appellant's trial.[34] The date of 28 July 2003 was selected, with the Prosecution expected to finish presenting its evidence by the end of August 2003 and the Appellant expected to start his defence on 6 October 2003. On 22 July 2003, the Appellant submitted a motion seeking the postponement of his trial.[35] On 28 July 2003, after hearing the parties on the issue,[36] the Trial Chamber dismissed the Motion to Postpone.[37]

17. The Appellant's trial thus started as planned, on 28 July 2003, and by the end of August 2003 the Prosecution finished presenting its case. In a status conference held on 28 August 2003, the Appellant requested the Trial Chamber to postpone the commencement of the Defence case until 6 December 2003.[38] This request was denied by the Trial Chamber.[39] The Appellant now asks the Appeals Chamber to reverse the Decisions of 28 July and 28 August 2003.[40]

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[29] Trial Judgement, paras. 177, 190.
[30] Trial Judgement, paras. 196, 197, 319.
[31] Trial Judgement, paras. 302-304.
[32] *See infra* section II.C.1.
[33] *See* Trial Judgement, para. 194.
[34] No record of these meetings was kept. Judges Reddy and Egorov (two of the Judges on the Trial Chamber Bench) were also present at the meeting of 10 July 2003.
[35] Defence Motion Seeking Postponement of Trial Date, Pursuant to Rule 73 of the Rules of Procedure and Evidence, filed confidentially in French on 22 July 2003 ("Motion to Postpone").
[36] T. 28 July 2003 pp. 1-12.
[37] T. 28 July 2003 pp. 13, 14 ("Decision of 28 July 2003").
[38] T. 28 August 2003 p. 5.
[39] T. 28 August 2003 pp. 20, 21 ("Decision of 28 August 2003").
[40] Gacumbitsi Notice of Appeal, paras. 10, 12; Gacumbitsi Appeal Brief, para. 116.

18. The Appellant asserts that at both of the informal conferences, his counsel informed the President that his team had encountered difficulties, including having been prevented from going on mission since October 2002, that prevented it from being ready for the start of the trial on 28 July 2003. On both occasions, the President proposed the same solution: adding a co-counsel and an additional assistant to his team.[41] Nonetheless, the Appellant asserts, his co-counsel was not appointed until 14 July 2003, and as of 22 July 2003, the additional assistant had still not been appointed and his investigators had still not returned from mission.[42] The Appellant submits that the Trial Chamber's failure to postpone the proceedings violated his right to have adequate time and facilities to prepare his defence as provided by Article 20(4)(b) of the Statute.[43] He further argues that, in its Decision of 28 August 2003, the Trial Chamber erroneously attributed to his counsel a statement that Defence investigators had met with approximately 200 potential witnesses; this statement had in fact been made by the representative of the Defence Counsel Management Section ("DCMS") of the Registry of the Tribunal.[44]

19. The Appeals Chamber notes that trial scheduling is subject to the Trial Chamber's discretion.[45] The accused of course has a right, under Article 20(4)(b) of the Statute, to "adequate time and facilities for the preparation of his or her defence". But it is the Trial Chamber that is best positioned to consider the demands of trial preparation in each particular case and to set a schedule that respects that right while also avoiding undue delay in the administration of justice.[46] The Appeals Chamber thus will only reverse a Trial Chamber's scheduling decision upon a showing of abuse of discretion[47] resulting in prejudice, that is, rendering the trial unfair.[48] The Appellant has not made such a showing, as will be demonstrated below.

(a) Decision of 28 July 2003

20. The Appeals Chamber finds that the Appellant has not shown that the Trial Chamber abused its discretion in rejecting his Motion to Postpone. First, the Appellant does not contest that, prior to 28 July 2003, he had been in contact with more than 200 potential witnesses. He states that not all of these contacts were fruitful and that the Defence had problems finding credible witnesses,[49] but

[41] Gacumbitsi Appeal Brief, paras. 45-52.
[42] Gacumbitsi Appeal Brief, paras. 54, 55.
[43] Gacumbitsi Appeal Brief, para. 58.
[44] Gacumbitsi Appeal Brief, paras. 64, 65, referring to T. 28 July 2003 p. 7; T. 28 August 2003 p. 5.
[45] *See* Statute, art. 19(1); *Ntabakuze* Decision, p. 4.
[46] *Milošević* Scheduling Appeal Decision, para. 18.
[47] *See Ntabakuze* Decision, p. 4; *Milošević* Scheduling Appeal Decision, para. 16.
[48] *See, e.g., Semanza* Appeal Judgement, para. 73 (rejecting an allegation of procedural error for lack of prejudice). When the Appeals Chamber considers, in the context of an appeal from judgement, allegations of procedural error violating the right to a fair trial, the standard of prejudice is whether the error in fact rendered the trial unfair. *Cf. Ntakirutimana* Appeal Judgement, para. 27 (discussing indictment defects).
[49] *See* Gacumbitsi Reply, para. 63.

he does not demonstrate that these problems were the result of inadequate time being allotted or that they impaired his defence. Second, although the Appellant contends that he twice mentioned to the President problems that were affecting his preparation for the trial, he does not dispute that, as the Trial Chamber found, on both occasions he nonetheless ultimately agreed to the starting date of 28 July 2003. Under the circumstances, the Trial Chamber acted within its discretion to determine that the Appellant's rights under Article 20(4)(b) of the Statute were not impaired.

21. Moreover, even if the Trial Chamber's decision had amounted to an abuse of discretion, the Appellant has not demonstrated that it caused him any prejudice. He does not, for instance, point to any way in which he would have defended himself differently had he had more time to prepare.[50] Moreover, the Decision of 28 July 2003 included safeguards to ensure the fairness of the proceedings. For instance, the Trial Chamber left open the possibility that the Appellant could "recall back Prosecution witnesses to interview or cross-examine them on specific issues if the Defence justify that before the Chamber".[51] Further, the Decision of 28 July 2003 was concerned principally with the commencement of the Prosecution's case. The Trial Chamber left open the possibility for the Defence to request that the start of its own case be postponed, and the Defence later did so.[52] For these reasons, the Appeals Chamber dismisses this sub-ground of appeal.

(b) Decision of 28 August 2003

22. The Appeals Chamber is likewise not convinced that the Decision of 28 August 2003 amounted to an abuse of discretion. First, the errors to which the Appellant points are of no consequence. It was, indeed, a representative of DCMS who stated that the Defence had contacted more than 200 potential witnesses -- but that figure was based on information provided by the Appellant, and the Appellant did not challenge its accuracy at the time it was brought up. It is also true that the Appellant did initially object, during the 10 July 2003 conference, to the 6 October 2003 start date for the Defence case. But after he was told that co-counsel and an assistant would be appointed, he agreed to that start date.[53] The promised appointments were made after the conference.[54]

23. Second, the Appellant has shown no reason to question the Trial Chamber's conclusion that, under the circumstances, the Defence had "had sufficient time and resources to prepare its case and

[50] *See* Gacumbitsi Appeal Brief, paras. 58-61; Gacumbitsi Reply, paras. 34, 47-49, 53-56.
[51] T. 28 July 2003 p. 13. The Appellant does not contend that he ever took advantage of this option.
[52] T. 28 July 2003 p. 13.
[53] T. 28 August 2003 p. 12.
[54] Co-counsel was appointed on 14 July 2003, with retroactive effect to 1 July 2003 (Gacumbitsi Appeal Brief, para. 54). One additional assistant was appointed on 23 July 2003 (*see* T. 28 July 2003 pp. 5, 6), and the Trial Chamber accepted that the delay in appointing the second assistant was due to a potential conflict of interest (T. 28 July 2003 p. 13).

to draw up a list of witnesses to testify for Defence as of 6th October 2003".[55] Counsel had been appointed in October 2001, and since then the Defence team had billed more than 7,500 hours of preparatory work.[56] Further, the Appellant demonstrates no error in the Trial Chamber's finding that the Defence team's difficulties in contacting witnesses in Rwanda did not merit postponement of the trial.[57] Finally, he again fails to demonstrate any way in which his defence was materially impaired.[58] For these reasons, the Appeals Chamber dismisses this sub-ground of appeal.

### 3. Decision of 1 August 2003

24. On 14 July 2003, the Defence filed a motion seeking further information concerning certain Prosecution witnesses.[59] The Prosecution responded that the information in question was not subject to disclosure pursuant to Rule 70(A) of the Rules, but nonetheless agreed to provide it, and did so in Annex A to its Response to Motion for Disclosure.[60] The Defence replied that the information in Annex A suggested that the Prosecution possessed further material relating to proceedings commenced by the Rwandan authorities against the witnesses.[61]

25. On 1 August 2003, the Trial Chamber rendered a decision ordering the Prosecution, "if the information contained in Annex A is based on specific materials," to allow the Defence to inspect such materials within forty-eight hours.[62] The Appellant now challenges this decision.[63] He submits that the Trial Chamber erred in rendering a "conditional decision" because Annex A of the Response to the Motion for Disclosure showed that the Prosecution had knowledge of the material requested.[64] The Appellant also contends that the Prosecution never complied with the decision, and that this was brought to the attention of the Trial Chamber on several occasions, to no effect.[65]

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[55] T. 28 August 2003 p. 20.
[56] *See* T. 28 July 2003 p. 7; T. 28 August 2003 p. 5.
[57] T. 28 August 2003 p. 20.
[58] *See, e.g.*, Gacumbitsi Reply, paras. 47, 53-58.
[59] Motion to Disclose to the Defence All the Facts and Authorities that Led to the Arrest, Detention and Provisional Release of Prosecution Witnesses TBG, TBH, TBI, TBJ and TBK (Rule 66 of the Rules), filed in French on 14 July 2003 ("Motion for Disclosure").
[60] Prosecutor's Brief in Reply [sic] to a Defence Motion for Disclosure pursuant to Rule 66, filed confidentially on 17 July 2003 ("Response to Motion for Disclosure"), paras. 8-14.
[61] Defence's Reply to Prosecutor's Brief in Reply to a Defence Motion for Disclosure of Certain Information Relating to Prosecution Witnesses TBG, TBH, TBI, TBJ and TBK, filed confidentially in French on 22 July 2003 ("Reply to Response to Motion for Disclosure"), paras. 11-14.
[62] Decision on Motion to Disclose to the Defence All the Facts and Authorities that Led to the Arrest, Detention and Provisional Release of Prosecution Witnesses TBG, TBH, TBI, TBJ and TBK (Rule 66 of the Rules), filed on 1 August 2003 ("Decision of 1 August 2003"), p. 4.
[63] Gacumbitsi Notice of Appeal, para. 11; Gacumbitsi Appeal Brief, para. 117.
[64] Gacumbitsi Appeal Brief, para. 69.
[65] Gacumbitsi Appeal Brief, paras. 70, 71. The Appellant's assertion at paragraphs 70 through 73 of his Reply that the dispute was, in fact, over access to the materials contained in Annex A itself is obviously incorrect because Annex A had already been provided to the Defence; the Appeals Chamber need not address this assertion further.

26. The Appeals Chamber finds that the Appellant has demonstrated no error on the Trial Chamber's part. There is no evidence that the material in question even existed, nor that the Prosecution had the material in its possession but failed to disclose it. Accordingly, this sub-ground of appeal is dismissed.

### 4. Decisions of 11 and 18 November 2003

27. On 6 October 2003, the Defence filed the first version of a proposed expert report written by Mr. Pascal Ndengejeho.[66] On 17 October 2003, the Prosecution filed a notice of objection to the proposed expert report.[67] During the presentation of the Defence case, Judge Reddy fell ill, and, on 21 October 2003, the hearing was adjourned until 17 November 2003, pursuant to Rule 15 *bis* of the Rules.[68] On 3 November 2003, the Prosecution filed a motion arguing that Mr. Ndengejeho did not qualify as an expert witness, and seeking his removal from the list of Defence experts.[69] On the same day, the Prosecution filed a notice in which it communicated its acceptance of the report of expert witnesses Prof. Dominique Lecomte and Dr. Walter Vorhauer, informed the Trial Chamber that it did not intend to cross-examine these experts, and asked the Trial Chamber to admit the report into evidence without calling the expert witnesses to appear.[70]

28. On 11 November 2003, the Trial Chamber rendered a decision 1) admitting into evidence the report of Prof. Lecomte and Dr. Vorhauer and holding that it was not necessary that these experts be heard at trial; and 2) denying the status of expert witness to Mr. Ndengejeho, but allowing him to testify as a fact witness.[71] On 13 November 2003, unaware of the Decision of 11 November 2003, the Defence filed a response to the Motion for Exclusion of Expert, arguing that 1) the response was timely filed as counsel had only received the motion on 10 November 2003, and 2) the motion should be rejected as untimely.[72] On 17 November 2003, the Defence filed a request

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[66] Historical Background to the Events of 1994 in Rwanda and the Social Situation in Rusumo Commune, filed confidentially in French on 6 October 2003. The final version of the report was filed confidentially on 10 October 2003.
[67] The Prosecutor's Notice of Objection to the Expert Report of Pascal Ndengejeho, filed on 17 October 2003 ("Notice of Objection").
[68] *See* Gacumbitsi Appeal Brief, paras. 77-79; Prosecution Response, para. 74.
[69] Prosecutor's Motion for the Exclusion of the Proposed Expert Report and Evidence of Pascal Ndengejeho, filed on 3 November 2003 ("Motion for Exclusion of Expert").
[70] The Prosecutor's Notice of No Objection to the Expert Report of Dominique Lecomte & Walter Vorhauer, filed on 3 November 2003 ("Notice Accepting Expert Report").
[71] Decision on Expert Witness for the Defence Rules 54, 73, 89 and 94*bis* of the Rules of Procedure and Evidence, issued in French on 11 November 2003 ("Decision of 11 November 2003").
[72] *Réponse de la Défense à la requête du Procureur tendant à solliciter le rejet du rapport du témoin Pascal Ndengejeho*, filed confidentially on 13 November 2003 ("Response to Motion for Exclusion of Expert").

for reconsideration of the Decision of 11 November 2003.[73] The Trial Chamber dismissed this request on 18 November 2003.[74]

29. The Appellant challenges the Decisions of 11 and 18 November 2003 on several grounds.[75] He argues that the Prosecution did not object to Mr. Ndengejeho's qualification as an expert until well after fourteen days past the filing of his report, violating Rule 94 *bis* of the Rules; that the Trial Chamber granted the Motion for Exclusion of Expert without giving the defence a chance to respond to it; and that the decisions violated his right to call expert witnesses to counter the Prosecution experts, and thereby prejudiced him, contrary to the Trial Chamber's finding in the Decision of 18 November 2003.[76] The Appellant adds, in his reply, that 1) Mr. Ndengejeho was recognized as an expert in the *Semanza* and *Simba* cases;[77] 2) the Trial Chamber took its decision "on the basis of the information [...] brought to the Chamber's attention," without indicating its sources of information;[78] and 3) while the Trial Chamber allowed Mr. Ndengejeho to testify as a fact witness, it knew that Mr. Ndengejeho was not in Rusumo in April and May 1994,[79] and it unfairly limited the duration of his testimony to two hours.[80]

30. The Appeals Chamber observes that while the Motion for Exclusion of Expert was filed on 3 November 2003, it appears that Defence counsel received it on 10 November 2003. According to Rules 7 *ter* and 73(E) of the Rules, the Defence had five days from that date to file its response, and the Response to the Motion for Exclusion of Expert was thus timely filed. However, there is no indication that the Trial Chamber was aware of the delay in transmission of the motion to the Defence and a decision had to be rendered before the resumption of trial on 17 November 2003 to allow the Registry to make the necessary arrangements. Under these circumstances, the Trial Chamber did not err in rendering its Decision of 11 November 2003.[81] Moreover, the views of the Appellant were eventually heard: after it learned of the transmission delay, the Trial Chamber admitted, and considered the merits of, the Request for Reconsideration.[82]

31. The Appeals Chamber agrees with the Appellant that the Prosecution's Motion for Exclusion of Expert itself was untimely. However, nothing in Rule 94 *bis* of the Rules implies that,

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[73] Extremely Urgent Motion for Review of the Decision Rendered by Trial Chamber III on 11 November 2003, filed confidentially in French on 17 November 2003 ("Request for Reconsideration"). In the alternative, the Defence asked the Trial Chamber to grant leave to appeal the Decision of 11 November 2003. *Ibid.*, p. 10.
[74] T. 18 November 2003 pp. 1, 2 ("Decision of 18 November 2003"). By the same token, the Trial Chamber dismissed the Defence's motion for certification to appeal the Decision of 11 November 2003 (T. 18 November 2003 p. 2).
[75] Gacumbitsi Notice of Appeal, paras. 13, 14; Gacumbitsi Appeal Brief, para. 116.
[76] Gacumbitsi Appeal Brief, paras. 72-93, 102-112; Gacumbitsi Reply, paras. 128-132.
[77] Gacumbitsi Reply, paras. 120, 121.
[78] Gacumbitsi Reply, paras. 122 (quoting from Decision of 11 November 2003, para. 9), 123.
[79] Gacumbitsi Reply, para. 124.
[80] Gacumbitsi Reply, paras. 125, 126.
[81] *See* Decision of 11 November 2003, para. 6.

absent a timely motion from the party opposing an expert, a Trial Chamber is obligated to admit expert testimony or to accept a witness's qualification as an expert. Rule 94 *bis* only sets forth a procedure by which an expert's report can be accepted into evidence without that expert testifying.[83] In other respects, the admission of expert testimony is governed only by the general provision of Rule 89, which entrusts the Trial Chamber with broad discretion to employ rules of evidence that "best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."[84] The determination of whether an expert witness is qualified is subject to the Trial Chamber's discretion.[85]

32. For these reasons, the Appeals Chamber agrees with the Trial Chamber's holding that it had the discretion to reject Mr. Ndengejeho as an expert witness *proprio motu* even if no timely motion was filed opposing him.[86] Moreover, the Trial Chamber did not abuse its discretion in deciding that Mr. Ndengejeho did not qualify as an expert. The Trial Chamber correctly recalled that "in contributing special knowledge to assist the Chamber, the expert must do so with the utmost neutrality and with scientific objectivity."[87] It then found:

> The Chamber is of the opinion that certain elements in the report submitted by Ndengejeho are not relevant to the instant case and cannot constitute an expert's contribution to justice. Furthermore, on the basis of the information about Mr. Ndengejeho brought to the Chamber's attention, his curriculum vitae and his report, the Chamber is of the opinion that Ndengejeho is not an expert within the meaning of Rule 94*bis* of the Rules.[88]

The Appellant does not show any error in this analysis. The fact that Mr. Ndengejeho is a professor and a former Rwandan minister does not automatically qualify him as an expert witness; it was left to the Trial Chamber's discretion to determine whether, based on the circumstances of the particular case, his background gave him a special insight.[89] Likewise, it is not relevant that he may have been recognized as an expert in the *Semanza* and *Simba* trials. Inherent in the notion of discretion is that different Trial Chambers are permitted to reach different decisions within that sphere of discretion, even if they are each presented with the same question.[90] Moreover, the questions faced by the Trial Chambers were not in fact the same. A witness's qualification as an expert turns on the contribution

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[82] T. 18 November 2003 p. 1.
[83] *Rutaganda* Appeal Judgement, para. 164.
[84] Rule 89(B) of the Rules; *see Rutaganda* Appeal Judgement, para. 164.
[85] *See Semanza* Appeal Judgement, para. 304; *Rutaganda* Appeal Judgement, para. 166.
[86] T. 18 November 2003 p. 1, recalling Decision of 11 November 2003, para. 8.
[87] Decision of 11 November 2003, para. 8.
[88] Decision of 11 November 2003, para. 9.
[89] Here, the Appellant points to no reason to believe that Mr. Ndengejeho had any particular expertise relative to this case. His academic degrees and teaching appointments were apparently in the field of education, and he served as Rwanda's minister of information; neither these qualifications nor anything else on his *curriculum vitae* demonstrates any obvious basis for specialized knowledge regarding the events in Rusumo Commune during April 1994. *See* Curriculum Vitae of Pascal Ndengejeho, appended to the Motion for Exclusion of Expert.
[90] *See, e.g., Bizimungu et al.* Decision on Mugiraneza Interlocutory Appeal, para. 21 (noting that "the exercise of the discretion of different Trial Chambers in relation to different cases is an unhelpful comparison to make").

he or she can make to a Trial Chamber's analysis of a particular case. Thus, the same person might be qualified as an expert in one case and not in another.

33. Moreover, the Appellant has not demonstrated that the challenged decisions prejudiced him. He asserts that Mr. Ndengejeho's testimony would have had an impact on the Trial Chamber's assessment of the evidence provided by Prosecution experts, but provides no explanation of what effect it might have had. Indeed, the Appellant does not even explain how the conclusions reached by Mr. Ndengejeho in his report differed from those offered by the Prosecution experts.[91]

34. Finally, the Appellant submits that Prof. Lecomte and Dr. Vorhauer should have been allowed to testify at trial.[92] In its Notice Accepting Expert Report, the Prosecution accepted the report of these experts and waived its right to cross-examine them. The Appellant filed no response to this notice. In accordance with Rule 94 *bis* (C) of the Rules, the Trial Chamber thus admitted the report into evidence and found that it was not necessary for the experts to appear at trial.[93] The Appeals Chamber finds no error in this.[94] Moreover, the Appellant does not appear to have raised his present objection at trial, and thus cannot do so on appeal.

35. Accordingly, this sub-ground of appeal is dismissed and the appeal under this ground is dismissed in its entirety.

[91] The Appellant merely states without further elaboration that Mr. Ndengejeho "is said to have strongly challenged the *testimony of*" Prosecution expert Alison Des Forges. Gacumbitsi Appeal Brief, para. 107.
[92] Gacumbitsi Appeal Brief, paras. 110-112.
[93] Decision of 11 November 2003, para. 7.
[94] Moreover, contrary to the Appellant's contentions (*see* Gacumbitsi Appeal Brief, paras. 72-75, 79, 80, 92), the appearance at trial of his experts was not "acquired" during the meetings of 28 August 2003 and 22 October 2003.

## B. Genocide (Ground of Appeal 2)

36. The Trial Chamber convicted the Appellant of planning, instigating, ordering, committing, and aiding and abetting the crime of genocide pursuant to Article 6(1) of the Statute.[95] The Appellant asserts that this conviction was based on errors in law and in fact. Specifically, he argues that the Trial Chamber erred in law in its legal characterization of the *dolus specialis* for genocide; that his conviction for committing genocide should be vacated because the Indictment did not allege his personal participation in the killing with sufficient specificity; and that the Trial Chamber erred in its assessment of the evidence in a number of respects. The Appeals Chamber will consider each of these contentions in turn.

37. The Appeals Chamber notes that in paragraphs 293 and 295 of the Judgement, the Trial Chamber stated that it was convicting the Appellant for genocide under Articles 2(3)(a) and 2(3)(b) of the Statute. The Appeals Chamber considers that this was evidently a mistaken reference on the Trial Chamber's part. The Trial Chamber could not have intended to convict the Appellant of conspiracy to commit genocide, which is the crime listed under Article 2(3)(b) of the Statute; just a few paragraphs earlier, it had correctly noted that conspiracy to commit genocide was not charged in the Indictment and thus declined to make any findings in respect of it.[96] The Trial Chamber's references in paragraphs 293 and 295 should therefore have been to Articles 2(2)(a) and 2(2)(b) of the Statute, which specify underlying acts of genocide. The Appellant was charged under Count 1 of the Indictment with genocide through "killing or causing serious bodily or mental harm to members of the Tutsi population", a reference to Articles 2(2)(a) and 2(2)(b) of the Statute, and the Trial Chamber plainly intended to convict him under both of these provisions.[97] The Appellant has not raised this point in his appeal. The Appeals Chamber corrects the error *proprio motu*, but considers that it did not affect the verdict.

### 1. Legal Characterization of the *Mens Rea* Element of the Crime of Genocide

38. The Appellant challenges the Trial Chamber's assessment of the question of *mens rea* for genocide.[98] He observes that the Trial Chamber held that genocidal intent can sometimes, as here, be inferred from the accused's acts and their factual context.[99] The Appellant suggests that the inferential approach is inconsistent with the notion of *dolus specialis* or specific intent because it removes from the Prosecution the burden of proving that the offender sought to destroy, in whole or

[95] Trial Judgement, para. 288.
[96] *See* Trial Judgement, para. 289 (incorrectly referring, however, to Article 2(3)(c) of the Statute).
[97] *See* Trial Judgement, paras. 261-290 (concerning killing); *ibid.*, paras. 291-293 (concerning bodily harm).
[98] Gacumbitsi Appeal Brief, paras. 120-128.
[99] Gacumbitsi Appeal Brief, para. 122.

in part, a protected group as such.[100] The Prosecution responds that the Trial Chamber's inferential approach was consistent with well established legal principles and amply supported by the evidence and factual findings in this case, including those connecting the Appellant to other perpetrators of the genocide.[101]

39. The Appeals Chamber finds that the Trial Chamber correctly recognized that genocide is a crime requiring "specific intent".[102] The Prosecution is required, under Article 2(2) of the Statute, to prove that the accused possessed the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

40. The Tribunal's jurisprudence conclusively establishes that genocidal intent can be proven through inference from the facts and circumstances of a case. By its nature, intent is not usually susceptible to direct proof. Only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent. Intent thus must usually be inferred. Here, the Trial Chamber stated:

> *It is possible to infer the genocidal intent inherent in a particular act charged from the perpetrator's* deeds and utterances considered together, as well as from the general context of the perpetration of other culpable acts systematically directed against that same group, notwithstanding that the said acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership in a particular group, while excluding members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.[...] Evidence of genocidal intent can be inferred from "the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing."[103]

41. This approach is consistent with the Appeals Chamber's previous holdings. For instance, the *Rutaganda* Appeal Judgement states:

> The Appeals Chamber concurs with the Appellant that in order to find a person guilty of genocide, it must be established that such a person was personally possessed of the specific intent to commit the crime at the time he did so. Nonetheless, as stated by the Appeals Chamber in *Kayishema/Ruzindana*, "explicit manifestations of criminal intent are [...] often rare in the context of criminal trials". In the absence of explicit, direct proof, the *dolus specialis* may therefore be inferred from relevant facts and circumstances. Such an approach prevents perpetrators from escaping convictions simply because such manifestations are absent.[104]

Specifically, relevant facts and circumstances could include "the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the

[100] Gacumbitsi Appeal Brief, paras. 123-126.
[101] Prosecution Response, paras. 99-114.
[102] Trial Judgement, para. 250.
[103] Trial Judgement, paras. 252, 253.
[104] *Rutaganda* Appeal Judgement, para. 525 (internal citations omitted).

repetition of destructive and discriminatory acts."[105] The Appeals Chamber emphasizes that the inferential approach does not relieve the Prosecution of its burden to prove each element of its case, including genocidal intent, beyond reasonable doubt. Rather, it is simply a different means of satisfying that burden.

42. In this case, in support of its finding that the Appellant possessed the requisite genocidal intent, the Trial Chamber cited the Appellant's urging of the *conseillers de secteur* in his commune, at a meeting on 9 April 1994, "to incite the Hutu to kill the Tutsi"; the Appellant's similar statements made directly to the Hutu population on three separate occasions on 13 and 14 April 1994; his instigation of the rape of Tutsi women and girls on 17 April 1994; and his personal killing of a Tutsi named Murefu on 15 April 1994, which signalled "the beginning of the attack at Nyarubuye Parish".[106] The Trial Chamber also referred to its earlier findings of fact. For instance, it found that at the 9 April 1994 meeting, the Appellant instructed the *conseillers* to return to their *secteurs* and organize meetings at which they were to instruct the Hutu "to separate themselves from the Tutsi" and then "to kill all the Tutsi, so that the *Inkotanyi* would no longer have any accomplices."[107] It also found that on 14 April 1994, at Rwanteru commercial centre, the Appellant "addressed about one hundred people and incited them to arm themselves with machetes and to participate in the fight against the enemy, specifying that they had to hunt down all the Tutsi."[108] And it found that later that same day, at Gisenyi trading centre, the Appellant urged about forty people "to kill all the Tutsi and throw their bodies into the River Akagera."[109]

43. The Appellant raises certain challenges to these and other findings, which will be discussed below. But he submits no serious contention that the Trial Chamber's findings of fact, if valid, were nonetheless insufficient as a matter of law to support an inference of genocidal intent. The Appellant offers no reasonable alternative explanation for the above-described actions and utterances. His repeated exhortations to crowds of people that they should kill all the Tutsis, even considered apart from his other actions, leave room for no other reasonable inference.

44. The Appellant further argues that the Trial Chamber improperly relied on the "acts of other perpetrators" to prove the Appellant's genocidal intent without establishing a nexus between those perpetrators and the Appellant.[110] This contention is without merit. In establishing the Appellant's mental state the Trial Chamber relied principally on the Appellant's own actions and utterances --

[105] *Jelisić* Appeal Judgement, para. 47; *see Rutaganda* Appeal Judgement, para. 525. *See also, e.g., Krstić* Appeal Judgement, paras. 27, 34, 35.
[106] Trial Judgement, para. 259.
[107] Trial Judgement, paras. 101, 93.
[108] Trial Judgement, para. 98.
[109] Trial Judgement, para. 99.
[110] Gacumbitsi Appeal Brief, para. 127.

which, as detailed above, provided ample evidence of his mindset -- and not those of others. The only aspect of the Trial Chamber's analysis that relates to the actions of others is its reference to "the scale of the massacres", which the Trial Chamber cited in support of its finding that the Appellant "acted with intent to destroy a substantial part of the targeted group."[111] In the Appeals Chamber's view, it is appropriate and consistent with the Tribunal's jurisprudence to consider, in determining whether the Appellant meant to target a sufficiently substantial part of the Tutsi population to amount to genocide, that the Appellant's actions took place within the context of other culpable acts systematically directed against the Tutsi population.[112] The Trial Chamber's findings discussed above clearly establish that the Appellant was an active participant in those culpable acts.

45. For these reasons, the Appeals Chamber dismisses this sub-ground of appeal.

2. Specificity of the Indictment in Respect of the Murder of Mr. Murefu

46. The Appellant's second legal challenge to his conviction for genocide pertains to the Trial Chamber's finding that he personally killed a Tutsi civilian, Mr. Murefu. The Appellant argues that this killing was not alleged in the Indictment and, as such, should not have been the basis of a conviction. He observes that the Trial Chamber recognized this when it acquitted him of the crime of murder, and suggests that it should also have done so in the context of genocide.[113]

47. As a threshold matter, the Appellant's argument concerning the omission of the killing of Mr. Murefu from the Indictment does not appear to be specifically set forth in his Notice of Appeal. The Prosecution did not, however, object on this basis to the inclusion of the argument in the Appellant's Appeal Brief, and it has fully responded to it. Under these circumstances, the Appeals Chamber will consider the Appellant's argument despite the inadequacy of the Notice of Appeal.

48. The Prosecution does not dispute that the killing was not specifically alleged in the Indictment, although it observes that Count 1 of the Indictment alleges as a general matter "that he was responsible for killings of members of the Tutsi population".[114] It concedes that "the better practice" would have been for the specific killing of Mr. Murefu to be pleaded as a material fact.[115] It contends, however, that any pleading defect with regard to this killing could not have affected the

[111] Trial Judgement, para. 258.
[112] *See Rutaganda* Appeal Judgement, paras. 526-530; *see also Jelisić* Appeal Judgement, para. 47 (referring to "the general context, the perpetration of other culpable acts systematically directed against the same group, [and] the scale of atrocities committed").
[113] Gacumbitsi Appeal Brief, paras. 257-259, 213-220. *See* Trial Judgement, para. 176.
[114] Prosecution Response, para. 152.
[115] Prosecution Response, para. 154.

outcome of the trial because it was only one fact among many supporting the Appellant's genocide conviction.[116]

49. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the Indictment so as to provide notice to the accused. The Appeals Chamber has held that "criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible 'the identity of the victim, the time and place of the events and the means by which the acts were committed.'"[117] An indictment lacking this precision may, however, be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge.[118] When an appellant raises a defect in the indictment for the first time on appeal, then he bears the burden of showing that his ability to prepare his defence was materially impaired.[119] In cases where an accused has raised the issue of lack of notice before the Trial Chamber, in contrast, the burden rests on the Prosecution to demonstrate that the accused's ability to prepare a defence was not materially impaired.[120]

50. The Indictment, taken alone, does not allege the killing of Mr. Murefu. In the Statement of Facts ("Statement") related to the genocide count, it states that "Sylvestre Gacumbitsi killed persons by his own hand", but provides no further details.[121] The Statement goes on to describe the massacre at Nyarubuye Parish, but does not mention Mr. Murefu and does not suggest that the Appellant participated personally in the killing there.[122] Count 4 of the Indictment (Murder) does allege that the Appellant killed a number of individuals in several separate incidents, but Mr. Murefu is not among them. The Appellant could not reasonably have known, on the basis of the Indictment alone, that he was being charged with the killing of Mr. Murefu. While in certain cases, "the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'",[123] this is not such a case. The Prosecution should have expressly pleaded the killing of Mr. Murefu, particularly as it had this information in its possession before the Indictment was filed.[124] The Appeals Chamber thus finds by majority, Judge Shahabuddeen and Judge Schomburg dissenting, that the Indictment was defective in this respect.

[116] Prosecution Response, para. 155.
[117] *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreškić et al.* Appeal Judgement, para. 89.
[118] *Ntakirutimana* Appeal Judgement, para. 27, referring to *Kupreškić et al.* Appeal Judgement, para. 114.
[119] *Niyitegeka* Appeal Judgement, para. 200; *Kvočka et al.* Appeal Judgement, para. 35.
[120] *Niyitegeka* Appeal Judgement, para. 200; *Kvočka et al.* Appeal Judgement, para. 35.
[121] Indictment, para. 4.
[122] Indictment, paras. 15-19.
[123] *Kupreškić et al.* Appeal Judgement, para. 89, referring to *Kvočka* Decision, para. 17.

51. The Prosecution further contends, however, that the Appellant waived any objection on grounds of vagueness by failing to object at trial to the testimony concerning the killing of Mr. Murefu.[125] Whether an accused raised a timely objection at trial affects the burden of proof on appeal concerning the prejudice caused by a defective indictment. As the Appeals Chamber stated in the *Niyitegeka* case:

> In general, "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finding against that party." Failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on grounds of waiver. In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation. [...]
>
> The importance of the accused's right to be informed of the charges against him under Article 20(4)(a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal. Where, in such circumstances, there is a resulting defect in the indictment, an accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired. All of this is of course subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.[126]

52. In this case, the transcripts of the testimony of Witnesses TAQ and TAO, who testified as to Mr. Murefu's killing, indeed show no record of a Defence objection at the relevant time.[127] However, the omission of the killing from the Indictment was brought to the Trial Chamber's attention on multiple other occasions. First, in its Rule 98 *bis* motion for acquittal on certain charges (including murder, but not genocide) filed at the close of the Prosecution's case, the Defence addressed the sufficiency of the evidence concerning the killing of Mr. Murefu in the context of the murder charge.[128] The Prosecution responded by stating that the killing had not been pleaded in the Indictment, and stated that it did "not seek a conviction for murder based on these facts.[...] At the close of trial the Prosecutor will be relying on these murders as evidence in support of other charges, and as evidence of a similar pattern of conduct pursuant to Rule 93 of the Rules."[129] It did not specify which of the "other charges" the murders would be used to support, nor did it suggest

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[124] Indeed, the Prosecution had in its possession since 29 November 2000 a statement of Witness TAQ which described the killing of Mr. Murefu by the Appellant.

[125] Prosecution Response, para. 153.

[126] *Niyitegeka* Appeal Judgement, paras. 199, 200 (internal citations omitted).

[127] *See* T. 29 July 2003 pp. 52, 53 (Witness TAQ); T. 30 July 2003 pp. 53, 54, 61, 62 (Witness TAO).

[128] Sylvestre Gacumbitsi's Motion for Judgement of Acquittal in Respect of One or More Counts Charged in the Indictment Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence, filed confidentially on 2 September 2003, paras. 27-33.

[129] Prosecutor's Response to the Defence Motion for a Judgment of Acquittal pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence, filed on 8 September 2003, paras. 38, 39.

that the lack of a Defence objection at trial entitled it to rely on incidents not charged in the Indictment. In its reply, the Defence addressed the issue of lack of notice, and specifically argued that the Prosecution should not be given the opportunity at the close of the trial to fill in the gaps in the Indictment by relying on the evidence in support of other charges.[130]

53. Subsequently, in his Final Trial Brief, the Appellant argued that the Indictment had not mentioned the killing of Mr. Murefu, that the allegation of his murder had emerged for the first time at trial, and that the Appellant should not be convicted for this uncharged offence.[131] The Trial Chamber was clearly aware of the Appellant's argument—and the Prosecution's concession—that Mr. Murefu's killing had not been alleged in the Indictment. It expressly relied on this omission in declining to base a murder conviction on that killing.[132]

54. Although the *Niyitegeka* Appeal Judgement referred to the accused's obligation to interpose a timely objection to a pleading defect when evidence is introduced at trial, it did so in the context of deciding whether and under what conditions it was appropriate for an appellant to challenge such a defect for the first time on appeal. This case presents a different situation. The Appellant repeatedly brought the issue to the Trial Chamber's attention in its briefing, and the Prosecution never suggested that he had waived his objection by not raising it earlier. And the Trial Chamber actually decided the issue, albeit in the context of murder alone and not genocide. In *Ntakirutimana*, the Appeals Chamber recognized that where the Trial Chamber has treated a challenge to an indictment as being adequately raised, the Appeals Chamber should not invoke the waiver doctrine.[133] In light of these circumstances, the Appeals Chamber holds that the Appellant did not waive his objection to the pleading defect. It therefore remains the Prosecution's burden to prove that the Appellant's defence was not materially impaired by the defect.

55. The question remains whether the vagueness of the Indictment was cured by the Prosecution's other filings. As the ICTY Appeals Chamber explained in *Kupreškić*:

> [I]n some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.[134]

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[130] *Réplique de la Défense à la réponse du Procureur aux fins d'acquittement sur un ou plusieurs chefs d'accusation; Article 98 bis du Règlement de procédure et de preuve*, filed on 15 September 2003, paras. 8, 44-48.
[131] Gacumbitsi Closing Brief, pp. 11, 12, 88, 89.
[132] Trial Judgement, para. 176.
[133] *See Ntakirutimana* Appeal Judgement, para. 23.
[134] *Kupreškić et al.* Appeal Judgement, para. 114.

Here, the Prosecution contends that the vagueness was cured by the witness statement of Witness TAQ, which provided the date and place of the killing as well as the name of the victim,[135] and by a summary of the anticipated testimony of Witness TAQ that was appended to the Prosecution Pre-Trial Brief.[136] The Appellant argues that the Indictment should have been amended accordingly but was not.[137]

56. In advance of the trial, the Prosecution disclosed to the Appellant the witness statement of Witness TAQ, which set forth, *inter alia*, the date and place of the killing as well as the name of one victim, Mr. Murefu. That statement was also included in summary form in the chart of witnesses, appended to the Prosecution Pre-Trial Brief. The summary of the anticipated testimony of Witness TAQ reads:

> On or around 15 April 1994, KARAMAGE arrived at Nyarabuye church with a large group of Hutu attackers armed with sticks. Not long after, Sylvestre GACUMBITSI arrived with a pick-up truck full of machetes. He was accompanied by a vehicle full of *Interahamwe* armed with firearms and grenades. At first, the refugees rejoiced when they saw GACUMBITSI, but he warned them: "If any Hutu has made the mistake of entering that church, let them come out immediately." GACUMBITSI then instructed the Hutus and the *Interahamwe*: "Get machetes! Start killing and surround the church so that no one escapes." An elderly Tutsi teacher named **MUREFU** rose up and asked GACUMBITSI what the Tutsis had done to deserve that fate. GACUMBITSI grabbed a machete and slashed his neck, killing him instantly. Within moments, grenades were being tossed into the church, and shots were fired.[138]

That statement is included in a chart that shows the charges to which each witness's testimony was expected to correspond. The chart makes clear that Witness TAQ's anticipated testimony related to the charge of genocide, specifically referring to paragraphs 4, 15, 16, 17, 18, 21, 22, and 23 of the Indictment.[139] Paragraph 4 of the Indictment, which was part of the "Concise Statement of Facts for Counts 1 and 2", indicates that the Appellant personally participated in killings.[140]

57. The ICTY Appeals Chamber was recently confronted with similar circumstances in the *Naletilić and Martinović* case: the material facts concerning a particular incident were not pleaded in the indictment, but were included in a chart of witnesses that set forth the facts to which each witness would testify and clearly identified the charges in the indictment to which those facts corresponded. The Appeals Chamber held that this "rather detailed information [...] was sufficient to put Martinović on notice of what specific incident was being alleged", and thus cured the defect

[135] Prosecution Response, para. 152.
[136] T. 9 February 2006 p. 28.
[137] T. 9 February 2006 p. 78.
[138] *See* Prosecution Pre-Trial Brief, Appendix 3, p. 11 (emphasis added).
[139] *See* Prosecution Pre-Trial Brief, Appendix 3, p. 10.
[140] "[...] Sylvestre GACUMBITSI killed persons by his own hand, ordered killings by subordinates, and led attacks under circumstances where he knew, or should have known, that civilians were, or would be, killed by persons acting under his authority."

in the indictment.[141] And it did not, contrary to the Appellant's suggestion here, hold that the Prosecution was obligated to formally amend the indictment to correspond with the clarifying information it subsequently provided. Likewise, in *Ntakirutimana*, the Appeals Chamber held that a witness statement, when taken together with "unambiguous information" contained in a Pre-Trial Brief and its annexes, was sufficient to cure a defect in an indictment.[142]

58. By majority, the Appeals Chamber holds, Judge Liu and Judge Meron dissenting, that the circumstances in this case are materially indistinguishable from those in *Naletilić and Martinović*, and that the summary of Witness TAQ's testimony was sufficient to clarify the general statement, already included in the genocide section of the Indictment, that "Sylvestre Gacumbitsi killed persons by his own hand". The summary clearly alleged the killing of Mr. Murefu and connected it to the genocide, did not conflict with any other information that was provided to the Appellant, and was provided in advance of the trial. It therefore unambiguously constituted "timely, clear, and consistent information" sufficient to put the Appellant on notice that he was being charged with committing genocide through the killing of Mr. Murefu.[143]

59. In addition, by a differently composed majority, the Appeals Chamber holds, Judge Güney dissenting, that even if the killing of Mr. Murefu were to be set aside, the Trial Chamber's conclusion that the Appellant "committed" genocide would still be valid. The Trial Chamber convicted the Appellant of "ordering" and "instigating" genocide on the basis of findings of fact detailing certain conduct that, in the view of the Appeals Chamber, should be characterized not just as "ordering" and "instigating" genocide, but also as "committing" genocide.

60. As the Trial Chamber observed, the term "committed" in Article 6(1) of the Statute has been held to refer "generally to the direct and physical perpetration of the crime by the offender himself."[144] In the context of genocide, however, "direct and physical perpetration" need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime.[145] Here, the accused was physically present at the scene of the Nyarubuye Parish massacre, which he

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[141] *See Naletilić and Martinović* Appeal Judgement, para. 45.
[142] *Ntakirutimana* Appeal Judgement, para. 48.
[143] In addition to his argument concerning the Indictment, the Appellant also challenges the evidentiary basis for the finding that he killed Mr. Murefu. His challenges to the credibility of Witness TAQ and the consistency of that witness's testimony with other testimony given at trial are considered elsewhere in this Judgement. His statement that the "Prosecutor failed to prove that [Mr. Murefu] existed" is a bare assertion that does not provide any reason to doubt the Trial Chamber's conclusion to the contrary; it merits no further discussion. *See* Gacumbitsi Appeal Brief, para. 217.
[144] Trial Judgement, para. 285; *see Kayishema and Ruzindana* Appeal Judgement, para. 187; *Tadić* Appeal Judgement, para. 188. The term also encompasses joint criminal enterprise, as discussed further below.
[145] For instance, it has been recognized that selection of prisoners for extermination played an integral role in the Nazi genocide. *See, e.g.*, Judgment of the International Military Tribunal for the Trial of German Major War Criminals, ( Nuremberg, 30th September and 1st October, 1946, p. 63 (London: His Majesty's Stationary Office, 1946) (Reprinted Buffalo, New York: William S. Hein & Co., Inc., 2001) (describing the selection process at Auschwitz); Att'y Gen. of

"directed" and "played a leading role in conducting and, especially, supervising".[146] It was he who personally directed the Tutsi and Hutu refugees to separate -- and that action, which is not adequately described by any other mode of Article 6(1) liability, was as much an integral part of the genocide as were the killings which it enabled.[147] Moreover, these findings of fact were based on allegations that were without question clearly pleaded in the Indictment.[148]

61. The Appeals Chamber is persuaded that in the circumstances of this case, the modes of liability used by the Trial Chamber to categorize this conduct -- "ordering" and "instigating" -- do not, taken alone, fully capture the Appellant's criminal responsibility. The Appellant did not simply "order" or "plan" genocide from a distance and leave it to others to ensure that his orders and plans were carried out; nor did he merely "instigate" the killings. Rather, he was present at the crime scene to supervise and direct the massacre, and participated in it actively by separating the Tutsi refugees so that they could be killed. The Appeals Chamber finds by majority, Judge Güney dissenting, that this constitutes "committing" genocide.

62. The Appeals Chamber unanimously dismisses this sub-ground of the Appellant's appeal.

### 3. Assessment of the Evidence Supporting the Genocide Conviction

63. The Appellant raises a number of challenges to the findings of fact underlying his conviction for genocide. The Appeals Chamber notes that in this part of his appeal, the Appellant repeatedly points to evidence he introduced at trial that contradicts the findings made by the Trial Chamber without attempting to demonstrate why the Trial Chamber's decision to instead credit the evidence introduced by the Prosecution was in error. In such instances, the Appeals Chamber will exercise its prerogative not to address the Appellant's submissions in detail.

#### (a) Alleged Errors Pertaining to Witness TAW

64. The Appellant raises various objections to the Trial Chamber's reliance on the testimony of Witness TAW, who testified as to the Appellant's actions between 7 and 13 April 1994. Other than describing him as "crucial" and alleging that several of his statements were uncorroborated by other witnesses, the Appellant does not explain in what way the Trial Chamber's findings concerning his liability for genocide would have differed absent reliance on Witness TAW's testimony.[149]

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Israel v. Adolf Eichmann, 36 I.L.R. 5, p. 185 (Isr. D.C., Jerusalem, Dec. 12, 1961), aff'd, 36 I.L.R.277 (Isr. S. Ct., May 29, 1962) (same).

[146] *See* Trial Judgement, paras. 168, 169, 171, 172, 173, 261.

[147] Trial Judgement, para. 168.

[148] *See* Indictment, paras. 4, 13-21.

[149] Gacumbitsi Appeal Brief, paras. 157, 158.

Nonetheless, in light of the fact that the Trial Chamber did rely on this witness in several respects, the Appeals Chamber will briefly address the Appellant's arguments.

65. Several of the Appellant's contentions amount to no more than observations that Witness TAW's testimony contradicted evidence introduced by the Defence. First, Witness TAW testified that the Appellant met on several occasions with Major Ndekezi, commander of the Rwanteru military camp, and conspired with him to plan genocide; the Defence submitted that Major Ndekezi was at the time serving with UNAMIR in Kigali and therefore could not have met with the Appellant, and that it was implausible that Rwanteru camp would not have been headed by someone of a higher rank than major.[150] The Trial Chamber did not specifically address these Defence arguments. However, it is well established that the Trial Chamber is not obligated to "explain in its judgement every step of its reasoning."[151] Here, the Trial Chamber could reasonably have concluded that Witness TAW's testimony was credible on the point. The Appellant does not point to any evidence supporting his assertion that Major Ndekezi was located elsewhere other than a document dated 5 March 1994, which, even if it were accurate and referred to the correct Major Ndekezi, could not provide evidence of his location in April 1994.[152] The Appellant also cites no evidence in support of the assertion that a military camp could not be commanded by a major.

66. Witness TAW testified that the Appellant attended a meeting on 8 April 1994 with various officials and *Interahamwe* leaders. The Appellant does not deny this fact, but argues that the meeting concerned security matters and that, contrary to what Witness TAW asserted, it was the prefect of Kibungo who chaired the meeting, not Colonel Rwagafirita.[153] The first point is consistent with the Trial Judgement and with Witness TAW's testimony. As to the second point, the Appellant has demonstrated no error. First, he merely offers a different account of the meeting without explaining why any reasonable trier of fact would have preferred it to that of Witness TAW. The Appellant does not point to any evidence in the record to support his further contention that there was no Colonel Rwagafirita in the Rwandan armed forces on 8 April 1994.[154] And even if Witness TAW incorrectly identified the person who chaired the meeting (which the Appeals Chamber need not decide), this point is irrelevant to the findings of liability and would not imply that a reasonable Trial Chamber would have rejected Witness TAW's evidence in its entirety.

67. The Appellant points to discrepancies between the testimonies of Witnesses TAW and TBH. The first noteworthy discrepancy concerns a meeting that took place on 9 April 1994, which

[150] Gacumbitsi Appeal Brief, paras. 129-133.
[151] *See Kajelijeli* Appeal Judgement, para. 147.
[152] Gacumbitsi Appeal Brief, para. 132, citing *Situation officiers armée Rwandaise*, MINADEF, 5 March 1994.
[153] Gacumbitsi Appeal Brief, paras. 135-138.

Witness TAW did not attend himself; his testimony was based on what Witness TBH had told him. Witness TBH stated that the distribution of weapons was not discussed at this meeting, while Witness TAW stated that it was.[155] On this point, the Appeals Chamber interprets the Trial Judgement as being in agreement with the Appellant that Witness TBH's account should prevail. The English translation of the Trial Judgement reads:

> Since the evidence of Witness TAW, who did not attend the meeting, was not corroborated and contradicted the evidence of a direct witness, Witness TBH, the Chamber can only find that the issue of weapons distribution was discussed during the meeting of 9 April 1994.[156]

In light of the rationale expressed in the first part of this sentence, the Appeals Chamber notes that the conclusion appears illogical. However, this was not an error on the Trial Chamber's part. Rather, it is an error of translation. The original French version reads (emphasis added):

> *Le témoignage de TAW, qui n'a pas assisté à la réunion, n'étant pas corroboré et s'opposant à celui d'un témoin direct, TBH, la Chambre ne peut conclure qu'une discussion sur la distribution d'armes a eu lieu lors de la réunion du 9 avril 1994.*

The Appeals Chamber considers that the best interpretation of this language indicates that the Trial Chamber held that it could *not* find that weapons distribution was discussed, rather than that it could "only" so find. This interpretation is supported by the Trial Judgement's subsequent references to the 9 April 1994 meeting, which do not mention weapons distribution being discussed there.[157] And there is no indication that the Trial Chamber based any aspect of the genocide conviction on the discussion of weapons distribution at that meeting. Thus, the Trial Chamber's analysis is consistent with that urged by the Appellant, and is not in error.[158]

68. The Appellant maintains, however, that if Witness TAW's account of the discussion of weapons distribution at the 9 April 1994 meeting is discredited, his claim that weapons were thereafter distributed on 10 April 1994 cannot safely be relied upon.[159] This is because on 10 April 1994 at Kibungo military camp, Witness TAW only saw a large number of boxes being loaded onto several vehicles; he did not actually see what was in the boxes.[160] The witness deduced that the boxes contained weapons "on the basis of information received the previous day from a participant at the meeting held at the *commune* office".[161] The Appellant contends that that participant was Witness TBH, and that in any event, if contrary to Witness TAW's testimony the weapons

[154] Paragraph 138 of the Gacumbitsi Appeal Brief refers to "Attachment No. 40" of the Gacumbitsi Book of Appeal. However, that attachment does not refer to the issue at hand.
[155] Gacumbitsi Appeal Brief, paras. 143, 144.
[156] Trial Judgement, para. 94.
[157] Trial Judgement, paras. 101, 259, 271, 303.
[158] At paragraph 142 of his Appeal Brief, the Appellant notes a discrepancy concerning the starting time of the 9 April meeting. However, he does not explain why a discrepancy on this detail undermines the credibility of either witness.
[159] Gacumbitsi Appeal Brief, paras. 164-168.
[160] Gacumbitsi Appeal Brief, paras. 145, 153, 164.

distribution had not been discussed at the 9 April 1994 meeting, Witness TAW's inference concerning the contents of the boxes was insupportable.[162]

69. The Appellant appears to misunderstand the basis of the Trial Chamber's holding that the boxes contained weapons. In addition to his statement concerning what he had learned from a participant in the previous day's meeting, Witness TAW *also* testified that he spoke to Mr. Léonidas Gacondo, the *cellule* official for Kavuzo, Kigina *secteur*, who was one of the recipients of the boxes. According to Witness TAW, Mr. Gacondo confided that the boxes contained weapons.[163] The Trial Chamber stated that the "circumstances of delivery, as well as the information collected by Witness TAW *from one of the consignees of the boxes*, lead the Chamber to find that they contained weapons, without being able to determine which type."[164] It thus cited what Witness TAW had learned from Mr. Gacondo, not what he had learned from a participant in the 9 April 1994 meeting. The Appellant does not challenge the reliability of this information. Nor does he dispute the Trial Chamber's holding that the "circumstances of delivery" -- *viz.*, the overall genocidal campaign then unfolding -- also supported the inference that the boxes contained weapons. The Appeals Chamber holds that it was reasonable for the Trial Chamber to find beyond a reasonable doubt that the Appellant distributed weapons on 10 April 1994.

70. As a general matter, the mere existence of inconsistencies between the testimonies of Witnesses TBH and TAW does not necessarily undermine either witness's credibility. The Appeals Chamber defers to the Trial Chamber's judgements on issues of credibility, including its resolution of disparities among different witnesses' accounts, and will only find that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[165] Here, the Trial Chamber reasonably concluded that any inaccuracies in Witness TAW's account resulted from the fact that he was relying on what others had told him and did not fundamentally undermine his credibility. Notably, the witness was forthright in acknowledging the limits of his direct knowledge.[166]

71. The Appellant argues that Witness TAW is biased against the Appellant because he blames the Appellant for the death of his family members and the failure to protect his property.[167] The Trial Chamber declined to find that this allegation of bias affected the witness's credibility, citing his apparently truthful demeanour, and noting that he "refrained from exaggerating his account of

[161] Trial Judgement, para. 57.
[162] Gacumbitsi Appeal Brief, paras. 164, 168.
[163] *See* Trial Judgement, para. 58.
[164] Trial Judgement, para. 95 (emphasis added).
[165] *See, e.g., Rutaganda* Appeal Judgement, paras. 24, 442, 443.
[166] Trial Judgement, para. 84.
[167] Gacumbitsi Appeal Brief, paras. 169-171; *see* T. 21 August 2003 pp. 13-16.

events in order to hurt the Accused."[168] The Appeals Chamber finds that the Trial Chamber's assessment of credibility is reasonable and defers to it. It bears noting that the mere fact that a witness or his family was a victim of an accused does not necessarily imply a bias that discredits that witness's testimony. This Tribunal, like criminal courts everywhere, routinely relies on the testimony of victims of crime, who, one would assume, are as motivated as anyone to see that justice is done with accuracy. It is for the trier of fact to determine whether a particular witness may have an incentive to distort the truth, and here the Appellant has not demonstrated that the Trial Chamber's assessment was in error.

72. Finally, the Appellant submits that the Trial Chamber's reliance on Witness TAW in concluding, *inter alia*, that weapons were distributed was in error because the evidence was uncorroborated and circumstantial.[169] It is well established that a Trial Chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.[170] Moreover, it is also permissible to rely on circumstantial evidence to prove material facts.[171] The Appeals Chamber finds no error in the Trial Chamber's assessment of the evidence in this regard.

(b) Credibility of Witness TBH

73. In addition to the above-mentioned arguments concerning inconsistencies between the testimonies of Witnesses TAW and TBH, the Appellant contends that the Trial Chamber erred in crediting the testimony of Witness TBH. He maintains that the witness was personally biased because the Appellant had previously removed him from an official position. Furthermore, he claims that the witness also had an incentive to agree to testify against the Appellant because it allowed him to leave prison in Rwanda, where he had been serving a sentence for genocide, in order to stay in Arusha for approximately one month while preparing his testimony. The Appellant further states that Witness TBH's own testimony illustrates that he was coached by the Prosecution: the witness clarified and added to testimony he had given earlier, explaining that he had been advised in discussions with the Prosecution that his testimony had been incomplete. Last, the Appellant alleges that Witness TBH falsely testified that he had implicated the Appellant in the written record of his guilty plea in Rwanda.[172]

74. The Trial Chamber acknowledged Witness TBH's prior dismissal as well as his genocide conviction, and assessed his testimony with caution as a result:

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[168] Trial Judgement, para. 84.
[169] Gacumbitsi Appeal Brief, paras. 201-208.
[170] *See Semanza* Appeal Judgement, para. 153.
[171] *See, e.g., Ntakirutimana* Appeal Judgement, para. 262.
[172] *See* Gacumbitsi Appeal Brief, paras. 173-183.

> The Chamber recalls that Witness TBH is an alleged accomplice of the Accused. It also recalls that the Accused removed Witness TBH from an official position, as the witness acknowledged. Thus, the Chamber assessed his evidence with caution. Having carefully examined Witness TBH's evidence, the Chamber finds, however, that his account of the meeting of 9 April 1994 and of the subsequent events implicating the Accused is credible and reliable, and that his testimony does not appear to have been born of any resentment towards the Accused.[173]

To be sure, the Trial Chamber did not specifically address all of the Appellant's arguments.[174] But it can be assumed to have been aware of the arguments presented to it and was not obligated to discuss all of them.[175] Moreover, the Appellant has not shown that no reasonable Trial Chamber could have deemed the witness credible. He has provided no evidence, for instance, that Witness TBH's trip to Arusha was conditioned on the content of his testimony, and no reason to believe that the incentive of a single month's sojourn outside prison was so powerful as to make it unreasonable to conclude that he was telling the truth. The passage of Witness TBH's testimony concerning the alleged prosecutorial coaching demonstrates no impropriety.[176] It is not inappropriate *per se* for the parties to discuss the content of testimony and witness statements with their witnesses, unless they attempt to influence that content in ways that shade or distort the truth. And the Appellant does not explain why the alleged discrepancy between Witness TBH's trial testimony and his written plea statement in Rwanda discredits him. The Trial Chamber has broad discretion to determine the weight to be given to discrepancies between a witness's testimony and his prior statements.[177]

75. Moreover, even if the Trial Chamber had erred in crediting Witness TBH's testimony, the Appellant has not shown how relying on it caused a miscarriage of justice. The Trial Chamber relied on the largely corroboratory accounts of Witnesses TBH and TAW. As noted above, Witness TAW was credible and the Appellant does not establish that reliance on his testimony alone, absent corroboration, would have been unsafe or would have resulted in a different verdict.[178]

(c) Credibility of Witnesses TAS, TBI, TBJ, and TBK

76. The Appellant contends that the Trial Chamber committed a logical error when it found, on the basis of Witness TAS's and TAW's testimony, that the Appellant exhorted a crowd consisting of a Hutu majority at Nyakarambi market to "let no one escape". He reasons that some Tutsis must have been present, and yet there is no allegation that anyone was killed at Nyakarambi on that

[173] Trial Judgement, para. 86.
[174] Gacumbitsi Closing Brief, pp. 46, 47.
[175] *See Rutaganda* Appeal Judgement, para. 536; *Kvočka et al.* Appeal Judgement, para. 23.
[176] The Appeals Chamber sees no reason to doubt the Prosecution's statement that "the witness was involved in normal preparation to give evidence, and nothing more." Prosecution Response, para. 140.
[177] *See Kajelijeli* Appeal Judgement, para. 96.
[178] The Trial Chamber expressly relied on Witness TBH's testimony and not Witness TAW's with respect to the discussion of weapons distribution at the 9 April 1994 meeting. But as to that point, the Trial Chamber's reliance on Witness TBH's version of events favoured the Appellant.

day.[179] This is a *non sequitur*. The Trial Chamber did not hold that the Appellant was giving instructions for immediate killings, but rather that he was seeking "to prepare the Hutu population for the elimination of the Tutsi."[180]

77. The Appellant further notes that the Witnesses TBI, TBJ, and TBK have all been arrested and/or sentenced in Rwanda for genocide.[181] He does not explain the implications of this observation for the witnesses' credibility or for the Trial Judgement. As noted above, the Trial Chamber explained with respect to Witness TBH that his genocide conviction did not preclude reliance on his testimony; the Appellant does not explain why a similar conclusion would not have been reasonable with respect to the other three witnesses. In light of the Appellant's failure to demonstrate an error meriting reversal, no further discussion is warranted.[182]

(d) Alleged Factual Errors Concerning the Attacks at Nyarubuye Parish

78. Finally, the Appellant challenges the Trial Chamber's assessment of the testimony of Prosecution Witnesses TAO, TAQ, and TAX concerning the attacks at Nyarubuye Parish from 15 through 17 April 1994.[183] These attacks were the central facts underlying the Appellant's genocide conviction. The Trial Chamber found that he had planned, instigated, ordered, committed, and aided and abetted the killings of thousands of Tutsi refugees, who had fled various surrounding areas and sought shelter at Nyarubuye, in multiple massacres over the course of those three days.[184]

79. First, the Appellant points to various minor variations among the testimonies of different witnesses, such as whether the Appellant spoke "aloud" or "through a megaphone", and whether the *Interahamwe* chanted "Let's exterminate them" or "Let's massacre them".[185] He also notes that Witness TAO first stated that he "saw" the Appellant and six police officers arrive at the parish, but then clarified on cross-examination that he in fact heard the car arrive, and shortly thereafter saw the Appellant and the officers.[186] In the Appeals Chamber's view, these discrepancies are minor, and the Trial Chamber was certainly reasonable in deeming the witnesses credible despite them. As the Trial Chamber noted, their testimonies largely corroborated one another and "[n]o major inconsistency or discrepancy was noted in their evidence. The discrepancies noted can be explained

[179] Gacumbitsi Appeal Brief, paras. 184, 185.
[180] Trial Judgement, para. 97.
[181] Gacumbitsi Appeal Brief, paras. 191, 193, 194.
[182] The Appellant's other observations in this subsection are also without merit. He asserts that Witness TAS was "coached and sent by *IBUKA*", but provides no further explanation or evidence. He contends that one witness testified that he did not find the Appellant in Kigarama; it is unclear which witness he means, and several witnesses testified that the Appellant did lead a crowd to Kigarama. The Appellant's contentions concerning the interlocutory decision of 1 August 2003 are considered in section II.A.
[183] Gacumbitsi Appeal Brief, paras. 209-256.
[184] Trial Judgement, para. 288. The issue of defects in the Indictment was considered in section II.B.2 above.
[185] Gacumbitsi Appeal Brief, paras. 227-229.

by the time that has elapsed since the massacres, the fact that they witnessed the massacres from different locations and at different times, and the considerable stress they were subjected to."[187]

80. The Appellant also points to disparities in what the various Prosecution witnesses observed.[188] For instance, on 16 April 1994, Witness TAQ did not see the Appellant at Nyarubuye Parish, while Witness TAO did. On 17 April 1994, Witness TAX heard the Appellant exhort the *Interahamwe* to kill the few surviving Tutsi refugees, using a metaphor of "striking at a snake". Witnesses TAQ and TAO did not hear these remarks. Some witnesses did not mention looting following the massacre, while others did. The Appeals Chamber finds that these contrasts do not amount to inconsistencies, but simply reflect the fact that different people in different vantage points saw and heard different things.[189] The Trial Chamber so found, and the Appellant has not demonstrated that its conclusions were unreasonable.[190]

81. Finally, the Appellant states that the Trial Chamber's findings of fact were contradicted by evidence introduced by the Defence, including the Appellant's own diary from 1994, which does not detail his participation in the massacres.[191] The Appellant does not show that the Trial Chamber improperly ignored any of this evidence. Rather, the Trial Chamber simply concluded that to the extent the evidence presented by the Defence and that presented by the Prosecution conflicted, the latter was more credible.[192] When faced with competing versions of events, it is the prerogative of the trier of fact to determine which is more credible.[193] The Appellant has not demonstrated that the Trial Chamber made an error.

(e) Conclusion

82. For the foregoing reasons the Appeals Chamber dismisses this sub-ground of appeal.

[186] Gacumbitsi Appeal Brief, para. 231.
[187] Trial Judgement, para. 145.
[188] *See, e.g.*, Gacumbitsi Appeal Brief, paras. 233, 234, 243, 244, 255.
[189] *See Niyitegeka* Appeal Judgement, para. 142.
[190] *See* Trial Judgement, paras. 149, 159, 163.
[191] Gacumbitsi Appeal Brief, paras. 236-242, 250-253.
[192] *See, e.g.*, Trial Judgement, paras. 153, 160.
[193] *See Rutaganda* Appeal Judgement, para. 29.

## C. Crimes against Humanity: Extermination (Ground of Appeal 3)

83. The Trial Chamber convicted the Appellant of planning, instigating, ordering, and aiding and abetting extermination as a crime against humanity.[194] It referred to its earlier factual findings on the Appellant's role in the massacre at Nyarubuye Parish,[195] and found that the Appellant had the requisite *mens rea* for extermination in that he intended to participate in that massacre and had knowledge of the widespread and systematic attack against Tutsi civilians in Rusumo in April 1994.[196] The Appellant challenges this conviction.[197]

### 1. The Requisite Intent for the Crime of Extermination

84. The Appellant first appears to submit that the Trial Chamber applied an incorrect legal standard on the requisite intent for crimes against humanity.[198] In the Appellant's view, "[t]he mental element must be proved by the existence of a widespread practice, which implies planning and tolerance of such act by the State."[199] The Appeals Chamber rejects this contention. As stressed by the Trial Chamber,[200] the existence of a policy or plan can be evidentially relevant, but it is not a separate legal element of a crime against humanity.[201] In particular, the ICTY Appeals Chamber has emphasized that proof of a plan or policy is not a prerequisite to a conviction for extermination.[202] The same can be said of "tolerance of such act by the State."

85. The Appellant further submits that the Trial Chamber erred in fact in finding that he had the requisite intent for the crime of extermination.[203] He avers that the Prosecution has not shown that he took any action to plan the extermination of Tutsis.[204] In particular, he contends that the meetings of 8 and 9 April 1994 only dealt with security issues and that Witness TBH (who testified as to the meeting of 9 April 1994) was manipulated by the Prosecution.[205] The Appellant also

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[194] Trial Judgement, paras. 314-316. Paragraph 314 of the English version of the Trial Judgement refers to "inciting" extermination whereas Article 6(1) of the Statute employs the term "instigated". Paragraph 314 of the authoritative French version of the Trial Judgement uses the term "*incité*", which is also the term employed in the French version of Article 6(1) of the Statute. The Appeals Chamber has already noted that "[t]here is a glaring disparity between the English text and the French text" of Article 6(1) of the Statute and held that, for the purposes of Article 6(1) of the Statute, "instigated" (in the English version) and "*incité*" (in the French version) are synonymous (*Akayesu* Appeal Judgement, para. 478).
[195] Trial Judgement, para. 308.
[196] Trial Judgement, paras. 311, 312.
[197] Although the Gacumbitsi Notice of Appeal (para. 40) is vague in setting forth the errors alleged, the Prosecution does not object to it, and the Appeals Chamber will therefore consider the errors as elucidated in the Appeal Brief.
[198] Gacumbitsi Appeal Brief, paras. 313, 314.
[199] Gacumbitsi Appeal Brief, para. 314 (no reference provided).
[200] Trial Judgement, paras. 297-301.
[201] *Semanza* Appeal Judgement, para. 269. *See also Kunarac et al.* Appeal Judgement, para. 98; *Krstić* Appeal Judgement, para. 225; *Blaškić* Appeal Judgement, para. 120.
[202] *Krstić* Appeal Judgement, para. 225.
[203] Gacumbitsi Appeal Brief, para. 315.
[204] Gacumbitsi Appeal Brief, para. 317, referring to the arguments made under Ground 2 (Genocide).
[205] Gacumbitsi Appeal Brief, paras. 318, 319, referring only to Exhibit 7 tendered at trial.

argues that he refuted the existence of the weapons allegedly distributed.[206] He alleges that he could not have planned the extermination of Tutsis at the same time as he was arresting the people harming the Tutsis and their property,[207] and that if he had planned to exterminate the Tutsis "he would not have waited for seven days" to do so when he had the capacity to do so earlier.[208]

86. The Appeals Chamber holds that the Trial Chamber applied the correct *mens rea* requirement for the crime of extermination. In accordance with the case-law of the Tribunal,[209] the Trial Chamber explained that for crimes against humanity "the accused must have acted with knowledge of the broader context of the attack, and with knowledge that his act formed part of the widespread and systematic attack against the civilian population."[210] While the Trial Chamber did not expressly outline the *mens rea* requirement specific to the crime of extermination, it implicitly applied the correct requirement by finding that the actions of the Appellant revealed his "intention to participate in a large scale massacre in Nyarubuye."[211] As the Appeals Chamber recently explained:

> the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, *and that the accused intended by his acts or omissions this result.*[212]

87. Moreover, the Appellant's argument is premised on a misinterpretation of the facts. The Trial Chamber did find that the Appellant took steps to plan the genocide and extermination of Tutsis in Rusumo Commune,[213] a conclusion that was reasonable, as discussed earlier.[214]

88. The actions of the Appellant in planning the extermination of Tutsis from 8 through 15 April 1994, as well as his subsequent actions from 15 through 17 April 1994, show that the Appellant had the intent to massacre a large number of individuals, and that he knew that his acts furthered a widespread and systematic attack against the Tutsis. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in assessing the Appellant's *mens rea*.[215]

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[206] Gacumbitsi Appeal Brief, para. 320 (no reference provided).
[207] Gacumbitsi Appeal Brief, para. 324, referring to the testimonies of Defence Witnesses UH3 (T. 6 October 2003 p. 23), ZEZ (T. 6 October 2003 p. 52), and MQ1 (T. 21 October 2003 pp. 68, 69).
[208] Gacumbitsi Appeal Brief, para. 323.
[209] *See Akayesu* Appeal Judgement, para. 467; *Ntakirutimana* Trial Judgement, para. 803; *Semanza* Trial Judgement, para. 332; *Cyangugu* Trial Judgement, para. 698. *See also, e.g., Kordić and Čerkez* Appeal Judgement, para. 99.
[210] Trial Judgement, para. 302.
[211] Trial Judgement, para. 311 ("[...] the Chamber does not doubt the Accused's intention to participate in a large scale massacre in Nyarubuye.").
[212] *Ntakirutimana* Appeal Judgement, para. 522 (emphasis added). *See also Stakić* Appeal Judgement, paras. 259, 260.
[213] *See* Trial Judgement, paras. 278, 311, 314.
[214] *See supra* section II.B.
[215] *See* Trial Judgement, paras. 311, 312.

### 2. Victims Named in the Indictment

89. The Appellant argues that the Trial Chamber should not have convicted him for extermination because the Prosecution had failed to prove that the individuals specifically mentioned in paragraph 28 of the Indictment were killed at Nyarubuye Parish.[216] The Appeals Chamber disagrees; such a showing was not required for an extermination conviction. Paragraph 28 of the Indictment reads:

> As direct consequences of orders or instructions from **Sylvestre GACUMBITSI** at Nyarabuye *paroisse,* there were numerous killings of family members and entire families, including UWIRAGIYE, MUGIRANEZA and TUYIRINGIRE, three children. The identity of each victim and the proximate number of fatalities and the exact circumstances of each death cannot be detailed exhaustively due to the overwhelming devastation of the massacres.

Although this paragraph lists certain specific victims, this is only by way of example. The Appellant was not convicted of personally "committing" extermination. The material fact for his conviction for planning, instigating, ordering, and aiding and abetting that crime was the fact that many refugees were killed as a consequence of the Appellant's orders or instructions. And, indeed, the Trial Chamber found "that many Tutsi who found refuge at Nyarubuye Parish were killed there between 15 and 17 April 1994."[217] The Appellant has not shown that this finding was unreasonable.

90. Next, the Appellant claims that the Trial Chamber should not have relied on the killing of Mr. Murefu and two others for the conviction as those individuals were not mentioned in the Indictment. The Appeals Chamber has considered this argument above in the context of the genocide charge.[218] In any event, however, any pleading failure with respect to the killing of Mr. Murefu would not affect the conviction for extermination. Because, as noted, the Appellant was not convicted for "committing" extermination, his conviction does not depend on the individual killing of Mr. Murefu or any other specific person. Accordingly, this sub-ground of appeal is dismissed.

### 3. Factual Basis for the Conviction

91. The Appellant contends that the Trial Chamber erred in fact and in law in relying on the evidence of several Prosecution witnesses (TAQ, TAX, TAO, Fergal Keane, and Alison Des Forges) and in discrediting that of several Defence witnesses (UHT, NG2, ZHZ, ZIZ).[219]

[216] Gacumbitsi Appeal Brief, para. 321. *See also ibid.*, paras. 213-220. At the Appeal Hearing, the Appellant made a similar argument with respect to paragraph 12 of the Indictment (relating to Counts 1 and 2). *See* T. 8 February 2006 pp. 27-31. However, since the Trial Chamber found that the allegations contained in paragraph 12 of the Indictment had not been proved, it is not necessary to examine this question. *See* Trial Judgement, para. 40.
[217] Trial Judgement, para. 174.
[218] *See* section II.B.
[219] Gacumbitsi Appeal Brief, paras. 262-265, 298-308.

92. First, the Appellant submits that Witness TAQ was not credible.[220] He reiterates some of the arguments already raised under Ground 2 of his appeal,[221] and adds that Witness TAQ contradicted herself as to whether she heard the Appellant ask Hutus to separate themselves from the Tutsis refugees[222] and that Witness TAX heard no such request.[223] The Appeals Chamber finds that the supposed contradictions are in fact simply references to different events taking place on different dates. Witness TAQ testified that, after Mr. Murefu was killed on 15 April 1994, she ran to hide nearby and, once there, heard the Appellant ask the Hutus to separate themselves from the other refugees.[224] The other excerpt of her testimony cited by the Appellant concerns the witness's flight from Nyarutunga on 14 April 1994.[225] Likewise, discrepancies between what Witnesses TAQ and TAX heard are of no importance; the two were not similarly situated at the relevant time (Witness TAQ was outside,[226] while Witness TAX was in the convent[227]). Finally, the Appellant's further assertion that Witness TAQ held a grudge against him is unexplained and unsupported, and merits no further discussion.[228]

93. The Appellant next contends that Witness TAO's testimony concerning what the Appellant stated when he arrived at Nyarubuye Parish on 15 April 1994 contradicts an alleged prior statement.[229] The Appeals Chamber finds that it was reasonable for the Trial Chamber to accept Witness TAO's testimony despite some inconsistencies with his prior statement, of which the Trial Chamber was aware.[230] As noted above, the Trial Chamber has wide discretion to determine whether discrepancies discredit a witness's testimony.[231] In this case, Witness TAO was asked about the inconsistencies in his statements, and responded that his answers to the questions of the investigators had been transcribed by many persons and that now that he was before the Trial Chamber, he could answer questions directly.[232] Likewise, the Appeals Chamber sees no significance in the Appellant's further argument that while Witness TAO said that he saw the Appellant with a person named Rubaguka, Witness TAQ saw only Rubaguka.[233] The Trial Chamber

[220] Gacumbitsi Appeal Brief, paras. 266-276.
[221] *See* Gacumbitsi Appeal Brief, para. 273 (*see supra* section II.B.3(d)).
[222] Gacumbitsi Appeal Brief, paras. 269, 270.
[223] Gacumbitsi Appeal Brief, para. 274.
[224] T. 29 July 2003 p. 53.
[225] T. 30 July 2003 pp. 11, 12.
[226] T. 29 July 2003 p. 53.
[227] T. 31 July 2003 p. 32.
[228] Gacumbitsi Appeal Brief, para. 272 (no reference to the record provided).
[229] Gacumbitsi Appeal Brief, paras. 279-281. According to the Appellant, Witness TAO recognized that, in a prior statement, he said that the Appellant tried to reassure the refugees before the police opened fire (the Appellant refers to T. 31 July 2003 pp. 14, 15), whereas at trial Witness TAO said that the Appellant told the refugees to not advance further because the Tutsi's hour had come (the Appellant refers to T. 30 July 2003 p. 54).
[230] Trial Judgement, paras. 123, 145.
[231] *See supra* section II.B.3. *See also, e.g., Rutaganda* Appeal Judgement, paras. 442, 443.
[232] *See* T. 31 July 2003 p. 14.
[233] Gacumbitsi Appeal Brief, para. 285 (no reference to the record provided).

reasonably concluded that this alleged "discrepancy may be explained by the fact that the two witnesses witnessed the event at different times from different locations."[234]

94. As to Witness TAX, the Appellant submits that she was eleven years old at the time of the events in 1994 and that she lied about the number of days she hid among the corpses before being saved by the RPF.[235] The Appeals Chamber finds that it was reasonable for the Trial Chamber to accept Witness TAX's testimony despite her young age at the time of the events. There is no rule requiring a Trial Chamber to reject *per se* the testimony of a witness who was a child at the time of the events in question, and the Appellant did not demonstrate that Witness TAX was not reliable or credible. Further, uncertainty as to the number of days Witness TAX hid among the corpses before being saved by the RPF does not affect the relevant aspects of her testimony.

95. With respect to both Fergal Keane and Alison Des Forges, the Appellant argues that their estimates of the number of people killed at Nyarubuye Parish were inflated because the RPF had brought more corpses to Nyarubuye Parish before the documentary was filmed.[236] But even if this were true (which the Appeals Chamber need not decide), this would not cast doubt on the occurrence of the attacks to which both Prosecution and Defence witnesses testified. Nor does the Appellant demonstrate that the difference in the estimates would have affected the Judgement in any other way.

96. The Appellant next contends that the Trial Chamber exhibited bias in finding Defence Witness UHT not credible on the basis of vagueness and contradictions while excusing similar variations in the accounts of the Prosecution witnesses.[237] The Appeals Chamber disagrees. The Trial Chamber's conclusion that Witness UHT was not credible was reasonable,[238] as was its assessment of the credibility of the Prosecution witnesses. The Appellant has not shown that the Trial Chamber applied differing standards in the assessment of the evidence.

97. The Appellant also submits that the Trial Chamber erred in rejecting the testimony of Defence Witnesses NG2, ZHZ, and ZIZ that the Appellant was not at Nyarubuye on 15 April 1994,

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[234] Trial Judgement, para. 159.

[235] Gacumbitsi Appeal Brief, paras. 288, 289. The Appellant also asserts that Fergal Keane used her to make publicity for a documentary, but does not explain why this would impugn her credibility.

[236] Gacumbitsi Appeal Brief, paras. 291-297. The Appellant further asserts that Fergal Keane was an agent for the RPF; this claim is unsubstantiated and does not suffice to impugn his testimony.

[237] Gacumbitsi Appeal Brief, paras. 308 (referring to Trial Judgement, para. 160), 309, 310.

[238] *See* Trial Judgement, para. 160. The Trial Chamber found Witness UHT "not very credible" because: 1) while he "testified that during the six hours he spent with the attackers at the parish on 16 April 1994, amongst corpses and survivors, he did not take part in finishing off the wounded [...] he could not testify as to what he did, apart from staying with his brother-in-law, being shocked and frightened"; and 2) Witness UHT was unclear as to the second vehicle that he saw at the parish. *Ibid.*

especially since the Trial Chamber had not disputed the credibility of these witnesses.[239] But as the Trial Chamber stated, it was "quite aware" of these witnesses' testimonies.[240] It simply found that, in light of the "consistent and specific" evidence placing the Appellant at Nyarubuye Parish on 15 April 1994, the Defence evidence did not raise a reasonable doubt as to his participation in the massacre.[241] The Appellant has not shown that this was unreasonable.

98. For the foregoing reasons, this sub-ground of appeal is dismissed and the appeal under this ground is dismissed in its entirety.

[239] Gacumbitsi Appeal Brief, paras. 298-306. The Appeals Chamber notes that the witnesses did not testify as to the events of 16 and 17 April 1994.
[240] *See* Trial Judgement, para. 153; *see also ibid.*, paras. 127, 130, 131.
[241] *See* Trial Judgement, para. 153.

## D. Crimes against Humanity: Rape (Ground of Appeal 4)

99. The Trial Chamber found that, on 17 April 1994, the Appellant publicly instigated the rape of Tutsi girls, declaring that sticks should be inserted into their genitals if they resisted.[242] It then found that the rapes of Witness TAQ and seven other Tutsi women were a direct consequence of the Appellant's instigation, and convicted the Appellant for those rapes.[243] The Appellant challenges his conviction for rape as a crime against humanity.[244]

### 1. Were the Rapes Part of a Widespread or Systematic Attack?

100. The Appellant submits that the Trial Chamber erred in law in convicting him of rape as a crime against humanity because the rapes in question were not committed in the course of a widespread and systematic attack. He submits that "systematic attack within the meaning of Article 3(g) of the Statute implies a deliberate act or plan" and that this element was not established here because the Prosecution did not prove the existence of preparatory meetings.[245]

101. The Trial Chamber stated:

> The attack must be widespread or systematic. The concept of "widespread" attack refers to the scale of the attack and multiplicity of victims. The attack must be "massive or large scale, involving many victims". The concept of "systematic" attack, within the meaning of Article 3 of the Statute, refers to a deliberate pattern of conduct, but does not necessarily include the idea of a plan. The existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic. However, the existence of such a policy or plan is not a separate legal element of the crime.[246]

This elucidation of the "widespread or systematic" requirement is in accordance with the case law of this Tribunal and that of the ICTY, and the Appeals Chamber sees no error in it.[247]

102. The Appellant also argues that Article 3(g) of the Statute is directed at crimes of a collective nature, whereas the evidence in this case established, at most, individual or isolated acts.[248] At the outset, it bears noting that it is not rape *per se* that must be shown to be widespread or systematic,

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[242] Trial Judgement, para. 224.
[243] Trial Judgement, paras. 224, 327, 328, 330. The Trial Chamber also found that the rapes recounted by Prosecution Witnesses TAO, TAS, and TAP had been established, but it acquitted the Appellant of them because it was not convinced that they were sufficiently connected to the Appellant's instigation. Trial Judgement, paras. 226, 227, 329. In particular, it found that, although Witness TAS testified that an attacker told her that he was acting in accordance with the Appellant's instructions, that hearsay evidence was not sufficiently reliable. *See* Trial Judgement, paras. 227, 327, 329.
[244] Gacumbitsi Notice of Appeal, paras. 41-46.
[245] Gacumbitsi Appeal Brief, para. 363; *see also* Gacumbitsi Reply, para. 85.
[246] Trial Judgement, para. 299 (internal citations omitted).
[247] ICTR: *Akayesu* Trial Judgement, paras. 579, 580; *Ntakirutimana* Trial Judgement, para. 804; *Semanza* Trial Judgement, paras. 328, 329; *Niyitegeka* Trial Judgement, para. 439. ICTY: *Kunarac et al.* Appeal Judgement, paras. 93-96; *Blaškić* Appeal Judgement, paras. 100, 101; *Kordić and Čerkez* Appeal Judgement, paras. 93, 94.
[248] Gacumbitsi Appeal Brief, paras. 368-372.

but rather the attack itself (of which the rapes formed part).[249] In the case at hand, the Trial Chamber reasonably concluded that there was a widespread and systematic attack against Tutsis in Rusumo Commune.[250] Its further conclusion that the rapes formed part of this attack[251] was also reasonable in light of the finding that "the victims of rape were chosen because of their Tutsi ethnic origin, or because of their relationship with a person of the Tutsi ethnic group".[252]

103. The Appellant specifically contends that the rape of Witness TAQ was isolated because she had known her attacker previously.[253] But this fact does not mean that her rape was isolated from the widespread and systematic attack. Indeed, the genocide and extermination campaign in Rwanda was characterized in significant part by neighbours killing and raping neighbours.[254] Moreover, as the ICTY Appeals Chamber has recognized, even in the event that "personal motivations can be identified in the defendant's carrying out of an act, it does not necessarily follow that the required nexus with the attack on a civilian population must also inevitably be lacking."[255] Whether or not the perpetrator and victim are acquainted, the question is simply whether the totality of the evidence proves a nexus between the act and the widespread or systematic attack. The Appellant has not shown that the Trial Chamber erred in holding that this requirement was satisfied here.

104. Accordingly, this sub-ground of appeal is rejected.

### 2. Assessment of the Evidence

105. The Appellant submits that the Prosecution witnesses who testified as to rapes were not credible.[256] As the Trial Chamber acquitted the Appellant in relation to the rapes recounted by Witnesses TAO, TAS, and TAP, it is not necessary to discuss the contentions of the Appellant with respect to these witnesses. As to Witness TAQ, the Appellant refers to his arguments under his third ground of appeal, which have already been dismissed.[257] He adds that the witness did not see him on 17 April 1994, but only heard his voice through a megaphone, which causes vocal distortion; moreover, this difficulty was compounded by the fact that there were three persons talking at the

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[249] *Kunarac et al.* Appeal Judgement, para. 96; *Blaškić* Appeal Judgement, para. 101; *Kordić and Čerkez* Appeal Judgement, para. 94.
[250] Trial Judgement, paras. 303, 305, 306, 322, 323.
[251] Trial Judgement, para. 225.
[252] Trial Judgement, para. 324.
[253] Gacumbitsi Appeal Brief, para. 372.
[254] For instance, paragraph 4 of the Indictment in this case described the events in Rusumo Commune as follows: "The campaign consisted in public incitement of Hutu civilians to separate themselves from their Tutsi neighbors and to kill them". *See also* Trial Judgement, para. 107. The Appellant has not challenged this basic account of the genocide, although he disputes his role in it.
[255] *Tadić* Appeal Judgement, para. 252.
[256] Gacumbitsi Appeal Brief, paras. 329, 330-339 (Witness TAP), 340-344 (Witness TAQ), 345-350 (Witness TAS), 351-359 (Witness TAO).
[257] Gacumbitsi Appeal Brief, para. 328. *See supra* section II.C.

same time.[258] Finally, he reiterates that Witness TAQ knew her assailant, which, he suggests, means that her rape was not triggered by the Appellant's instigation.[259] In his Reply, the Appellant adds that the Trial Chamber erred in finding a causal link between his statements and the rapes, and that no reasonable trier of fact would have relied only on Witness TAQ's testimony to prove such a link with respect to the rape of seven other women.[260]

106. With respect to the Appellant's argument concerning vocal distortion, the Trial Chamber concluded that "the witness knew the Accused sufficiently well, because of their relationship, to be able to recognize his voice over the megaphone without seeing him."[261] The Appellant has not shown that this conclusion was unreasonable, nor has he shown that the fact that there were other individuals also speaking made it unreasonable to rely on Witness TAQ's testimony. Moreover, there is no cogent reason why the Trial Chamber should only have accepted Witness TAQ's account of her own rape and not that of the rapes she witnessed. As noted above, the Trial Chamber reasonably concluded that Witness TAQ was credible.

107. As noted above, the acquaintance between Witness TAQ and her assailant does not mean that her rape cannot constitute a crime against humanity. Likewise, it does not demonstrate that the Appellant could not have instigated the attack. The critical question is whether the Appellant's words substantially contributed to the commission of the rape. As to that question, the Trial Chamber found:

> on 16 April 1994, around 9 a.m., the Accused, who was driving around in Rubare *cellule*, Nyarubuye *secteur*, using a megaphone, asked that Hutu young men whom [...] girls had refused to marry should be looked for so that they should have sex with the young girls, adding that "in the event [that] they [the young girls] resisted, they had to be killed in an atrocious manner". Placed in context, and considering the attendant audience, such an utterance from the Accused constituted an incitement, directed at this group of attackers on which the *bourgmestre* had influence, to rape Tutsi women. That is why, immediately after the utterance, a group of attackers attacked Witness TAQ and seven other Tutsi women and girls with whom she was hiding, and raped them.[262]

Given these factual findings, which have not been shown to be unreasonable, it was reasonable for the Trial Chamber to conclude that the Appellant's words substantially contributed to the rapes of Witness TAQ, as well as that of the seven other Tutsis.[263]

108. Accordingly, this ground of appeal is dismissed in its entirety.

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[258] Gacumbitsi Appeal Brief, paras. 342, 343.
[259] Gacumbitsi Appeal Brief, para. 344, referring to T. 30 July 2003 p. 35.
[260] Gacumbitsi Reply, paras. 89, 90, 93.
[261] Trial Judgement, para. 213 (internal citation omitted).
[262] Trial Judgement, para. 215 (internal citation omitted).
[263] *See* Trial Judgement, para. 328.

## E. Sentencing (Ground of Appeal 5)

109. The Appellant submits that his sentence should be reduced to fifteen years, in the event that the Appeals Chamber does not quash his convictions.[264] Pointing to the Trial Chamber's reliance on his position as *bourgmestre* as an aggravating factor, he claims that he was convicted only because of that position, and that his responsibility for the crimes was never proven.[265] As to mitigating circumstances, the Appellant contends that, on 11 and 12 April 1994, he used his authority as *bourgmestre* to have the perpetrators arrested and incarcerated.[266] The Appellant also asserts that he helped some persons to escape the massacres,[267] and that he was himself a victim as he had been threatened and had to go into hiding on 13 April 1994.[268] Finally, he contends that the sentence should be reduced in light of his advanced age and the normal life expectancy in Africa.[269]

110. The Prosecution responds that the Appellant did not demonstrate how the Trial Chamber failed to follow the applicable law or abused its discretion in imposing a sentence.[270] In reply, the Appellant states that "[i]t is dumbfounding to think that when the Accused requests a reduction in his sentence, he is formulating a ground of appeal" and that "the heading 'Sentence' is not at all a ground of appeal. The proof is that the Defence has nowhere made mention of any error."[271] Rather, the Appellant requests that the Appeals Chamber, "[c]onforming to the humanist idea of countries like France where the famous prisoner Maurice PAPON, was admitted to spend his last days in his home because of his advanced age," reduce his sentence to fifteen years.[272]

111. Given that, as the Appellant expressly concedes in his Reply Brief, he has not raised any error of the Trial Chamber in relation to the sentence imposed,[273] the Appeals Chamber rejects the request to reduce the sentence. It is well established that the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber absent a showing that the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow applicable law.[274]

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[264] Gacumbitsi Notice of Appeal, paras. 52-57, 60; Gacumbitsi Appeal Brief, para. 390.
[265] Gacumbitsi Appeal Brief, paras. 378-382, 385.
[266] Gacumbitsi Appeal Brief, paras. 382, 384.
[267] Gacumbitsi Appeal Brief, para. 386.
[268] Gacumbitsi Appeal Brief, para. 387.
[269] Gacumbitsi Appeal Brief, para. 389. *See also* Gacumbitsi Notice of Appeal, paras. 54-56.
[270] Prosecution Response, paras. 210-224.
[271] Gacumbitsi Reply, paras. 148, 152.
[272] Gacumbitsi Reply, para. 153.
[273] Even absent the admission in the reply, the result would be the same: the Gacumbitsi Appeal Brief does not attempt to show that the Trial Chamber committed any error that would require intervention of the Appeals Chamber.
[274] *See Kajelijeli* Appeal Judgement, para. 291; *Semanza* Appeal Judgement, para. 392.

# III. THE APPEAL OF THE PROSECUTION

## A. Murder as a Crime against Humanity (Ground of Appeal 2)

112. The Prosecution challenges the Appellant's acquittal for murder as a crime against humanity, with which he was charged pursuant to Articles 3(a), 6(1), and 6(3) of the Statute.[275] The Trial Chamber found that, on 13 April 1994, the Appellant expelled two of his Tutsi tenants, Marie and Béatrice, from their home, and that they were killed later that night.[276] However, the Trial Chamber considered these findings insufficient to establish the Appellant's responsibility for these killings.[277] The Prosecution contends, first, that the Trial Chamber erred in law and in fact by failing to conclude that the Appellant ordered these killings; and, second, that it erred in law by failing to consider the alternative theory that the Appellant aided and abetted the killings.[278]

### 1. Alleged Errors in Not Finding that the Appellant Ordered the Murder of Marie and Béatrice

113. At trial, Prosecution Witness TAS testified that, during the evening of 13 April 1994, she had heard a policeman named Kazoba tell someone that by noon the next day there would no longer be any Tutsi alive because the Appellant had ordered that all Tutsis be killed, starting with Marie and Béatrice.[279] She had seen Kazoba in the Appellant's company earlier that day.[280] The Trial Chamber found that this evidence was uncorroborated hearsay and declined to rely on it to establish that the Appellant had, indeed, ordered the murders.

114. On appeal, the Prosecution argues that the Trial Chamber erred in failing to take into account evidence establishing the wider genocidal campaign to which the Appellant contributed in a number of ways: meeting with and instructing *conseillers*, arranging for weapons distribution, and inciting violence through his public speeches.[281] The Prosecution maintains that this circumstantial evidence, as well as the evidence that the Appellant expelled his tenants notwithstanding the grave danger they faced, corroborates Witness TAS's hearsay testimony.[282] It contends that, in light of this combination of evidence, any reasonable Trial Chamber would have entered a conviction, and adds that the Trial Chamber failed to specify a standard by which the sufficiency of corroborative

[275] Indictment, Count 4.
[276] Trial Judgement, paras. 195, 196.
[277] Trial Judgement, paras. 196, 319.
[278] Prosecution Appeal Brief, paras. 59-116.
[279] *See* Trial Judgement, para. 180.
[280] *See* Trial Judgement, para. 67.
[281] Prosecution Appeal Brief, paras. 77-83.
[282] Prosecution Appeal Brief, para. 94.

evidence was to be assessed.[283] The Prosecution characterizes the alleged error as legal as well as factual, claiming that the Trial Chamber misunderstood the requirements for corroboration.[284]

115. It is well established that, as a matter of law, it is permissible to base a conviction on circumstantial evidence and/or hearsay evidence.[285] The Appeals Chamber recalls that, even if the law does not require evidence to be corroborated, a Trial Chamber, as the trier of fact, can decide that under particular circumstances corroboration is necessary.[286] Accordingly, the Trial Chamber made a factual finding specific to the evidence in this case: "the hearsay evidence of Witness TAS is insufficient, failing corroboration, to establish that the Accused ordered the murder of Marie and Béatrice."[287] Moreover, the Trial Chamber evidently did not ignore the evidence alleged by the Prosecution as corroborative of Witness TAS's hearsay evidence; it relied on this evidence to convict the Appellant of genocide and extermination.[288] Although the Trial Chamber did not specifically discuss this evidence in the context of the murder count, it was not obligated to set forth every step of its reasoning or to cite every piece of evidence that it considered.[289]

116. Moreover, it was reasonable for the Trial Chamber to conclude -- taking into account the hearsay testimony of Witness TAS as well as the circumstantial evidence -- that it was not established beyond reasonable doubt that the Appellant *ordered* the murders of Marie and Béatrice. The Appellant's involvement in various aspects of the genocidal campaign might reasonably be taken as support for the credibility of the hearsay testimony that he ordered these particular murders, as might the fact that he expelled Marie and Béatrice with little regard for the obvious danger to their lives. But none of this evidence provides such unambiguous proof that he issued such an order that a reasonable Trial Chamber would have *had* to convict him on that basis.

117. This sub-ground of appeal is dismissed.

### 2. Alleged Failure to Consider Other Modes of Liability

118. As an alternative to its ordering theory, the Prosecution argues that the Appellant should have been convicted for aiding and abetting the murders of Marie and Béatrice.[290] It maintains that the Trial Chamber's findings that the Appellant expelled his tenants in full knowledge of the risk that they would be killed, and that they were then in fact killed, are sufficient to establish that he

[283] Prosecution Appeal Brief, paras. 93, 94.
[284] *See* Prosecution Appeal Brief, paras. 75, 104.
[285] *Kamuhanda* Appeal Judgement, para. 241; *Kupreškić et al.* Appeal Judgement, para. 303.
[286] *Bagilishema* Appeal Judgement, para. 79.
[287] Trial Judgement, para. 196.
[288] *See, e.g.,* Trial Judgement, para. 237 (the Appellant's misuse of influence); 92-99 (meetings and public incitement); 194-196 (eviction of tenants and their death).
[289] *See, e.g., Kajelijeli* Appeal Judgement, para. 59.

aided and abetted the murders.[291] The Prosecution also claims that the Appellant should have been held responsible under this count pursuant to a joint criminal enterprise theory, an argument considered below in Section III.D.[292]

119. The Trial Chamber did not expressly discuss the possibility that the Appellant was liable for the murders of Marie and Béatrice as an aider and abetter. The Appellant suggests, however, that this is because the Prosecution had failed to plead or argue this mode of liability.[293]

120. The preamble to Count 4 of the Indictment (Murder) states that the Appellant is charged under Article 6(1) of the Statute "by virtue of his affirmative acts in planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation or execution of the crime charged".[294] Subsequent paragraphs under that count detail the specific allegations. Paragraph 36 of the Indictment is relevant to the killing of Marie and Béatrice; it reads as follows:

> On a date uncertain during April - June 1994, **Sylvestre GACUMBITSI** personally ordered the tenants in one of his homes to vacate the premises. After announcing that his home was not CND, a reference to the cantonment of RPF soldiers in Kigali, **Sylvestre GACUMBITSI** ordered the killing of his former tenants.

121. The Prosecution contends that the Appellant would suffer no prejudice if the Appeals Chamber were to consider liability for aiding and abetting, as this mode of liability and all relevant material facts were pleaded in the Indictment, all the witnesses who testified to those facts were cross-examined by the Defence, and the Defence would not have altered its cross-examination or called any additional evidence.[295] The Prosecution further argues that the Trial and Appeals Chambers have a duty to consider all of the implications of the evidence presented, and to render judgment based on all theories of culpability disclosed in the pleadings and on the evidence.[296]

122. The question for the Appeals Chamber is whether the allegations in the Indictment were sufficient to give the Appellant clear and timely notice that he was being charged with the killings of Marie and Béatrice for aiding and abetting. As recently noted by the Appeals Chamber:

> it has long been the practice of the Prosecution to merely quote the provisions of Article 6(1) of the Statute in the charges, leaving it to the Trial Chamber to determine the appropriate form of participation under Article 6(1) of the Statute. The Appeals Chamber reiterates that, to avoid any possible ambiguity, it would be advisable to indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged. Nevertheless, even if an individual count of the indictment does not indicate precisely the form of responsibility pleaded, an accused

[290] Prosecution Appeal Brief, paras. 59, 95.
[291] Prosecution Appeal Brief, para. 102, referring to Trial Judgement, paras. 194, 197.
[292] Prosecution Appeal Brief, para. 103.
[293] *See* Gacumbitsi Response, para. 137.
[294] Indictment, Count 4.
[295] Prosecution Appeal Brief, para. 97.
[296] Prosecution Appeal Brief, para. 99, referring to *Krnojelac* Appeal Judgement, para. 172 (citing *Rutaganda* Appeal Judgement, para. 580).

> might have received clear and timely notice of the form of responsibility pleaded, for instance in other paragraphs of the indictment.[297]

123. In considering whether the Appellant received clear and timely notice, the Indictment must therefore be considered as a whole. In this case, the Appeals Chamber finds, by majority, Judge Güney and Judge Meron dissenting, that the reference to aiding and abetting in the preamble to Count 4, taken in combination with the allegations of material facts sufficient to support a conviction under that mode of liability, was sufficient to put the Appellant on notice that he was charged with aiding and abetting the murders of Marie and Béatrice. Specifically, paragraph 36 of the Indictment states that the Appellant ordered his tenants to leave their home and made an announcement that, in the context of the ongoing genocide, made clear that he was doing so because he did not want the home to serve as a refuge for Tutsi. Other paragraphs of the Indictment detail the context of the genocidal campaign, which ensured that in expelling the tenants under these circumstances, the Appellant was exposing them to a high probability of death.[298] Taken together -- and independently of the allegation at the end of paragraph 36 that the Appellant subsequently ordered the tenants' murder, which pleads the alternative "ordering" theory -- these paragraphs allege the necessary material facts in support of a conclusion that the Appellant aided and abetted their murder.

124. Thus, the Trial Chamber erred in failing to consider whether the Appellant aided and abetted the murder of Marie and Béatrice. Although the Trial Chamber therefore entered no conviction for aiding and abetting murder, it did enter findings of fact sufficient to support such a conviction. It detailed the expulsion of the tenants, the statements of the Accused, the context of the genocidal campaign and the Appellant's involvement therein, and the killing of the tenants, and concluded that "the Accused expelled his tenants, Tutsi women, knowing that by so doing he was exposing them to the risk of being targeted by Hutu attackers on grounds of their ethnic origin."[299] On the basis of these findings of fact, the Appeals Chamber will enter a new conviction for aiding and abetting murder.

125. For the foregoing reasons, this sub-ground of appeal is upheld.

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[297] *Semanza* Appeal Judgement, para. 259, referring to *Ntakirutimana* Appeal Judgement, para. 473; *Aleksovski* Appeal Judgement, n. 319.
[298] Indictment, paras. 3-25.
[299] *See* Trial Judgement, paras. 194-197. Paragraph 197 makes reference to findings elsewhere in the Judgement detailing the context of the genocide and the Appellant's involvement. These findings have been discussed elsewhere in the Judgement of the Appeals Chamber and need not be further detailed.

## B. Responsibility for Rapes Committed in Rusumo Commune (Ground of Appeal 3)

126. Although the Appellant was convicted of eight rapes under Count 5 of the Indictment, the Trial Chamber acquitted him of certain other rapes that had been recounted by Prosecution Witnesses TAO, TAS, and TAP. The Trial Chamber found that these rapes had taken place, but that the Prosecution had not proven that the Appellant had instigated them.[300] On appeal, the Prosecution argues that the Trial Chamber should have convicted the Appellant for these rapes, either for instigation or under other modes of Article 6(1) or Article 6(3) liability.[301]

### 1. Instigation

#### (a) Legal Requirements for Instigation

127. The Prosecution argues that the Trial Chamber erred in law by requiring it to establish that the Appellant's instigation was a condition *sine qua non* of the commission of the rapes.[302] Instead, it contends that to establish culpability for instigation, it suffices to show that the accused's instigation "substantially contributed" to the commission of the crime -- that is, that he "set in motion a chain of events that were the foreseeable consequence of his instigation of the crime."[303] The Prosecution concludes that the totality of the evidence in this case establishes beyond reasonable doubt that this standard was satisfied.[304]

128. The Trial Chamber held that conviction for instigation requires proof "of a causal connection between the instigation and the *actus reus* of the crime."[305] It found "no evidence of a link" between the Appellant's words and the rapes recounted by Witnesses TAS, TAO, and TAP.[306]

129. As the *Kordić and Čerkez* Appeal Judgement established, "it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused"; rather, "it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime."[307] Thus, the Prosecution has correctly stated the causation requirement for instigation. However, there is no indication that the Trial Chamber misunderstood this requirement. Its reference to a "causal connection between the instigation and the *actus reus* of

[300] Trial Judgement, paras. 226, 227, 329.
[301] Prosecution Appeal Brief, para. 117.
[302] Prosecution Appeal Brief, para. 120.
[303] Prosecution Appeal Brief, paras. 120-122, referring to *Kayishema and Ruzindana* Appeal Judgement, para. 198.
[304] Prosecution Appeal Brief, para. 121.
[305] Trial Judgement, para. 279.
[306] Trial Judgement, para. 329.
[307] *Kordić and Čerkez* Appeal Judgement, para. 27.

the crime"[308] does not specify what kind of causation must be proven, and without more it cannot be inferred that the Trial Chamber required that the instigation be the *sine qua non* of the rapes.

130. While the Trial Chamber did not use the phrase "substantially contributing", its language made clear that it found that this standard was not satisfied. Specifically, it found "no evidence establishing a link" -- substantial or otherwise -- between the Appellant's words and the rapes recounted by Witnesses TAS, TAO, and TAP.[309] Accordingly, the Trial Chamber did not err in law, and this sub-ground of appeal is dismissed.

(b) Evidence Supporting Instigation

131. In the alternative, the Prosecution argues that the Trial Chamber erred by failing to draw the only reasonable conclusion supported by the totality of the evidence and by its own factual findings: that the Appellant was responsible for instigating all the rapes established.[310] For instance, the Prosecution notes, the Trial Chamber found that on or about 17 April 1994,[311] the Appellant drove around Nyarubuye *secteur* with a megaphone inciting Hutu men to rape Tutsis and to kill atrociously those who resisted. Such rapes were then carried out, including by inserting sticks in the victims' genitals, and some victims died.[312] The specific rapes recounted by Witnesses TAO, TAS, and TAP were perpetrated around mid-April 1994 in Rusumo Commune; some of them were perpetrated within Nyarubuye *secteur*, including by the Nyarubuye *conseiller*.[313] The Prosecution points to the findings concerning the Appellant's knowledge of the rapes, his authority as *bourgmestre*, and his role in the genocide, and cites the testimony of Witness TAS that those who raped her told her that the Appellant had ordered the rape and killing of Tutsi women and girls.[314]

(i) The Rape of Witness TAS

132. Witness TAS, a Hutu woman married to a Tutsi man, testified that, on an unspecified date, she was raped by two Hutu men, one of whom told her that the Appellant had authorized the rape of Tutsis but that no decision had yet been taken concerning Hutu women who were married to Tutsis.[315] The Trial Chamber concluded that the rape of Witness TAS had been established,[316] but

[308] Trial Judgement, para. 279.
[309] Trial Judgement, para. 329.
[310] Prosecution Appeal Brief, paras. 123-135.
[311] Although paragraph 215 of the Trial Judgement puts the instigation on 16 April 1994, the Trial Chamber relied on the testimony of Witness TAQ, who in fact testified that the Appellant made the relevant statements on 17 April 1994. *See* T. 29 July 2003 pp. 61, 62. Paragraph 227 of the Trial Judgement refers to the correct date, 17 April 1994.
[312] *See* Trial Judgement, para. 215; Prosecution Appeal Brief, para. 124.
[313] *See* Trial Judgement, paras. 205, 215, 226; Prosecution Appeal Brief, para. 124.
[314] Prosecution Appeal Brief, para. 124; *but see* Trial Judgement, para. 327 (finding this testimony inadequate to establish the Appellant's involvement).
[315] T. 5 August 2003 pp. 22, 23, 51, summarized in Trial Judgement, para. 209.
[316] Trial Judgement, para. 226.

found that her uncorroborated hearsay testimony concerning the Appellant's instructions was insufficient to prove that he had instigated the rape.[317]

133. There is no evidence that the rape of Witness TAS took place after the Appellant's statements instigating rapes on 17 April 1994, and no direct evidence that, prior to that date, the Appellant had instigated rape.[318] The only evidence to the latter effect was Witness TAS's account of her attacker's statement, which the Trial Chamber did not find reliable.[319] No error has been shown in this finding. Although the Trial Chamber is not precluded as a matter of law from relying on uncorroborated hearsay testimony to establish an element of a crime, it is not obligated to do so.[320] Accordingly, the Trial Chamber did not err in declining to find that the Appellant instigated the rape of Witness TAS.

(ii) The Rapes of Witness TAP and her Mother

134. Witness TAP testified that one day in April 1994, after the President died, she heard loud noises, gunfire, buildings collapsing, and explosions coming from Nyarubuye Parish.[321] She explained that the following day,[322] a group of thirty unidentified attackers sexually assaulted and killed her mother, and subsequently raped her.[323] The Trial Chamber accepted Witness TAP's account of the rapes,[324] but was not persuaded that there was a "sufficient nexus" between the Appellant's words on 17 April 1994 and those rapes to establish his responsibility for them.[325]

135. As with the rape of Witness TAS, there is no evidence that the rapes recounted by Witness TAP took place after 17 April 1994, the date of the Appellant's instigation. The Prosecution did not establish the date on which the rapes in question took place. Witness TAP situated the rapes temporally as the day after which she heard loud noises from Nyarubuye Parish. The Appeals Chamber notes that the principal attack at Nyarubuye Parish, a possible source of the sounds testified to by Witness TAP, took place on 15 April 1994.[326] This would mean that the rapes in

[317] Trial Judgement, paras. 227, 327.
[318] Although paragraph 215 of the Trial Judgement puts the instigation on 16 April 1994, the Trial Chamber relied on the testimony of Witness TAQ, who in fact testified that the Appellant made the relevant statements on 17 April 1994. *See* T. 29 July 2003 pp. 61, 62. Paragraph 227 of the Trial Judgement refers to the correct date, 17 April 1994.
[319] Trial Judgement, para. 227.
[320] *See, e.g., Rutaganda* Appeal Judgement, para. 34 (noting that "[t]he Trial Chamber has the discretion to cautiously consider" hearsay evidence).
[321] T. 6 August 2003 pp. 7, 8.
[322] T. 6 August 2003 p. 8. *See also* Trial Judgement, para. 207 (internal citation omitted): "*Le témoin précise que cette attaque s'est produite le lendemain du jour où, en avril 1994, après la mort du Président, elle avait entendu des bruits importants qui lui indiquaient que quelque chose de spécial se passait à la paroisse de Nyarubuye.*" The English translation of this paragraph is inaccurate: "The witness explained that the attack occurred the day after the President's death".
[323] T. 6 August 2003 pp. 8-11. *See also* Trial Judgement, paras. 207, 208.
[324] Trial Judgement, paras. 219, 226.
[325] Trial Judgement, paras. 227, 329.
[326] Trial Judgement, paras. 152, 167, 174.

question took place on 16 April 1994, one day before the Appellant's instigation of rapes.[327] As no other evidence shows that the Appellant's actions or words substantially contributed to the rapes of Witness TAP and her mother, the Trial Chamber did not err in finding that the Prosecution had not established beyond reasonable doubt that the Appellant instigated these rapes.

(iii) The Rapes Recounted by Witness TAO

136. Witness TAO, a Tutsi man, testified that at some point after the attack at Nyarubuye Parish on 15 April 1994 his wife was taken to the house of the *conseiller* of Nyarubuye Sector, Isaïe Karamage.[328] Witness TAO testified that his wife spent two or three days there, and that she told him afterward that the *conseiller* had raped her every night.[329] A few days later, Witness TAO witnessed the rape and killing of his wife by unknown attackers.[330]

137. The Trial Chamber noted that Witness TAO's testimony regarding the rapes of his wife by Mr. Karamage was hearsay,[331] but it nevertheless considered it reliable, "especially as other witnesses testified that there were similar incidents of rape at the same house, or at least, that women and girls gathered there".[332] The Trial Chamber also accepted that Witness TAO witnessed the rape and killing of his wife by unknown attackers.[333] However, the Trial Chamber found that the Prosecution had not proven a link between the Appellant's words on 17 April 1994 and the rapes recounted by Witness TAO,[334] and that the Appellant could not be convicted for them.[335]

138. Although at least some of the rapes in question appear to have been committed after the Appellant instigated rape, there is no evidence that the Appellant's instigation substantially contributed to them. The Prosecution did not establish that Mr. Karamage and the other attackers were aware of the Appellant's statements of 17 April 1994. The Prosecution's suggestion that "[i]t is only reasonable to conclude that, even if some perpetrators of the other rapes did not directly hear the [Appellant]'s instigation, they were told by others about it, or were inspired by the actions of others who had heard it"[336] is speculative and plainly does not establish that this was the *only* reasonable conclusion. Thus, the Prosecution has not shown an error in the Trial Chamber's conclusion that no nexus was proven between the instigation and the rapes.

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[327] *See supra* footnote 317.
[328] T. 30 July 2003 p. 58; T. 31 July 2003 pp. 20, 21.
[329] T. 30 July 2003 p. 58; T. 31 July 2003 p. 21.
[330] T. 30 July 2003 pp. 59, 60.
[331] Trial Judgement, para. 216.
[332] Trial Judgement, para. 217.
[333] Trial Judgement, para. 218.
[334] Trial Judgement, para. 227.
[335] Trial Judgement, para. 329.
[336] Prosecution Appeal Brief, para. 126.

2. Other Modes of Liability under Article 6(1) of the Statute

139. The Prosecution also submits that the Trial Chamber erred in failing to convict the Appellant for planning, ordering, committing through a joint criminal enterprise, and aiding and abetting the rapes recounted by Witnesses TAO, TAS, and TAP.[337] It submits that the Appellant had the requisite *mens rea* for any of these modes of liability because he acted "with the full awareness of the substantial likelihood that indiscriminate rape of Tutsis would occur in Rusumo."[338] As to the *actus reus*, the Prosecution argues that the only reasonable conclusion is that the Appellant's public call for the indiscriminate rape of Tutsis, taken together with all the other proven facts, establishes that he aided and abetted the rapes in question.[339] The Prosecution makes no attempt to explain how the evidence establishes the *actus reus* of planning or ordering rape, and so the Appeals Chamber will not consider its assertion of error in this regard. Its submissions regarding joint criminal enterprise will be addressed in Section III.D below.

140. The Prosecution states that the causation standard for aiding and abetting "is that the acts have a substantial effect on the commission of the crime."[340] The Appeals Chamber agrees, but finds that the Prosecution has not established that this standard was satisfied. As discussed in the previous subsection, the evidence at trial was insufficient to prove beyond reasonable doubt that the Appellant's words on 17 April 1994 had any effect on the rapes in question. The Prosecution does not point to any other specific acts or omissions that support a conviction for aiding and abetting. Accordingly, this sub-ground of appeal is dismissed.

3. Article 6(3) Liability

141. The Prosecution challenges the Trial Chamber's holding that the Appellant lacked superior authority over the *conseillers*, gendarmes, soldiers, and *Interahamwe* in Rusumo Commune at the time of the events.[341] It argues that the Trial Chamber erred in law by requiring proof that the Appellant was a superior in a formal administrative hierarchy rather than examining whether he exercised effective control.[342] It further claims that because overwhelming evidence established that the Appellant possessed such effective control, he should have been convicted for the rapes recounted by Witnesses TAO, TAP, and TAS under Article 6(3) of the Statute.[343]

[337] Prosecution Appeal Brief, paras. 117, 136, 137.
[338] Prosecution Appeal Brief, para. 142.
[339] Prosecution Appeal Brief, para. 143.
[340] Prosecution Appeal Brief, para. 143.
[341] Prosecution Appeal Brief, paras. 147, 148, referring to Trial Judgement, para. 243.
[342] Prosecution Appeal Brief, paras. 148-150.
[343] Prosecution Appeal Brief, paras. 150-152.

142. The Trial Chamber did not enter a formal legal finding concerning the Appellant's Article 6(3) responsibility for rape, instead stating:

> Having found the Accused criminally liable under Article 6(1) of the Statute for instigating others to commit rape in Rusumo *commune* in April 1994, the Chamber does not deem it necessary to *enquire* whether he is equally responsible pursuant to Article 6(3) of the Statute, given the similarity of the acts charged and the lack [*sic*] [of] evidence of a superior-subordinate relationship between the Accused and the perpetrators of the rapes.[344]

As to the first part of this statement, it is true that convictions should not be entered under both Articles 6(1) and 6(3) of the Statute for the same crime based on the same conduct.[345] The Appellant's Article 6(1) conviction for rape only extended to some of the rapes alleged, however. The Trial Chamber therefore had to consider whether the Appellant was responsible for the other rapes under Article 6(3) of the Statute, that is those recounted by Witnesses TAO, TAP, and TAS. It in fact implicitly did so, concluding that there was no evidence of a superior-subordinate relationship. Its holding on this point was further elaborated in its factual findings:

> On the evidence tendered, the Chamber cannot find that the Accused had superior authority over the *conseillers*, *gendarmes*, soldiers and *Interahamwe* that were in his *commune* at the time of the events under consideration. The law did not, *per se*, place him in such a position. Although his responsibilities regarding the maintenance of law and order afforded him the power to take legal measures that would be binding on everyone in the *commune*, the Prosecution has not adduced any evidence that such power placed him, *ipso facto*, in the position of a superior within a formal administrative hierarchy vis-à-vis each category of persons mentioned above.[346]

143. This analysis focuses on the Appellant's *de jure* authority -- specifically, whether the "law" placed him in power and whether he was "a superior within a formal administrative hierarchy". The Trial Chamber does not appear to have considered the Appellant's *de facto* authority. This was an error. A superior "possesses power or authority over subordinates either *de jure* or *de facto*; it is not necessary for that power or authority to arise from official appointment."[347] To establish liability under Article 6(3) of the Statute, the following must be shown:

- A crime over which the Tribunal has jurisdiction was committed;
- The accused had effective control over the perpetrators of the crime (*i.e.*, the material ability to prevent or punish the commission of crimes);
- The accused knew or had reason to know that the crime was going to be committed or had been committed; and

[344] Trial Judgement, para. 332 (emphasis in original).
[345] *See Kajelijeli* Appeal Judgement, para. 81.
[346] Trial Judgement, para. 243.
[347] *Kajelijeli* Appeal Judgement, para. 85.

- The accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by a subordinate.[348]

144. The Trial Chamber found that the Appellant knew or had reason to know of the rapes recounted by Witnesses TAO, TAS, and TAP.[349] The key question is whether the Appellant had effective control over the perpetrators. Attempting to show effective control, the Prosecution, in its Appeal Brief, points to Trial Chamber findings concerning the Appellant's general authority as *bourgmestre* to impose law and order in the commune, as well as his leading role in the genocidal campaign.[350] Yet it cannot be extrapolated from these findings that he exercised effective control over every person who was present in the commune during the time in question. The Prosecution advances no arguments specifically addressing the relationship between the Appellant and the perpetrators of the particular rapes described by Witnesses TAO, TAS, and TAP.

145. The Appeals Chamber therefore cannot conclude that the Prosecution met its burden of proving beyond a reasonable doubt that the Appellant had effective control over the perpetrators of the rapes recounted by Witnesses TAO, TAS, and TAP. Accordingly, the Appeals Chamber affirms the Trial Chamber's finding that the Appellant cannot be convicted under Article 6(3) of the Statute for these rapes.

146. This sub-ground of appeal is dismissed, and the appeal under this ground is dismissed in its entirety.

[348] For the leading cases, *see Čelebići Case* Appeal Judgement, paras. 182-314; *Bagilishema* Appeal Judgement, paras. 24-62; *Blaškić* Appeal Judgement, paras. 53-85.
[349] Trial Judgement, para. 228.
[350] Prosecution Appeal Brief, para. 152.

### C. Elements of Rape as a Crime against Humanity (Ground of Appeal 4)

147. The Prosecution's fourth ground of appeal seeks a clarification of the law relating to rape as a crime against humanity or as an act of genocide.[351] The Prosecution argues that non-consent of the victim and the perpetrator's knowledge thereof should not be considered elements of the offence that must be proved by the Prosecution; rather, subject to the limitations of Rule 96 of the Rules, consent should be considered an affirmative defence.[352]

148. The Prosecution argues that the crime of rape only comes within the Tribunal's jurisdiction when it occurs in the context of genocide, armed conflict, or a widespread or systematic attack against a civilian population -- circumstances in which genuine consent is impossible. In support, it quotes a report by a Special Rapporteur to the UN Commission on Human Rights:

> The manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negate the need for the Prosecution to establish lack of consent as an element of the crime.[353]

149. The Prosecution posits that rape should be viewed in the same way as other violations of international criminal law, such as torture or enslavement, for which the Prosecution is not required to establish absence of consent.[354] Further, it contends that Rule 96(ii) of the Rules presumes that consent is a defence that must be supported by credible evidence introduced by the accused.[355]

150. The Trial Chamber found that the circumstances in this case were so coercive as to negate any possibility of consent.[356] The Prosecution therefore does not allege an error invalidating the verdict. However, it maintains, and the Appeals Chamber agrees, that the matter should be considered as one of "general significance" for the Tribunal's jurisprudence.[357]

151. In the *Kunarac* case, the ICTY Appeals Chamber defined rape as follows:

> *the actus reus of the crime of rape in international law is constituted by:* the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be

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[351] Prosecution Notice of Appeal, para. 16.
[352] Prosecution Appeal Brief, paras. 155, 156.
[353] Prosecution Appeal Brief, para. 157, citing Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-Like Practices during Armed Conflict, Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur to the Economic and Social Council: Commission on Human Rights, E/CN.4/Sub.2/1998/13 (22 June 1998), para. 25. *See also ibid.*, para. 158, quoting Report of the Preparatory Commission for the International Criminal Court - Addendum: Part II - Finalized Draft Text of the Elements of Crimes, PCNICC/2001/1/Add.2 (2 November 2000), arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).
[354] Prosecution Appeal Brief, paras. 159, 182.
[355] Prosecution Appeal Brief, para. 160.
[356] Prosecution Appeal Brief, paras. 163, 164.
[357] *Akayesu* Appeal Judgement, para. 19. *See also Tadić* Appeal Judgement, paras. 247, 281; *Čelebići Case* Appeal Judgement, paras. 218, 221.

> consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[358]

However, it immediately emphasized that "the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible."[359]

152. The Appeals Chamber adopts and seeks to further elucidate the position expressed by the ICTY Appeals Chamber in the *Kunarac et al.* Appeal Judgement. Two distinct questions are posed. First, are non-consent and the knowledge thereof elements of the crime of rape, or is consent instead an affirmative defence? Second, if they are elements, how may they be proved?

153. With respect to the first question, *Kunarac* establishes that non-consent and knowledge thereof are elements of rape as a crime against humanity. The import of this is that the Prosecution bears the burden of proving these elements beyond reasonable doubt. If the affirmative defence approach were taken, the accused would bear, at least, the burden of production, that is, the burden to introduce evidence providing *prima facie* support for the defence.

154. As the Prosecution points out, Rule 96 of the Rules does refer to consent as a "defence". The Rules of Procedure and Evidence do not, however, redefine the elements of the crimes over which the Tribunal has jurisdiction, which are defined by the Statute and by international law.[360] The Appeals Chamber agrees, moreover, with the analysis of the Trial Chamber in the *Kunarac* case:

> The reference in the Rule [96] to consent as a "defence" is not entirely consistent with traditional legal understandings of the concept of consent in rape. Where consent is an aspect of the definition of rape in national jurisdictions, it is generally understood [...] to be *absence of consent* which is an *element* of the crime. The use of the word "defence", which in its technical sense carries an implication of the shifting of the burden of proof to the accused, is inconsistent with this understanding. The Trial Chamber does not understand the reference to consent as a "defence" in Rule 96 to have been used in this technical way.[361]

Rather than changing the definition of the crime by turning an element into a defence, Rule 96 of the Rules must be read simply to define the circumstances under which evidence of consent will be admissible.[362] Thus, it speaks to the second part of the present inquiry: how may non-consent be proven?

155. The answers both Tribunals have given to this second question resolve as a practical matter the objections raised by the Prosecution with respect to the elements approach. The Prosecution can

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[358] *Kunarac et al.* Appeal Judgement, para. 127 (internal citation omitted).
[359] *Kunarac et al.* Appeal Judgement, para. 130.
[360] *See Tadić* Judgement on Allegations of Contempt, para. 25, n. 26.
[361] *Kunarac et al.* Trial Judgement, para. 463 (emphasis in original).
[362] *Kunarac et al.* Trial Judgement, para. 464.

prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. As with every element of any offence, the Trial Chamber will consider all of the relevant and admissible evidence in determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But it is not necessary, as a legal matter, for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim.[363] Indeed, the Trial Chamber did so in this case.

156. Under certain circumstances, the accused might raise reasonable doubt by introducing evidence that the victim specifically consented. However, pursuant to Rule 96(ii) of the Rules, such evidence is inadmissible if the victim:

> (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
>
> (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.

Additionally, even if it admits such evidence, a Trial Chamber is free to disregard it if it concludes that under the circumstances the consent given was not genuinely voluntary.

157. As to the accused's knowledge of the absence of consent of the victim, which as *Kunarac* establishes is also an element of the offence of rape, similar reasoning applies. Knowledge of non-consent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent.

[363] *See Kunarac et al.* Appeal Judgement, paras. 131, 132 (holding that voluntary consent is impossible in a coercive detention environment); *Akayesu* Trial Judgement, para. 688 ("The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of *Interahamwe* among refugee Tutsi women at the *bureau communal*.").

## D. Joint Criminal Enterprise (Ground of Appeal 5)

158. The Appeals Chamber, following ICTY precedent, has recognized that an accused before this Tribunal may be found individually responsible for "committing" a crime within the meaning of Article 6(1) of the Statute under one of three categories of "joint criminal enterprise" ("JCE") liability.[364] The present ground of appeal concerns the Appellant's liability for murder, genocide, extermination and rape under the first and third categories.[365] The first (or "basic") category encompasses cases in which "all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention" to commit the crime that is charged.[366] The third (or "extended") category concerns cases in which the crime charged, "while outside the common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose."[367]

159. At paragraph 289 of the Trial Judgement, the Trial Chamber stated:

> The Prosecution seems to allege that the Accused participated in a joint criminal enterprise. However, the Chamber cannot make a finding on such allegation since it was not pleaded clearly enough to allow the Accused to defend himself adequately.

160. The Prosecution submits that this holding was in error.[368] It observes that the Indictment charged that the Appellant acted "in concert with" others in pursuit of a "common scheme, strategy, or plan". The Prosecution argues that this language is the functional equivalent of "joint criminal enterprise" and sufficed to put the Appellant on notice, particularly in conjunction with the factual allegations in the Indictment and the "collective" nature of the crimes charged.[369] The Prosecution further contends that any vagueness in the Indictment was cured by its Pre-Trial Brief[370] and asserts that it consistently advanced the JCE theory at trial.[371] It argues that the Appellant should have been convicted on this theory for committing murder, genocide, extermination, and rape.[372]

### 1. Applicable Law Concerning the Pleading of Joint Criminal Enterprise

161. The relevant law concerning specificity of indictments as a general matter is set forth in Section II.B above. This Tribunal's leading precedent on pleading practice with respect to JCE is the *Ntakirutimana* Appeal Judgement, which invokes this passage from the *Krnojelac* Appeal Judgement:

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[364] *Ntakirutimana* Appeal Judgement, paras. 463, 468. *See also Rwamakuba* Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide.
[365] *See* Prosecution Appeal Brief, paras. 184, 205-208.
[366] *Ntakirutimana* Appeal Judgement, para. 463.
[367] *Ntakirutimana* Appeal Judgement, para. 465.
[368] Prosecution Appeal Brief, para. 184.
[369] Prosecution Appeal Brief, para. 191.
[370] Prosecution Appeal Brief, paras. 197-199.

> With respect to the nature of the liability incurred, the Appeals Chamber holds that it is vital for the indictment to specify at least on what legal basis of the Statute an individual is being charged (Article 7(1) and/or 7(3)). Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial. Likewise, when the Prosecution charges the "commission" of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether the term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both. The Appeals Chamber also considers that it is preferable for an indictment alleging the accused's responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged. However, this does not, in principle, prevent the Prosecution from pleading elsewhere than in the indictment--for instance in a pre-trial brief--the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in law in the light of the facts alleged. This option is, however, limited by the need to guarantee the accused a fair trial.[373]

162. More recently, the ICTY Appeals Chamber elaborated in *The Prosecutor v. Kvočka et al.*:

> An indictment which merely lists the charges against the accused without pleading the material facts does not constitute adequate notice because it lacks "enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence". Whether or not a fact is considered material depends on the nature of the Prosecution's case. The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.[...] *If the Prosecution relies on a theory of joint criminal enterprise, then the Prosecutor must plead the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise.* Therefore, in order for an accused charged with joint criminal enterprise to fully understand which acts he is allegedly responsible for, the indictment should clearly indicate which form of joint criminal enterprise is being alleged.
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> [...]
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> The Appeals Chamber also considers that *the Indictment is defective because it fails to make any specific mention of joint criminal enterprise*, although the Prosecution's case relied on this mode of responsibility. As explained above, joint criminal enterprise responsibility must be specifically pleaded. *Although joint criminal enterprise is a means of "committing", it is insufficient for an indictment to merely make broad reference to Article 7(1) of the Statute.* Such reference does not provide sufficient notice to the Defence or to the Trial Chamber that the Prosecution is intending to rely on joint criminal enterprise responsibility. *Moreover, in the Indictment the Prosecution has failed to plead the category of joint criminal enterprise or the material facts of the joint criminal enterprise*, such as the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise.[374]

Thus, *Kvočka* unambiguously established that failure to plead a JCE theory, including the category of JCE and the material facts supporting the theory, constitutes a defect in the indictment. It held, however, that the defect in that case was cured by the Prosecution's subsequent submissions.[375]

163. The Appeals Chamber adopts the holding and rationale of the ICTY Appeals Chamber in *Kvočka*. The mode of liability under Article 6(1) (including the JCE theory) must be pleaded in the

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[371] Prosecution Appeal Brief, paras. 200-203.
[372] Prosecution Appeal Brief, paras. 184, 210.
[373] *Krnojelac* Appeal Judgement, para. 138. *See also Ntakirutimana* Appeal Judgement, para. 475.
[374] *Kvočka et al.* Appeal Judgement, paras. 28, 42 (emphases added, internal citations omitted).

indictment, or the indictment is defective. As *Krnojelac* makes clear, however, such defects may be cured by the provision of timely, clear, and consistent information -- for example, in a pre-trial brief.[376] This approach is consistent with the Appeals Chamber's approach to all other pleading failures.[377]

164. The Appeals Chamber will now consider whether the Indictment gave proper notice of the Prosecution's intent to rely on a JCE theory. The Prosecution does not argue that the Appellant has waived any objection to the vagueness of the Indictment in this respect. Thus, if it finds that the Indictment is defective, the Appeals Chamber will have to consider whether the Prosecution has proven that the defect was cured by the provision of timely, clear, and consistent information.

### 2. Allegations in the Indictment

165. The words "joint criminal enterprise" are not contained in the Indictment. This absence does not in and of itself indicate a defect. As the Appeals Chamber noted in *Ntakirutimana*, the *Tadić* Appeal Judgement used interchangeably the expressions "joint criminal enterprise", "common purpose", and "criminal enterprise".[378] It is possible that other phrasings might effectively convey the same concept.[379] The question is not whether particular words have been used, but whether an accused has been meaningfully "informed of the nature of the charges" so as to be able to prepare an effective defence.[380]

166. In this regard, two of the Prosecution's contentions are readily dismissed. First, the Appellant plainly could not have been expected to infer the Prosecution's reliance on a JCE theory from the mere fact that the Indictment "explicitly charged the [Appellant] with collective crimes: genocide, complicity in genocide, extermination, murder and rape in connection with the massacres that took place at various locations".[381] "Collective crimes" in this sense, *i.e.* crimes that involve multiple responsible parties or that take place in the context of mass violence, are alleged in every case before this Tribunal. But the Statute and Tribunal's jurisprudence indicate that an individual can participate in such crimes in various ways involving different kinds of interactions with other people -- for instance, ordering, aiding and abetting, "committing" through JCE, "committing"

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[375] *Kvočka et al.* Appeal Judgement, paras. 43-54.
[376] *Krnojelac* Appeal Judgement, para. 138.
[377] *See supra* section II.B.2.
[378] *Ntakirutimana* Appeal Judgement, n. 783.
[379] *See Ntakirutimana* Appeal Judgement, n. 783.
[380] *Ntakirutimana* Appeal Judgement, para. 470. The Appeals Chamber notes, however, that because today ICTY and ICTR cases routinely employ the phrase "joint criminal enterprise", that phrase should for the sake of maximum clarity preferably be included in future indictments where JCE is being charged.
[381] Prosecution Appeal Brief, para. 191.

through direct physical perpetration, and so forth. As the *Kvočka* Appeal Judgement makes clear, an accused cannot be expected to infer the mode of liability; it must be charged.

167. Second, the Prosecution's assertion that the allegations in the Indictment that the Appellant was responsible for "committing" crimes should be read to encompass a JCE theory[382] is similarly untenable and inconsistent with *Kvočka*, as the Prosecution in fact conceded at oral argument. It is not enough for the generic language of an indictment to "encompass" the possibility that JCE is being charged. Rather, JCE must be pleaded specifically.[383] Otherwise, an accused could reasonably infer that references to "committing" crimes are meant to refer to acts that he personally perpetrated.

168. The Prosecution's other argument is based on paragraphs 22 and 25 of the Indictment, which read as follows:

> 22. From those first days of April 1994 through 30 April 1994, **Sylvestre GACUMBITSI** ordered, directed or acted in concert with local administrative official in Kibungo *préfecture*, including *bourgmestres* and *conseillers de secteur*, to deny protection to civilian Tutsi refugees and to facilitate attacks upon them by communal police, *Interahamwe*, civilian militias and local residents.
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> [...]
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> 25. **Sylvestre GACUMBITSI,** in his position of authority and acting in concert with others, participated in the planning, preparation or execution of a common scheme, strategy or plan to exterminate the Tutsi, by his own affirmative acts or through persons he assisted or by his subordinates with his knowledge and consent. [Emphases added]

169. The Appellant and his trial counsel have, however, used French throughout the proceedings. Although the Indictment was written in English, it is the French translation that is critical to determining whether the Appellant received proper notice of the charges against him, to the extent that any distinctions in phrasing are relevant. Paragraphs 22 and 25 of the translation read:

> *22. De ces premiers jours d'avril 1994 jusqu'au 30 avril de la même année,* ***Sylvestre GACUMBITSI*** *a ordonné ou dirigé les autorités administratives locales de la préfecture de Kibungo, y compris les bourgmestres et conseillers de secteur, de refuser toute protection aux réfugiés civils Tutsis et de faciliter les attaques de la police communale, des Interahamwe, des milices civiles et des résidents locaux contre ces réfugiés ou a agi de concert avec ces autorités en cela.*
>
> *[...]*
>
> *25.* ***Sylvestre GACUMBITSI****, de par sa position d'autorité, et agissant de concert avec d'autres, a participé à la planification, la préparation ou l'exécution d'un plan, d'une stratégie ou d'un dessein communs visant à exterminer les Tutsis, par ses propres actes positifs ou par le biais de personnes qu'il a aidé ou par ses subordonnés dont il connaissait et approuvait les agissements. [Emphases added]*

[382] Prosecution Appeal Brief, para. 192.
[383] *Kvočka et al.* Appeal Judgement, para. 42.

170. As a threshold matter, these paragraphs are found in a portion of the Indictment alleging material facts in support of the genocide and complicity in genocide counts only. They are not incorporated elsewhere in the Indictment and, therefore, cannot support the Prosecution's reliance on a JCE theory with respect to the murder, extermination, and rape counts.[384]

171. With respect to the genocide count, the Appeals Chamber finds, by majority, Judge Shahabuddeen and Judge Schomburg dissenting, that the paragraphs relied upon by the Prosecution were not sufficient to provide notice to the Appellant that he was being charged with participation in a joint criminal enterprise. First, taken alone, the words "acted in concert with" ("*a agi de concert avec*"), as used in paragraph 22 of the Indictment, do not suffice to meet the pleading requirements outlined above.[385]

172. Paragraph 25 of the Indictment comes closer to providing the necessary notice, as it clearly refers to concerted action among a plurality of persons in support of "a common scheme, strategy or plan to exterminate the Tutsi" ("*d'un plan, d'une stratégie ou d'un dessein communs visant à exterminer les Tutsis*"). This language is similar to that employed in *Tadić* and seems to encompass the critical elements of a JCE charge. However, in then proceeding to state that the accused participated in the common scheme "by his own affirmative acts or through persons he assisted or by his subordinates with his knowledge and consent", the Indictment could be read to invoke three established modes of liability other than JCE: "committing" through direct, personal perpetration,

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[384] Prosecution Appeal Brief, para. 184.

[385] The practice of the ICTY contains instances where the phrase "acting in concert" has been considered insufficient to imply, without more, an allegation of joint criminal enterprise. The Pre-Trial Chamber in the *Brđanin and Talić* case held that the use of the words "[acting] individually and in concert" in that indictment was ambiguous and that if the Prosecution sought to rely on the Article 7(1) liability of "acting in concert as part of a common purpose or design, or as part of a common criminal enterprise [...] then this should be made clear". *Brđanin and Talić* Decision on Objections, para. 12. This decision was followed by an amendment to the indictment to specifically state that the accused in that case "participated in a criminal enterprise". *The Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Further Amended Indictment, 12 March 2001, para. 27 ("the common purpose of which was the permanent removal of the majority of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state"). When it addressed the accused's objection to the indictment, the Pre-Trial Chamber in the *Deronjić* case stated that "the [i]ndictment for example does not plead a case of common purpose or common criminal enterprise liability against the accused, unless the vague reference to the accused acting 'in concert with others who share his intent' is meant to include such a case, *in which event it is not pleaded with sufficient particularity.*" *Deronjić* Decision on Form of the Indictment, para. 30 (emphasis added). The Prosecution consequently filed an amended indictment in that case where it explicitly used the expression "joint criminal enterprise". *The Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Amended Indictment, 29 November 2002, paras. 2-8. Furthermore, "acting in concert" has also been used in several indictments where the Prosecution did not intend to rely on joint criminal enterprise for its case. In the *Strugar* case, while the indictment contained the expression "acting [...] in concert with [others]", the Prosecution explicitly stated during a pre-trial hearing and in a pre-trial filing that it was not pleading joint criminal enterprise. *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, Indictment, 23 February 2001, para. 18. *Strugar* Decision Concerning the Form of the Indictment, para. 21, referring to transcript of hearing of 12 March 2002 p. 108 and to *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, Prosecution's Response to the Defence Preliminary Motion, 21 February 2002, para. 13. Similarly, in the *Miodrag Jokić* case, while the indictment stated that the accused had acted "individually or in concert with others," the Prosecution charged him for aiding and abetting crimes pursuant to Article 7(1) of the Statute, to which he eventually pled guilty. *The Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-PT, Second Amended Indictment, 27 August 2003, paras. 15, 22. *Jokić* Sentencing Judgement, paras. 9, 21. *See also Jokić* Sentencing Appeal Judgement, paras. 14, 16.

aiding and abetting, and Article 6(3) superior responsibility. The Appellant could have interpreted the paragraph, taken as a whole, to refer only to those modes of liability and not to JCE, and he cannot therefore be said to have received clear notice of the JCE theory. This is especially so because, at the time of the Indictment, JCE was still an unfamiliar mode of liability in this Tribunal, although it had been employed at the ICTY.

173. As noted, the Prosecution also argues that the material facts set forth in the Indictment were sufficient to provide notice of the JCE theory. Specifically, the Prosecution states that the Indictment identified (i) the nature or essence of the JCE; (ii) the period over which it existed; (iii) the identity of its participants; and (iv) the nature of the accused's participation.[386] But even assuming the Indictment can be construed as containing all the material facts necessary to support a JCE theory, these facts were not clearly identified as being intended to plead such a theory. The mere inclusion in an indictment of scattered facts that might relate to a mode of liability does not suffice to put an accused on notice that the mode of liability is being alleged.

174. For these reasons, the Appeals Chamber finds, by majority, Judge Shahabuddeen and Judge Schomburg dissenting, that the Trial Chamber did not err in finding the Indictment defective.

### 3. Whether Defects in the Indictment were Cured

175. The sole post-Indictment submission to which the Prosecution points in support of its contention that any defects in the Indictment were cured is its Pre-Trial Brief. However, that brief did not provide any clear indication to the Appellant that he was being charged as a JCE participant. It nowhere referred to a joint criminal enterprise, a common criminal purpose, or any other synonym. Part II of the Pre-Trial Brief (Factual Allegations) was divided into chapters including "Planning", "Preparing", and "Executing" (sub-divided into "Instigating", "Ordering, Leading and Supervising", and "Killing").[387] As to "Executing", the Pre-Trial Brief explained:

> During the month of April 1994, **Sylvestre Gacumbitsi** used his position as the *Bourgmestre* of Rusumo Commune and as an influential member of the MRND political party to execute the campaign of looting, raping and killing of the Tutsi civilians. **Sylvestre Gacumbitsi** ordered his subordinates from the local administration, communal policemen, members of the *Interahamwe* and Hutu civilians to attack and destroy the Tutsi civilian population. He instigated, led and supervised some of these attacks. **Sylvestre Gacumbitsi**, by his own hands, killed Tutsi civilians.[388]

This description does not give any indication that the Prosecution was pursuing a JCE theory. Nor is any such indication to be found in Part III of the Prosecution Pre-Trial Brief (Legal Issues). In fact,

[386] *See* Prosecution Appeal Brief, paras. 193, 194.
[387] *See* Prosecution Pre-Trial Brief, pp. 11-16.
[388] Prosecution Pre-Trial Brief, para. 2.16.

when discussing modes of liability in relation to each count, the Pre-Trial Brief does not even refer to "acting in concert with others" or to "a common scheme, strategy or plan" (in contrast to paragraphs 22 and 25 of the Indictment). It simply states that "the accused Sylvester [*sic*] Gacumbitsi, by virtue of the acts attributed to him, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of" genocide,[389] or that "[t]he accused planned, instigated, ordered, committed, or aided and abetted in" the extermination, murder, and rape.[390] Thus, if anything, the Pre-Trial Brief is less clear than the Indictment with respect to joint criminal enterprise, and cannot be found to have cured the Indictment's defects.

176. The Prosecution also mentions certain submissions during the trial, although it concedes that these are "not relevant to the question whether the Respondent was unfairly prejudiced in the conduct of his defence" by defects in the Indictment.[391]

177. The Appeals Chamber has previously stated that "in some instances, information contained in an Opening Statement of the Prosecution may cure a defective indictment."[392] The Appeals Chamber need not decide now whether and under what circumstances such a statement might be sufficient to plead the mode of liability, however, because no assistance is provided to the Prosecution by its Opening Statement in this case. The Prosecution points to the following statement made during its opening address:

> Today, Your Honours, Gacumbitsi stands charged with 5 counts: The count of genocide, or complicity in genocide in the alternative.
>
> He is also charged Your Honours with extermination, murder and rape, as crimes against humanity, all arising from culpable acts we allege he committed in concert with others as part of the common scheme whose singular objective was the total destruction of the Tutsi ethnic group.[393]

Even had it been timely, this statement was not, on its own, sufficient to correct the defect in the Indictment and the Pre-Trial Brief. It was not further developed; the Prosecution did not connect it, for instance, to specific factual allegations that supported the JCE claim. Nor did it specify to which category of JCE it meant to allude. The indictment places an accused on notice of the charges he faces. For a subsequent submission to be understood to clarify vagueness in an indictment, the implications of that submission must be clearer than the Prosecution's statement was here.

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[389] Prosecution Pre-Trial Brief, para. 3.35c. *See also ibid.*, para. 3.37c, in relation to complicity in genocide ("the accused Sylvester [*sic*] Gacumbitsi, by virtue of the acts attributed to him, knowingly aided and abetted in the planning, preparation or execution [...]").
[390] Prosecution Pre-Trial Brief, paras. 3.39a, 3.41a, 3.43a.
[391] Prosecution Appeal Brief, para. 200.
[392] *See, e.g., Kordić and Čerkez* Appeal Judgement, para. 169.
[393] Prosecutor's Opening Statement, T. 28 July 2003 p. 19. *See also* Prosecution Appeal Brief, para. 201.

178. Only in its Closing Brief did the Prosecution provide further details on its JCE theory, and that submission obviously came too late. Thus, the defect in the Indictment was not cured by the provision of timely, clear, and consistent information, and the Trial Chamber did not err in refusing to consider the JCE theory.

179. Accordingly, this ground of appeal is dismissed in its entirety.

## E. Authority for Ordering (Ground of Appeal 6)

180. The Trial Chamber found that the Appellant ordered crimes committed by the communal policemen, but did not find that he ordered crimes committed by the *conseillers*, gendarmes, soldiers, and *Interahamwe* who were in his commune at the time of the events under consideration. The Prosecution challenges this. First, it argues that the Trial Chamber erred in law by requiring proof of a formal superior-subordinate relationship in order to find that the Appellant had the authority or power to order.[394] Second, it contends that the Trial Chamber failed to draw the only reasonable conclusion on the evidence: that the Appellant was a superior to, and possessed the capacity to order, not only the communal policemen, but also the other perpetrators of the crimes.[395] The Appellant responds that the Trial Chamber correctly stated the law and that the factual findings and evidence cited by the Prosecution do not show when or how he gave orders to the other assailants.[396]

### 1. Alleged Error of Law

181. The Appeals Chamber agrees with the Prosecution that ordering does not require the existence of a formal superior-subordinate relationship. But the Trial Chamber did not misapprehend the law in this respect. It held:

> The Trial Chamber is of the opinion that the issue must be determined in light of the circumstances of the case. The authority of an influential person can derive from his social, economic, political or administrative standing, or from his abiding moral principles. Such authority may also be *de jure* or *de facto*. When people are confronted with an emergency or danger, they can naturally turn to such influential person, expecting him to provide a solution, assistance or take measures to deal with the crisis. When he speaks, everyone listens to him with keen interest; his advice commands overriding respect over all others and the people could easily see his actions as an encouragement. Such words and actions are not necessarily culpable, but can, where appropriate, amount to forms of participation in crime, such as "incitement" and "aiding and abetting" provided for in Article 6(1) of the Statute. In certain circumstances, the authority of an influential person is enhanced by a lawful or unlawful element of coercion, such as declaring a state of emergency, the *de facto* exercise of an administrative function, or even the use of threat or unlawful force. The presence of a coercive element is such that it can determine the way the words of the influential person are perceived. Thus, mere words of exhortation or encouragement would be perceived as orders within the meaning of Article 6(1) referred to above. *Such a situation does not, ipso facto, lead to the conclusion that a formal superior-subordinate relationship exists between the person giving the order and the person executing it.* As a matter of fact, instructions given outside a purely informal context by a superior to his subordinate within a formal administrative hierarchy, be it *de jure* or *de facto*, would also be considered as an "order" within the meaning of Article 6(1) of the Statute.
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> The Chamber recalls its factual finding that Sylvestre Gacumbitsi had superior authority only over the communal police. *The Prosecution failed to show that he also had superior authority over the conseillers, Interahamwe, gendarmes or any other persons who participated in the attacks. Moreover, the Prosecution failed to demonstrate that, in the absence of a formal superior-subordinate relationship between the Accused and the population and attackers, the circumstances*

[394] Prosecution Appeal Brief, paras. 213-218.
[395] Prosecution Appeal Brief, paras. 219-220.
[396] Gacumbitsi Response, paras. 316-327.

> *of the case suggest that the Accused's words of incitement were perceived as orders within the meaning of Article 6(1) of the Statute.*[397]

182. Thus, after finding that no formal superior-subordinate relationship existed, the Trial Chamber proceeded to consider whether, under the circumstances of the case, the Appellant's statements nevertheless were perceived as orders. This is in accordance with the most recent judgements of the Appeals Chamber. In the *Semanza* Appeal Judgement, the Appeals Chamber explained:

> As recently clarified by the ICTY Appeals Chamber in *Kordić and Čerkez*, the *actus reus* of "ordering" is that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.[398]

The Appeals Chamber notes that this element of "ordering" is distinct from that required for liability under Article 6(3) of the Statute, which does require a superior-subordinate relationship (albeit not a formal one but rather one characterized by effective control).[399] Ordering requires no such relationship -- it requires merely authority to order, a more subjective criterion that depends on the circumstances and the perceptions of the listener.

183. Accordingly, this sub-ground of appeal is dismissed.

### 2. Alleged Error of Fact

184. The Trial Chamber found that, as *bourgmestre*, the Appellant was the highest authority and most influential person in the commune, with the power to take legal measures binding all residents.[400] His role in the genocide demonstrated his authority: he convened meetings with the *conseillers*; asked them to organize meetings to tell people to kill Tutsis, and verified that these meetings had been held; and directly instructed *conseillers*, other leaders, and the Hutu population to kill and rape Tutsis.[401] The Trial Chamber pointed to several instances in which the Appellant "instructed", "ordered", or "directed" the attackers in general, not just the communal policemen:

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[397] Trial Judgement, paras. 282, 283 (emphasis added, internal citations omitted).
[398] *Semanza* Appeal Judgement, para. 361, referring to *Kordić and Čerkez* Appeal Judgement, para. 28. *See also Kamuhanda* Appeal Judgement, para. 75 ("To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial effect on the commission of the illegal act." (internal citations omitted)).
[399] *See supra* section III.B.3.
[400] Trial Judgement, paras. 241-243.
[401] Trial Judgement, paras. 101, 104.

- On 14 April 1994, after giving a speech telling people "to arm themselves with machetes and [...] to hunt down all the Tutsi", the Appellant led assailants to Kigarama, where they engaged in an attack on Tutsis "carried out under [the Appellant's] personal supervision".[402]

- At Nyarubuye Parish on 15 April 1994, the Appellant "*instructed* the communal police and the *Interahamwe* to attack the refugees and prevent them from escaping", which they did.[403]

- On 16 April 1994, the Appellant "directed" an attack at Nyarubuye Parish, during which the assailants "finished off" survivors and looted the parish building.[404]

- On 17 April 1994, the Appellant ordered a group of attackers to kill fifteen Tutsi survivors of previous attacks at Nyarubuye Parish, which they immediately did.[405]

185. These findings made clear that the Appellant had authority over the attackers in question and that his orders had a direct and substantial effect on the commission of these crimes. In view of these facts, no reasonable trier of fact could find that the Appellant's words were not perceived as orders by the attackers in general, not just the communal police, to commit these crimes.

186. In *Semanza*, the Appeals Chamber found that the Trial Chamber had unreasonably failed to conclude that Laurent Semanza was liable for ordering a massacre.[406] This conclusion was based on the facts that Mr. Semanza had "directed attackers, including soldiers and *Interahamwe*, to kill Tutsi refugees who had been separated from the Hutu refugees"[407] and that the refugees "were then executed on the directions" of Mr. Semanza.[408] The Appeals Chamber concluded as follows:

> On these facts, no reasonable trier of fact could hold otherwise than that the attackers to whom the Appellant gave directions regarded him as speaking with authority. That authority created a superior-subordinate relationship which was real, however informal or temporary, and sufficient to find the Appellant responsible for ordering under Article 6(1) of the Statute.[409]

The Trial Chamber in the *Kamuhanda* case reached a similar conclusion under similar facts, and the Appeals Chamber affirmed it.[410] The present case is materially indistinguishable from these cases.

187. Accordingly, the Trial Chamber erred in fact by not convicting the Appellant for ordering the crimes committed by all attackers, not just the communal policemen, at Nyarubuye Parish on 15, 16, and 17 April 1994 and on 14 April 1994 at Kigarama. This sub-ground of appeal is upheld.

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[402] Trial Judgement, para. 98.
[403] Trial Judgement, paras. 152, 154 (emphasis added). *See also ibid.*, paras. 168, 172 (the Appellant "directed attacks" at Nyarubuye), 173 (the Appellant led the attacks at Nyarubuye "by instructing the attackers to kill the refugees").
[404] Trial Judgement, para. 171.
[405] Trial Judgement, para. 163.
[406] *Semanza* Appeal Judgement, paras. 363, 364.
[407] *Semanza* Appeal Judgement, para. 363.
[408] *Semanza* Appeal Judgement, para. 363, quoting *Semanza* Trial Judgement, paras. 178, 196.
[409] *Semanza* Appeal Judgement, para. 363.
[410] *Kamuhanda* Appeal Judgement, para. 76 (holding that "a reasonable trier of fact could conclude from the fact that the order to start the massacre was directly obeyed by the attackers that this order had direct and substantial effect on the crime, and that the Appellant had authority over the attackers, regardless of their origin").

## F. Sentencing (Ground of Appeal 1)

188. The Prosecution contends that the Trial Chamber considered irrelevant factors in mitigation of sentence, and that it failed to take sufficient account of the gravity of the crimes and the degree of the Appellant's criminal responsibility.[411] In the Prosecution's view, there were no mitigating factors in this case that would justify imposing less than the maximum sentence of life imprisonment.[412] In response, the Appellant asserts that this ground of the Prosecution's appeal must fail in its entirety.[413]

### 1. The Appellant's Use of the Communal Police

189. The Prosecution contends that the Appellant's "reliance on the police, armed, uniformed, and responsible for public security, to launch attacks during the widespread or systematic killings of Tutsi civilians, was a circumstance that should have been seen as extremely aggravating."[414]

190. The Trial Judgement does not expressly mention the Appellant's use of the police as an aggravating circumstance. However, it did not need to do so. It clearly described and gave weight to the Appellant's abuse of his powers as *bourgmestre*, of which his use of the police was merely a part.[415] The Trial Chamber stated:

> In the instant case, the Chamber finds that the status of the Accused in April 1994, as *bourgmestre* and the most important and influential personality of Rusumo *commune*, is an aggravating circumstance, insofar as the Accused participated in the crimes committed and was one of the ringleaders, in terms of planning the crimes, inciting their commission and sometimes driving attackers to the massacre sites. By so doing, he betrayed the trust that the people of his *commune* had placed in him. His active participation in the said crimes explains why he could not take measures to prevent or to punish the perpetrators, when he had the opportunity to do so. The seriousness of the crimes committed, particularly genocide, but also the particularly atrocious rapes that some victims suffered, further constitute aggravating circumstances.[416]

191. The Appeals Chamber finds no discernible error in the Trial Chamber's analysis.

### 2. The Appellant's Formal Status as a Superior

192. The Prosecution argues that the Trial Chamber erred in relying on the fact that the Appellant's formal status as a superior was confined to the communal police because this ignored

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[411] Prosecution Appeal Brief, para. 21. The Prosecution argues that even if there are mitigating circumstances, this does not automatically entitle the Appellant to a "credit" in sentencing; life imprisonment thus might still be appropriate. *See ibid.*, para. 38, citing *Niyitegeka* Appeal Judgement, para. 267 and *Musema* Appeal Judgement, para. 396.
[412] Prosecution Appeal Brief, para. 21.
[413] Gacumbitsi Response, para. 100. Most of the Appellant's other arguments concerning sentencing (*see ibid.* paras. 35-47 and 96-98) are not responsive to the Prosecution's first ground of appeal and will not be considered here.
[414] Prosecution Appeal Brief, para. 27.
[415] The Prosecution had not, indeed, identified abuse of the police as a separate aggravating circumstance in its closing brief at trial. *See* Prosecution Closing Brief, paras. 435-450.
[416] Trial Judgement, para. 345.

the fact that the Appellant instigated and aided and abetted other participants in the attacks.[417] In response, the Appellant denies that he had any authority over the soldiers and gendarmes who participated in the attacks.[418]

193. In its conclusion on aggravating and mitigating circumstances, the Trial Chamber stated:

> [...] the Chamber is not persuaded that the Accused had superior responsibility over the perpetrators of the crimes committed in Rusumo *commune* in April 1994, with the exception of the communal policemen of Rusumo. Accordingly, the Chamber cannot take into account the aggravating circumstances submitted by the Prosecution.[419]

The Appeals Chamber recalls its holding above that the Trial Chamber erred in not holding the Appellant liable for ordering the crimes committed not only by the police but also by the "other perpetrators".[420] This error will be taken into account in the Appeals Chamber's consideration of the gravity of the crime for the purpose of determining the Appellant's sentence. In light of this determination, the Appeals Chamber does not consider it necessary to determine whether, had the Trial Chamber's holdings concerning the Appellant's authority over the other attackers been correct, it should nonetheless have considered the Appellant's authority as an aggravating factor in sentencing.

3. The Appellant's Prior Good Character, Accomplishments, and Relationships with Tutsis

194. The Prosecution submits next that the Trial Chamber accorded undue weight in mitigation to the Appellant's prior good character and accomplishments.[421] It argues that, if anything, these are aggravating factors, since, as the Trial Chamber found, the Appellant abused the trust he had earned through his prior good character and his position as *bourgmestre*.[422] Moreover, the Prosecution argues, the Trial Chamber erred in considering that the Appellant's good relationship with the Tutsis before April 1994 could serve as a mitigating factor in light of the horrific and discriminatory crimes the Appellant committed against the Tutsis between April and June 1994.[423]

195. The Appeals Chamber in the *Semanza* case considered similar arguments, as follows:

> 397. Trial Chambers of both International Tribunals have to a greater or lesser extent taken into account an accused's previous good character in mitigation, as well as accomplishments in functions previously held. For instance, in *Niyitegeka* the Trial Chamber considered in mitigation

[417] Prosecution Appeal Brief, para. 28.
[418] Gacumbitsi Response, paras. 83-85.
[419] Trial Judgement, para. 353.
[420] *See supra* section III.E.
[421] Prosecution Appeal Brief, para. 29.
[422] Prosecution Appeal Brief, paras. 29, 30.
[423] Prosecution Appeal Brief, para. 31. The Appellant responds that, to the contrary, the Trial Chamber erred by not giving sufficient weight to these mitigating circumstances. Gacumbitsi Response, para. 48. The Appeals Chamber notes its holding above that the Appellant has failed to allege any sentencing error in his own appeal, and will not consider these contentions here.

> that the accused was a person of good character prior to the events "and that as a public figure and a member of the MDR, he advocated democracy and opposed ethnic discrimination." Similarly, in *Ntakirutimana*, the Trial Chamber found as a mitigating factor that Elizaphan Ntakirutimana was a "highly respected personality within the Seventh-Day Adventist Church of the West-Rwanda Field and beyond" and that he led an "exemplary life as a church leader." The Trial Chamber also noted Gérard Ntakirutimana's good character, and that he had testified that his return to Rwanda in 1993 was prompted by "his hope to contribute to development and to promote peace within his country." In the *Obrenović* Sentencing Judgement, the ICTY Trial Chamber held that "prior to the war Dragan Obrenović was a highly respected member of his community who did not discriminate against anybody."
>
> 398. The Appeals Chamber is of the view that it was within the Trial Chamber's discretion to take into account as mitigation in sentencing the Appellant's previous good character and accomplishments as bourgmestre. Precedent does not support the Prosecution's position that "being a successful academic, politician or administrator is irrelevant" as a mitigating factor in crimes of genocide and crimes against humanity. Notwithstanding, the Appeals Chamber notes that in most cases the accused's previous good character is accorded little weight in the final determination of determining the sentence. However, in this case, the Trial Chamber does not indicate how much weight, if any, it attaches to the Appellant's previous character and accomplishments. Thus, it is not clear that these mitigating factors unduly affected the sentence, given the nature of the offences. Consequently the Appeals Chamber finds no discernible error on the part of the Trial Chamber.
>
> 399. Finally, the Appeals Chamber finds no merit in the Prosecution's argument that there exists a contradiction in the Trial Chamber's reasoning that the Appellant's position of influence was an aggravating factor, whereas his previous accomplishments as bourgmestre were considered in mitigation.[424]

196. These findings are directly transposable to the case at hand. There is no indication that the Trial Chamber abused its discretion, and the Prosecution's arguments in this respect are dismissed.

### 4. Alleged Irrelevant Factors in Mitigation

197. The Prosecution submits that the Trial Chamber gave weight to irrelevant considerations, including the fact that the Appellant's family lives in Rwanda and has good relationships with its neighbors from all ethnic groups and the fact that the Appellant's active involvement in the events was of a short duration.[425] The Appellant responds that the fact that his family lives at peace with other groups in Rwanda shows that he did not commit any reprehensible act because, had he done so, his family would have been targeted in revenge.[426]

198. The Appeals Chamber finds that the Trial Chamber erred in considering that the good relationships of the Appellant's family with its neighbors constituted a factor in mitigation. While there is no exhaustive list of what constitutes a mitigating circumstance,[427] the fact that the Appellant's family has good relationships with its neighbors of all ethnic groups cannot be considered to constitute an "individual circumstance" of the Appellant and should not be considered

[424] *Semanza* Appeal Judgement, paras. 397-399 (internal citations omitted).
[425] Prosecution Appeal Brief, paras. 34-37.
[426] Gacumbitsi Response, paras. 77-79.
[427] As recalled recently by the ICTY Appeals Chamber in the *Babić* Sentencing Appeal, para. 43.

in sentencing.[428] Nevertheless, it is unclear what weight, if any, the Trial Chamber gave to this factor. In these circumstances, the Appeals Chamber will not increase the Appellant's sentence as a result of the Trial Chamber's error.

199. The Prosecution also submits that it is "hardly a mitigating factor that the [Appellant's] active involvement in the events was of short duration."[429] The Trial Chamber, however, did not consider the short duration of the Appellant's involvement to be a mitigating factor. Rather, the Trial Chamber merely noted that the duration of the Appellant's involvement was not so long that it might constitute an aggravating factor.[430] The Appeals Chamber sees no error in this observation.

### 5. Gravity of the Crimes and Degree of Criminal Culpability

200. The Prosecution contends that the Trial Chamber committed an error by failing to impose a sentence reflecting the gravity of the crimes and of the Appellant's degree of criminal culpability.[431] It submits that the Trial Chamber should have considered the Appellant as one of the most serious offenders, deserving the highest penalty available at the Tribunal.[432]

201. The Trial Chamber properly stated the legal principles on which the Prosecution relies. After noting that the crimes committed were very serious,[433] it stated that "the penalty should, first and foremost, be commensurate with the gravity of the offence" and that "[s]econdary or indirect forms of participation are generally punished with a less severe sentence."[434]

202. The Prosecution argues, however, that the Trial Chamber failed to apply these principles properly because the sentence it imposed was inconsistent with those issued in comparable cases.[435] It contends that the correct sentence for extermination as a crime against humanity, especially when combined with other serious offences including rape, is life imprisonment.[436] And for genocide, it claims, the principle that the default punishment is life imprisonment is clearly established:

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[428] A "family circumstance" that could properly be considered in mitigation is, for instance, the fact that the convicted person is the parent of children of very young age (*see Kunarac et al.* Appeal Judgement, para. 362; *Erdemović* Sentencing Judgement, para. 16; *Tadić* Sentencing Judgement, para. 26).
[429] Prosecution Appeal Brief, para. 37.
[430] Trial Judgement, para. 353.
[431] Prosecution Appeal Brief, paras. 40-46.
[432] Prosecution Appeal Brief, para. 45.
[433] *See* Trial Judgement, para. 345 ("The seriousness of the crimes committed, particularly genocide, but also the particularly atrocious rapes that some victims suffered, further constitute aggravating circumstances."). It bears noting that the gravity of the offence is the core basis for sentencing, rather than an aggravating factor. Here, however, there is no indication either that the Trial Chamber failed to account adequately for this factor or that it impermissibly "double-counted" it. *See Deronjić* Sentencing Appeal, para. 106.
[434] Trial Judgement, para. 354.
[435] Prosecution Appeal Brief, para. 47, referring to *Češić* Sentencing Judgement, para. 26.
[436] Prosecution Appeal Brief, paras. 53-57, referring to *Stakić* Trial Judgement, paras. 936, 937.

> In addition to the [Appellant], the ICTR has, to date, found eighteen people guilty of crimes under Article 2 of the Statute. Out of these eighteen, eleven have been sentenced to imprisonment for the remainder of their lives. In two of the remaining cases, *Ruzindana* and *Gérard Ntakirutimana*, the Tribunal passed a sentence of 25 years' imprisonment. In only five instances, where the accused was found guilty of genocide, have sentences of less than 25 years' imprisonment been imposed. These include the sentences of Semanza, who received 15 years for complicity in genocide, Imanishimwe, who was sentenced to 15 years' imprisonment for genocide, and Elizaphan Ntakirutimana, who was sentenced to 10 years' imprisonment for genocide. The other two cases are Omar Serushago, who received 15 years' imprisonment, and Ruggiu, who received 12 years' imprisonment for incitement to commit genocide, following their guilty pleas.[437]

It further notes that, contrary to the present case, exceptional circumstances in mitigation were found in the cases of Omar Serushago and Georges Ruggiu in that they both pleaded guilty, were found to have co-operated substantially with the Prosecutor, and had expressed genuine remorse for their participation in the offences.[438] Similarly, Élizaphan Ntakirutimana received only ten years of imprisonment because of mitigating factors including his advanced age and fragile health.[439]

203. In response, the Appellant refers to the Penal Code of Rwanda, which he submits provides that no sentence for a fixed term shall be longer than twenty years or thirty years in case of several offences.[440] The Appellant also refers to the *Semanza* Trial Judgement, where the Trial Chamber stated that it was not convinced that the accused in that case deserved life imprisonment.[441] The Appellant further argues that the comparative analysis engaged in by the Prosecution is not helpful because the differences between the various cases are more important than the similarities and because the sentence must be individualized.[442]

204. The Appeals Chamber is of the view that, although the Trial Chamber correctly noted that the sentence should first and foremost be commensurate with the gravity of the offences and the degree of liability of the convicted person, it then disregarded these principles in imposing a sentence of only thirty years' imprisonment on the Appellant. The Appeals Chamber recalls that the Appellant played a central role in planning, instigating, ordering, committing, and aiding and

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[437] Prosecution Appeal Brief, para. 50 (internal citations omitted). Since the Prosecution filed its Appeal Brief, the Appeals Chamber has rendered Judgements in the *Ntakirutimana*, *Semanza*, *Kajelijeli*, and *Kamuhanda* cases. It affirmed the sentences of both appellants in the *Ntakirutimana* case. *Ntakirutimana* Appeal Judgement, Disposition. In the *Semanza* Appeal Judgement (*see* Disposition), the Appeals Chamber, *inter alia*, entered a new conviction for genocide, and increased the sentence to a total of thirty-five years (twenty-five of which were for genocide); this sentence reflected a reduction the Appeals Chamber imposed for violations of Mr. Semanza's pre-trial rights. In the *Kajelijeli* Appeal Judgement (*see* para. 325), the Appeals Chamber maintained the convictions for genocide and extermination (except insofar as they were also based on superior responsibility), but reduced the sentence from life imprisonment to forty-five years' imprisonment because it found that Mr. Kajelijeli's fundamental rights were seriously violated during his arrest and detention. In the *Kamuhanda* Appeal Judgement (*see* para. 365), the Appeals Chamber, *inter alia*, affirmed the convictions for genocide and extermination and affirmed the life imprisonment sentences imposed by the Trial Chamber.

[438] Prosecution Appeal Brief, para. 55, referring to *Serushago* Sentencing Judgement, paras. 31-42; *Ruggiu* Sentencing Judgement, paras. 52-80.

[439] Prosecution Appeal Brief, para. 56, referring to *Ntakirutimana* Trial Judgement, para. 906.

[440] Gacumbitsi Response, paras. 89, 90.

[441] Gacumbitsi Response, para. 92, referring to *Semanza* Trial Judgement, para. 559. However, the Appellant does not explain the similarities between Semanza's case and his own.

abetting genocide and extermination in his commune of Rusumo, where thousands of Tutsis were killed or seriously harmed.[443] The Trial Chamber also found the Appellant guilty of instigating rape as a crime against humanity,[444] noting that he had exhibited particular sadism in specifying that where victims resisted, they should be killed in an atrocious manner.[445] The Appellant was thus convicted of extremely serious offences. Moreover, unlike in most of the other cases in which those convicted for genocide have received less than a life sentence, there were no especially significant mitigating circumstances here.[446] Instead, the Appellant was a primary player, a leader in the commune who used his power to bring about the brutal massacre and rape of thousands.

205. The Appeals Chamber is, as noted above, fully cognizant of the margin of discretion to which Trial Chambers are entitled in sentencing. This discretion is not, however, unlimited. It is the Appeals Chamber's prerogative to substitute a new sentence when the one given by the Trial Chamber simply cannot be reconciled with the principles governing sentencing at the Tribunal. This is such a case. The Appeals Chamber concludes that in light of the massive nature of the crimes and the Appellant's leading role in them, as well as the relative insignificance of the purported mitigating factors, the Trial Chamber ventured outside its scope of discretion by imposing a sentence of only thirty years' imprisonment. The Appeals Chamber therefore upholds this sub-ground of the Prosecution's appeal.

### 6. Implications of the Appeals Chamber's Findings on the Sentence

206. Furthermore, the Appeals Chamber has held that the Appellant was responsible for ordering the acts of genocide, extermination, murder, and rape committed not only by the communal police, but also by the other perpetrators who participated in the attacks at Nyarubuye Parish and at Kigarama.[447] Additionally, the Appeals Chamber has found by majority, Judge Güney and Judge Meron dissenting, that the Appellant aided and abetted the murders of two of his Tutsi tenants, Marie and Béatrice, whom he expelled from their home and who were killed later that night. Consequently, it will enter a new conviction for murder as a crime against humanity under Count 4

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[442] Gacumbitsi Response, paras. 93 (referring to *Čelebići Case* Appeal Judgement, paras. 717, 719), 94, 95.
[443] Trial Judgement, para. 174.
[444] Trial Judgement, paras. 321-333.
[445] Trial Judgement, paras. 224, 325.
[446] Although not every individual convicted of genocide or extermination has been sentenced to life imprisonment (for instance, a fixed term of imprisonment was imposed in cases where the convicted person had pleaded guilty (*see Serushago* Sentencing Judgement, upheld on appeal (*Serushago* Appeal Judgement); *Ruggiu* Sentencing Judgement) or where the pre-trial rights of the convicted person had been infringed (*see Semanza* Appeal Judgement, para. 389 and Disposition; *Kajelijeli* Appeal Judgement, paras. 324, 325) and in two other cases (*Kayishema and Ruzindana* Trial Judgement, Sentence, para. 28, upheld on appeal (*Kayishema and Ruzindana* Appeal Judgement, para. 372); *Ntakirutimana* Appeal Judgement, para. 564 and Disposition)), the Appeals Chamber considers that the Appellant's case is not comparable to these cases.
[447] *See supra* section III.E.

of the Indictment.[448] The Appeals Chamber has also found that the Trial Chamber erred in failing to give proper weight to the gravity of the crimes committed by the Appellant and to his central role in those crimes. The Appeals Chamber considers that the maximum sentence is warranted in the Appellant's case and that there are no significant mitigating circumstances that would justify imposing a lesser sentence than imprisonment for the remainder of his life.

[448] *See supra* section III.A.

# IV. DISPOSITION

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

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

**NOTING** the written submissions of the parties and their oral arguments presented at the hearing on 8 and 9 February 2006;

**SITTING** in open session;

**CORRECTS**, *proprio motu*, the reference to Articles 2(3)(a) and 2(3)(b) of the Statute in paragraphs 293 and 295 of the Trial Judgement to Articles 2(2)(a) and 2(2)(b) of the Statute;

**DISMISSES** the Appellant's appeal in its entirety;

**ALLOWS**, in part, by majority, Judge Güney and Judge Meron dissenting, the Prosecution's second ground of appeal, **FINDS** that the Appellant aided and abetted the murder of his Tutsi tenants, Marie and Béatrice, and **ENTERS** a conviction for murder as a crime against humanity under Count 4 of the Indictment;

**ALLOWS**, in part, the Prosecution's sixth ground of appeal and **HOLDS** that the Appellant is responsible for ordering the crimes committed by all attackers at Nyarubuye Parish on 15, 16, and 17 April 1994 and on 14 April 1994 at Kigarama;

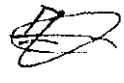
**ALLOWS**, in part, the Prosecution's first ground of appeal and **QUASHES** the sentence of thirty years' imprisonment imposed on the Appellant by the Trial Chamber;

**DISMISSES** the Prosecution's appeal in all other respects;

**ENTERS** a sentence of imprisonment for the remainder of the Appellant's life, subject to credit being given under Rule 101(D) of the Rules for the period already spent in detention from 20 June 2001;

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

**ORDERS**, in accordance with Rules 103(B) and 107 of the Rules, that Sylvestre Gacumbitsi is to remain in the custody of the Tribunal pending his transfer to the State in which his sentence will be served.



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

| Mohamed Shahabuddeen | Mehmet Güney | Liu Daqun |
|---|---|---|
| Presiding Judge | Judge | Judge |

| Theodor Meron | Wolfgang Schomburg |
|---|---|
| Judge | Judge |

Presiding Judge Shahabuddeen appends a separate opinion.

Judge Liu and Judge Meron append a separate opinion.

Judge Schomburg appends a separate opinion.

Judge Güney appends a partially dissenting opinion.

Judge Meron appends a partially dissenting opinion.

Signed on the 28th day of June 2006 at The Hague, The Netherlands,

and issued this 7th day of July 2006 at Arusha, Tanzania.

[SEAL OF THE TRIBUNAL]

# V. SEPARATE OPINION OF JUDGE SHAHABUDDEEN

## A. Preliminary

1. Mr. Murefu was an old man; he was a teacher. He was also a Tutsi. At the beginning of these sad happenings, he found himself a refugee among fellow Tutsi refugees; they had hurried to a church in search of protection from a looming peril to life and limb. Mr. Murefu made a desperate attempt to avert the threatened calamity; he made a protest to the appellant, a Hutu holding high office in the community. Mr. Murefu asked why the Tutsis were being killed. The appellant said he had no answer to give, because "the Tutsi hour had come". He took a machete from an *Interahamwe* and slew Mr. Murefu, striking him on the neck.[1] Then events picked up speed; an attacking crowd was being led by the appellant; thousands of Tutsis were killed. But, citing only one of these killings, namely, that of Mr. Murefu, the Trial Chamber convicted the appellant of "committing" genocide.

2. The appellant appeals. The Appeals Chamber dismisses the appeal. It gives two grounds for its decision. First, it holds that, there being no mention in the indictment of the slaying by the appellant of Mr. Murefu, this circumstance constituted a defect in the indictment which precluded evidence of the slaying from being given. However, it also holds that the defect was cured by the prosecution's subsequent submissions. Evidence of the slaying could therefore be given; and such evidence established that the appellant "committed" genocide. Second, the Appeals Chamber holds that the appellant's other actions as pleaded in the indictment and proven at trial, including his personal supervision of the massacre of refugees sheltering at the church, constituted "committing" genocide, even apart from the killing of Mr. Murefu.

3. Though the dismissal of the appeal is unanimous, these two grounds for the dismissal are supported by different majorities. I form part of the majority in both cases. But, in part B I explain that I would hold, in the alternative, that the indictment was not defective with respect to the killing of Mr. Murefu and that there was therefore nothing to be cured. In part E, I argue that, in any event, the appellant should have been convicted for committing genocide through participation in a joint criminal enterprise. As to both of these points, the Appeals Chamber holds the indictment to be defective. In so doing, in my respectful view, it imposes too formulaic a set of pleading requirements on the prosecution.

[1] Trial Judgement, para. 112, evidence of witness TAQ. The Trial Chamber found that the witness was credible. *See ibid.*, para. 145.

4. Also, I propose to consider some other issues on which judicial opinion is divided. In part C, I shall deal with the correctness of the first holding mentioned above, concerning "curing", that is to say, assuming that it has to be dealt with. In part D, I shall deal with the correctness of the second holding mentioned above, concerning the appellant's other actions at the genocide. Turning to an appeal by the prosecution, I shall deal in part F with the correctness of a holding which the Appeals Chamber makes on aiding and abetting.

5. My examination of the foregoing leads me to support the conclusion reached by the Appeals Chamber. I disagree with some of its findings, but the disagreement in no way impairs that support. On the contrary, I consider that the judgement of the Appeals Chamber could be strengthened in the areas in which I disagree. Some repetition will be inevitable, but the endeavour will be to keep duplication to a minimum.

## B. The indictment was not defective as it stood

6. The appellant did not raise any question that he did not understand that the indictment charged him with "committing" genocide; no such issue is before the court. The question before the court is whether, in proof of "committing" genocide, the prosecution is entitled to adduce evidence that the appellant killed Mr. Murefu,[2] regard being had to the circumstance that that killing is not mentioned in the indictment. The Appeals Chamber answers in the negative. I am of the opposite view.

7. With respect, it appears to me that the major difficulty with the Appeals Chamber's answer is that it does not adequately distinguish between admissibility of evidence of the killing of Mr. Murefu to prove murder and admissibility of that evidence to prove genocide. Although murder, as a crime against humanity, must be committed pursuant to an attack against a civilian population, it does not require proof of intent to destroy a protected group. It consists, fundamentally, of the killing of individuals. Accordingly, the deaths of the individual victims are elements of the crime and have to be referred to in the indictment. Because the killing of Mr. Murefu was not mentioned

[2] As to the question whether it is enough to rely on one killing to prove genocide, it has been suggested that "[t]he reference to 'members of the group' as victims of a genocidal act in paragraph (a) of Article 2 of the Genocide Convention means that the act itself must involve the killing of at least two members of the group." Khan, Dixon and Fulford (eds.), *Archbold: International Criminal Courts: Practice, Procedure and Evidence*, 2nd ed. (2005), p. 676, paras.13-32. But that seems at variance with the *Semanza* Trial Judgement, para 316, in which the Trial Chamber observed that "there is no numeric threshold of victims necessary to establish genocide". Schabas expresses the view that "from a grammatical standpoint, the phrase can just as easily apply to a single act of killing" and that "[c]learly, the quantitative dimension, that genocide involves the intentional destruction of a group 'in whole or in part,' belongs to the mental and not the material element..." William A. Schabas, *Genocide in International Law* (Cambridge, 2000), p. 158. The view that a single killing could suffice if the other conditions are met would seem to accord with the thinking of the Appeals Chamber in this case.

in the indictment for murder, evidence of it was correctly excluded by the Trial Chamber on the charge for that crime.[3]

8. By contrast, the essence of the crime of genocide is an intent to destroy a protected group.[4] The persons in the group may be legion. It is settled jurisprudence that, in the case of a mass killing, individual victims do not have to be specifically referred to in the indictment. If the indictment does refer to them, it is only by way of illustration of the crime; there may be hundreds of illustrations. The Appeals Chamber indeed embraces a similar logic when, examining the extermination count, it says that, "[a]though" the indictment "lists certain specific victims, this is only by way of example;"[5] failure to give evidence of their deaths did not invalidate the charge.

9. What must be borne in mind is the distinction between the material facts necessary to establish an offence and the evidence adduced to prove those material facts.[6] The material facts must be pleaded, the evidence need not.[7] When an indictment alleges genocide, proof of any one killing is not a *material fact* as it would be in a case of murder; it is *evidence* of a material fact, namely, that the intent of the accused was the destruction of a group, as a group. Each individual killing does not have to be specifically referred to in the indictment.

10. In sum, it was not necessary to mention the killing of Mr. Murefu in the count of the indictment relating to genocide as if the appellant was being charged in that count with murdering him. The Trial Chamber did not err in admitting the evidence of his death on the charge for genocide though excluding it on the charge for murder. The Appeals Chamber is of a different view.[8] I respectfully disagree with it.

### C. If there was any defect in the indictment concerning Mr Murefu, it was cured so as to make evidence of his killing admissible

11. Thus far, I have proceeded on the basis that the killing of Mr Murefu was evidence, not a material fact, and accordingly was not required to be pleaded in the indictment under the normal rules which say that matters of evidence do not have to be pleaded. But there could be an argument that, though it related to evidence, the killing of Mr Murefu had to be referred to in the indictment. The argument is as follows:

[3] Trial Judgement, paras. 176, 317-320.
[4] *See, inter alia*, Statute, art. 2(2) (referring to "intent to destroy" a "group, as such"); *ibid.* para. (a) (referring to "killing members of the group").
[5] Judgement of the Appeals Chamber, para. 89.
[6] *Kupreskić* Appeal Judgment, para. 88.
[7] *Ibid.*
[8] Judgement of the Appeals Chamber, para. 54.

12. Fairness is a wide and fundamental rule; it goes beyond the normal rules regulating the contents of an indictment; it requires that the accused be put in a position to investigate a specific incident from the beginning of the case even if it relates to evidence and not to a material fact. The killing of Mr Murefu was a specific incident; moreover, it was the foundation of the Trial Chamber's conclusion as to guilt. Therefore, even if the killing concerned evidence, it had to be referred to in the indictment. Not having been so referred to, the defence did not have due notice of it and accordingly the prosecution could not adduce evidence of it.

13. It is not necessary to express an opinion on the validity of that argument. Assuming that for any reason the indictment was defective for not mentioning the killing of Mr Murefu, any such defect was properly cured.

14. The prosecution gave the defence a copy of the written statement of witness TAQ[9], dated 29 November 2000; that statement, though otherwise redacted, mentioned the killing of Mr. Murefu by the appellant. The prosecution said that the redacted statement was given to the defence on 14 June 2001. That would have been six days before 20 June 2001 when the appellant was arrested. But there was no argument about the precise date, and at any rate no contention that it was not provided in advance of the trial, which began nearly two years later. Additionally, on the eve of the trial, a summary of the anticipated evidence of witness TAQ was annexed to the Pre-Trial Brief of the prosecution which was filed on 16 May 2003.[10] The summary specifically stated that it related to paragraphs of the indictment (4, 15, 16 and 17) which concerned genocide. And although it did not specify a mode of liability, the Appeals Chamber's cases do not suggest that it needed to do so, nor was there any lack of clarity in any event. It is obvious that to physically kill a man because he is Tutsi, in connection with an ongoing genocidal campaign, is to "commit" genocide; it is not mere instigation or evidence of *mens rea*.

15. Thus, witness TAQ was going to be asked to testify on the killing of Mr. Murefu as part of the case for the prosecution, *inter alia*, on genocide, and the accused was told that before 28 July 2003 when the case began. When the evidence was eventually given – by both witness TAQ and witness TAO – defence counsel naturally did not object on the ground that it exceeded the scope of the indictment in that it related to genocide. This lack of objection is significant because it must have been apparent to defence counsel that the evidence of the killing of Mr. Murefu was inextricably bound up with the evidence of the various actions which went to constitute genocide.[11]

16. The testimony of witness TAO included this statement by him:

[9] Judgement of the Appeals Chamber, para. 55.

> When they started to sing, Gacumbitsi said out aloud – he asked the Hutu that were there to move away from the Tutsi, because the Tutsis' hour had come, and the *Interahamwe* started to sing, "Let's exterminate them".[12]

This showed that evidence was being given in proof of an intent to commit genocide. Witness TAO also testified that, *inter alia,* the appellant "took a machete from the hands of someone standing next to him and cut – slashed at one of the elderly persons who was there, and another elderly person who was also cut up. And he told the policemen, 'Open fire,' and they opened fire. And those who had machetes started to slash and cut up their victims".[13] Other evidence of this kind was given.[14] The evidence of witness TAQ[15] showed that Mr. Murefu had asked the appellant: "What have the Tutsis done? Why are they being killed?"[16] Also, according to witness TAQ, three persons asked the appellant, "You as a *responsable*, the Tutsis are being killed. Why are they being treated in this manner? What did they do to deserve this?"[17] The Trial Chamber considered the evidence of witnesses TAQ and TAO to be credible.[18]

17. Defence counsel cross-examined witnesses TAQ and TAO extensively but did not object to the fact that their evidence (concerning the killing of Mr. Murefu, as so given) went outside of murder and covered matters relating to genocide.[19] An accused is expected to object at the time evidence exceeding the scope of the indictment is introduced at trial.[20] In a no-case submission, defence counsel objected to the admissibility of the evidence relating to the killing of Mr. Murefu but only in relation to murder. The answer of the prosecution was that it did "not seek a conviction for murder on these facts ... At the close of trial the Prosecutor will be relying on these murders as evidence in support of other charges ...". The Appeals Chamber correctly points out that, in his "briefing", the appellant "repeatedly" brought to the attention of the Trial Chamber the fact that Mr. Murefu's death had not been mentioned in the indictment, but, as the Appeals Chamber also recognises, this was "in the context of murder alone and not genocide".[21] The inference is warranted that the appellant did not object to admissibility of the evidence of the killing of Mr. Murefu in relation to genocide because he recognised that the defence had been given due notice that witness TAQ's evidence of Mr. Murefu's killing would be part of the evidence of genocide.

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[10] *Ibid.*, paras. 55, 56.
[11] *See* T. 29 July 2003. pp. 52-53; T. 30 July 2003, pp. 52-54; T. 31 July 2003, pp. 15-16.
[12] T. 30 July 2003, p. 54.
[13] *Ibid.*
[14] *See, e.g.*,Trial Judgement, para. 113.
[15] *See* T. 29 July 2003, pp. 42-71, T. 30 July 2003, pp. 1-48.
[16] *See* T. 29 July 2003, p. 52.
[17] *See* T. 30 July 2003, p. 20.
[18] *See* Trial Judgement, para. 145.
[19] See witness TAQ's evidence in T. 29 July 2003, pp. 42-71 and T., 30 July 2003, pp. 1-48, and witness TAO's evidence in T. 30 July 2003, pp. 46-52, and T. 31 July 2003, pp. 1-19.
[20] Judgement of the Appeals Chamber, paras. 51, 52, 54.
[21] *Ibid.*, para. 54.

18. In his "Closing Arguments", dated 9 February 2004, the appellant contended that the evidence relating to the killing of Mr Murefu was "mentioned for the first time in court".[22] That concerned murder. If it concerned genocide, it did not tell the whole story; it was too weak to be worthy of serious consideration. The defence had advance notice that the evidence would be given, and that it concerned genocide.

19. The summary provided by the prosecution to the defence in this case was materially indistinguishable from the summary of witness testimony which was provided to the defence in *Naletilić and Martinović* and which the Appeals Chamber found sufficient to cure a defect in the indictment in that case.[23] The holding in that case was correct, and the Appeals Chamber is right to follow it here. In my opinion, any vagueness in the indictment was sufficiently cured. Evidence that the appellant killed Mr Murefu was properly admitted on the genocide charge. I respectfully agree with the Appeals Chamber in concluding to this effect.

### D. The Trial Chamber made other findings of fact which showed that the appellant committed genocide

20. I agree with the Appeals Chamber that the findings made by the Trial Chamber as to the appellant's other conduct showed that he "committed" genocide. Apart from the killing of Mr Murefu, it is useful to recall briefly just what the appellant did.

21. The Trial Chamber found, generally, that the appellant was not at any remove from the crime scene; he was physically present at the action. Specifically, it found that, being there, he "gave a signal for the massacres to commence"[24] and "ordered Hutu refugees to separate themselves from the Tutsi"[25] – a step indicating an intention to commit the genocide which immediately followed. Indeed, as the Trial Chamber found, he "directed"[26] the attacks, he "personally took part"[27] in them, he "led attacks against Tutsi civilians by example"[28], he

[22] Defence Closing Brief, ICTR-2001-64-T, 9 February 2004, p. 12.
[23] *Naletilić and Martinović* Appeal Judgement, paras. 27, 45, 62-65. It bears noting that, while with respect to an incident involving the beating of a man called "the Professor", the information provided by the Chart of Witnesses in the *Naletilić and Martinović* case was complemented by a reference to that incident in the Prosecution's Opening Statement, this was not the case with respect to another incident involving the unlawful transfer of prisoners, described at paragraphs 62 through 65 of the Appeals Judgement in that case. With respect to the latter incident, the ICTY Appeals Chamber specifically held that the Opening Statement and other submissions did not provide information that remedied the defect in the indictment, and that it was therefore necessary to rely on "the information in the Prosecution Chart of Witnesses alone". *Ibid.*, para. 63. Finally, I also note that the Chart of Witnesses in *Naletilić and Martinović* did not specify which mode of liability was being pleaded.
[24] Trial Judgement, para. 168.
[25] *Ibid.*
[26] *Ibid.*, paras. 169, 171,172.
[27] *Ibid.*, para. 172.
[28] *Ibid.*, para. 173.

"participated in the attack on Nyarubuye Parish on 15 and 16 April 1994"[29], and he "played a leading role in conducting and, especially, supervising the attack"[30].

22. A person who engaged in the attacks in those ways would plainly be guilty of "committing" genocide. Justice would not be served by holding that this view does not apply to the appellant as the principal actor; it would be a misunderstanding and misapplication of the law to say that, on those findings of fact made by the Trial Chamber, he was guilty of "ordering" or "instigating" but not of "committing" genocide. He not only "ordered" or "instigated" but actually participated in the "commission" of the crime. Those acts were before the Appeals Chamber and both sides addressed them.

23. Questions have been raised on the Trial Chamber's observation that "'[c]ommitting' refers generally to the direct and physical perpetration of the crime by the offender himself."[31] Two glosses may be put on the Trial Chamber's observation.

24. First, attention is invited to the word "generally" in the Trial Chamber's statement. It is accepted that the statement does not deny that there can be a "committing" where the accused acts through a joint criminal enterprise. However, there are not two rules, but one; it is not the position that non-JCE cases are governed by the "direct and physical perpetration" rule and JCE cases by another rule which, mysteriously, exempts them from the application of the "direct and physical perpetration" rule. The matter always turns on whether there is "direct and physical perpetration". What happens is that, in the circumstances of a case of JCE, there is a "direct and physical perpetration" even though the accused is not in personal contact with the victim: the JCE is his instrument. But I see no reason why the rationale of that view has to be limited to that situation. Why, for example, can there not be "direct and physical perpetration" where the accused perpetrates his crime through the instrumentality of another, even though no JCE is involved and even though there is no personal contact between the accused and the victim? To say that in such a case the proper charge is one of "ordering" and not one of "committing" imposes too great a strain on the legal apparatus. That may be defensible in some circumstances but not in all; it depends on the immediacy of the relationship between the accused and the result of his action. In any event, it is to be observed that in this case the Trial Chamber found that the appellant "personally took part"[32] in the attacks and in other ways directly participated in them. Why that should give difficulty in

[29] *Ibid.*, para. 261.
[30] *Ibid.*
[31] Trial Judgement, para. 285, footnote omitted; *see Kayishema and Ruzindana* Appeal Judgement, para. 187; *Tadić* Appeal Judgement, para. 188.
[32] Trial Judgement, para. 172.

finding that he engaged in the "direct and physical perpetration" of the crime of genocide resulting from the attacks is not clear to me.

25. Second, I agree with the Appeals Chamber that proof of personal killing is not required to show "the direct and physical perpetration of the crime by the offender himself."[33] To hold the contrary will be too narrow. Even in relation to a charge of genocide by "killing members of the group", the "direct and physical perpetration" test can be fulfilled even if it is not proved that the appellant himself killed anyone.

26. A more important question is whether the Appeals Chamber may (on the Trial Chamber's findings of the appellant's participation in respects other than the killing of Mr Murefu) make a determination that the appellant committed genocide in view of the fact that the Trial Chamber did not make a similar determination on those findings. In holding in paragraph 285 of its judgement that the appellant committed genocide, the Trial Chamber cited only the killing of Mr. Murefu, stating that the "Trial Chamber therefore finds that [the appellant] committed genocide ...". But a microscopic reading of the Trial Chamber's judgement would not be appropriate. The Appeals Chamber has previously held that a conclusion of guilt would be upheld where other inferences sustaining guilt would reasonably have been drawn at trial.[34] In this case, the factual findings of the Trial Chamber require the Appeals Chamber to determine that the appellant was guilty of committing genocide.

27. The last question is this: if the Appeals Chamber were so to determine, would there be a breach of the requirement for the Trial Chamber to give reasons? The Trial Chamber gave only one reason for holding that the appellant committed genocide, namely, the killing of Mr Murefu. Can it be argued that an additional reason cannot now be given? It seems necessary to bear in mind that "[a]n appeal lies from the judgment, not the reasons for judgment".[35] True, the Trial Chamber did not give the additional reason. But, where the additional reason is apparent from the record, that it was not previously given is not relevant; reliance on it does not cause the appellant prejudice. Accordingly, the Appeals Chamber is right to affirm the Trial Chamber's judgement that the appellant committed genocide on the basis of his conduct other than in respect of the killing of Mr Murefu.

[33] Judgement of the Appeals Chamber, para. 60.
[34] *Kordić and Čerkez*, Appeal Judgement, para. 288. And see the authorities cited by Judge Weinberg de Roca in footnote 9 of her separate opinion in *Kordić and Čerkez*, Appeal Judgment, pp. 301 *et seq.*
[35] *The Queen v. Sheppard*, 2002 SCC 26, Binnie J., para. 4.

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## E. In any event, the appellant was responsible for genocide through group criminality

### 1. Joint Criminal Enterprise

28. Evidence of the appellant's responsibility for genocide under joint criminal enterprise ("JCE") was admissible if JCE was pleaded in the indictment so as to give the appellant fair notice of the basis on which he was charged. The Trial Chamber found that it "was not pleaded clearly enough to allow the Accused to defend himself adequately,"[36] and the Appeals Chamber has in substance upheld that finding.[37] I respectfully disagree.

29. JCE is not mentioned specifically in the indictment. However, I agree with the Appeals Chamber that the absence of the words "joint criminal enterprise" from the indictment "does not in and of itself indicate a defect. ... It is possible that other phrasings might effectively convey the same concept. The question is not whether particular words have been used, but whether an accused has been meaningfully 'informed of the nature of the charges' so as to be able to prepare an effective defence."[38] To rely on JCE, an indictment need not plead the doctrine *ipsissima verba* if the intention is apparent.

30. In *Tadić*,[39] no special formulae were used; the indictment simply presented the facts necessary to make out a case under the theory. It was not complained that this was insufficient; in my view it was sufficient. An indictment corresponding in substance to the requirements of JCE would have been valid if filed before the elements of the doctrine were assembled by the Appeals Chamber in *Tadić* under the rubric "joint criminal enterprise"; such an indictment would be valid if filed thereafter even though the indictment made no reference to those terms.

31. So far as formulae are concerned, two phrases come to mind: "acting in concert with others" and "common purpose" (or its close equivalents, such as "common scheme, strategy, or plan"). As to "acting in concert with others", in *Brđanin and Talić*[40] the Trial Chamber pointed out that the problem in that case was that the accused were charged "individually or in concert in the operations relating to the conduct of the hostilities ...".[41] In the opinion of the Trial Chamber, that phrase could

[36] Trial Judgement, para. 289.
[37] Judgement of the Appeals Chamber, paras. 172, 174.
[38] *Ibid.*, para. 165, footnotes omitted. Prosecuting counsel Ms Onsea obviously understood the jurisprudence to be requiring the indictment to "mention joint criminal enterprise as a term" when she said, "[W]e acknowledge that the indictment, as such, is vague in light of recent jurisprudence of the Appeals Chamber in that it does not plead JCE, as such ...". See Transcript of the Appeals Chamber, Thursday 9 February 2006, p. 54.
[39] *Tadic* Appeal Judgement, 15 July 1999.
[40] *Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001.
[41] *Ibid.*, para. 12.

mean "that each of the accused acted individually and *in concert with each other* ... "[42]. The Trial Chamber implied that a different consequence would have followed if the indictment had "pleaded that the two accused had acted 'in concert with others'".[43] In the instant case, paragraph 25 of the indictment expressly speaks of the appellant as "acting in concert with others".

32. As to "common purpose", for the reasons given, in *Brđanin and Talić* the Trial Chamber held that the phrase "individually or in concert" was ambiguous, but it stated that if "the prosecution seeks to rely upon the 'accomplice' liability of *acting in concert as part of a common purpose or design, or as part of a common criminal enterprise,* held by the Appeals Chamber to fall within Article 7.1, then this should be made clear."[44] This shows that the Trial Chamber considered that the words "acting in concert *as part of a common purpose or design"*, as opposed to "acting in concert" only, would have been sufficiently clear.

33. I do not propose to go through the other cases *seriatim*. My conclusion from a review of them is that it is enough if the indictment alleges in substance that the accused was "acting in concert with others" in pursuit of a "common purpose". Both expressions, or their equivalents,[45] were used in this case. Nothing more would appear to be required to plead a joint criminal enterprise. If any cases are really to the contrary, they cannot be correct.

34. In fact, the Appeals Chamber acknowledges that the "language [used in paragraph 25 of the indictment in this case] is similar to that employed in *Tadić* and seems to encompass the critical elements of a JCE charge".[46] However, the Appeals Chamber finds that the meaning of that paragraph was rendered confusing by the later statement in that paragraph that the appellant participated in the action "by his own affirmative acts or through persons he assisted or by his subordinates with his knowledge and consent".[47] With respect, I do not find this statement confusing at all. It merely pleads, as required by the Appeals Chamber's jurisprudence, the "nature of [the appellant's] participation in the enterprise."[48] It does not obscure the plain meaning of the allegation in the indictment that the appellant acted "in concert with others" in support of a "common scheme, strategy or plan to exterminate the Tutsi".

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[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.* (emphasis added, citing *Tadić* Appeal Judgement, paras. 185-229).
[45] Rather than "common purpose", the actual expression used (in the French version of the indictment, which is the relevant one) is "*d'un plan, d'une stratégie ou d'un dessein communs*". These expressions, however, are functionally equivalent, as made evident by paragraph 188 of the *Tadić* Appeal Judgement, which uses the expression "*dessein commun*". *See also Prosecutor v. Krnojelac*, Case No. IT-95-25, *Décision relative à la forme du deuxième acte d'accusation modifié*, 11 May 2000, paras. 9, 10. (holding that the expression "*dessein commun*" is equivalent to "*enterprise criminelle commune*", and also using the phrase *plan commun* as a synonym).
[46] Judgement of the Appeals Chamber, para. 172.
[47] *Ibid.*
[48] *See Kvočka et al.* Appeal Judgement, para. 28.

35. As to the category of JCE on which the prosecution intended to rely, it is true that the indictment did not expressly indicate this as is seemingly required by the Appeals Chamber in *Kvočka*.[49] But that case does not exclude statements by implication, and I do not consider that this elementary rule is displaced by general propositions of the law applicable to indictments, as set out in that case. The test remains, as the Appeals Chamber says, "whether an accused has been meaningfully 'informed of the nature of the charges' so as to be able to prepare an effective defence."[50] Here the material facts presented in the indictment naturally indicated the basic or first category of JCE.[51] The prosecution sought to hold the appellant responsible for crimes perpetrated by a group of which he was a member, that crime being within a purpose common to all members of the group. The aim of the prosecution was fully within the first category of JCE. The prosecution did not seek to impose liability for crimes that, though foreseeable, were beyond the group's objective, as permitted by the third category of JCE; nor did the allegations fall into the second category of an ongoing "system" of ill-treatment. So it must have been apparent to the appellant that the first category was intended. In these circumstances, to assert that it was the duty of the prosecution to state the exact category into which the case fell looks procrustean in practice and excessive in law.

36. As to the necessary material facts to support the case being brought under the first category of JCE, the indictment included a reference to "the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise".[52] All three of these matters were pleaded. First, the common criminal purpose is specified in paragraph 25 of the indictment as being to "exterminate the Tutsis".[53] Second, the other participants in the JCE are identified in paragraph 22 of the indictment as "local administrative official [*sic*] in Kibungo *préfecture,* including *bourgmestres* and *conseillers de secteur*".[54] Third, as noted above, paragraph 25 of the indictment states the nature of the appellant's participation; this was further detailed in a number of other paragraphs of the indictment.[55]

37. As to the state of the law in the ICTR, it is recognised that joint criminal enterprise was not applied in this Tribunal until after its elucidation by the ICTY Appeals Chamber. For some time

[49] *See Kvočka et al.* Appeal Judgement, paras. 28, 42.
[50] Judgement of the Appeals Chamber, para. 165, footnotes omitted.
[51] *See Krnojelac* Appeal Judgement, para. 144 (affirming the Trial Chamber's decision not to consider an extended form of JCE liability because it had not been adequately pleaded).
[52] *Kvočka* Appeal Judgement, para. 28.
[53] *See also* Indictment, paras 3-4 (detailing the objectives of the genocide).
[54] *See also* Indictment, paras. 5-12 (detailing interactions between the appellant and these persons). Although not all of the members of the JCE are identified by name, such precision is not necessary. See *Cermac*, Decision on Ivan Cermak's and Mladen Markac's Motion on Form of Indictment, IT-03-73-PT, 8 March 2005, para. 27; *Krstić* Appeal Judgment, para. 143.
[55] *See* Indictment, paras. 4-24.

now, however, the phrasing used in paragraphs 22 and 25 of the indictment has had a firm foundation in the jurisprudence of the ICTR.[56] It could not be argued that one of the central issues addressed in the *Tadić* Appeal Judgement – the first judgement of the ICTY Appeals Chamber on an appeal from a conviction – could have escaped the notice of reasonably diligent defence counsel in an ICTR case,[57] especially given that the two Appeals Chambers have the same judges.

38. The findings of the Trial Chamber are sufficient to establish the appellant's liability under the first category of JCE. These findings have been discussed in other sections of the Appeals Chamber's judgement and need not be reiterated here. It suffices to say that the appellant clearly joined with others (including *conseillers* and other local officials) in a joint criminal enterprise to destroy the Tutsi population in Rusumo Commune; numerous atrocities, including mass killings and rapes, were perpetrated in pursuit of that common criminal purpose. Thousands died – that was the appellant's object.

39. In short, the indictment pleaded JCE. The Appeals Chamber incorrectly held that it did not. It was open to the Trial Chamber to find that, even if the appellant did not personally commit genocide, he did so through JCE. On the evidence, it would have found so.

40. Now for some concluding remarks. A suggestion that the doctrine of JCE was *created* by *Tadić* is not correct. In *Tadić* the Appeals Chamber was putting forward a judicial construct developed out of its analysis of scattered principles of law gathered together for the purpose of administering international criminal law. The expression "joint criminal enterprise" can be found in those principles;[58] the Appeals Chamber was not proposing any modification of those principles. Courts frequently carry out such an exercise for the better appreciation of what they are doing; especially may this be done where an international criminal court feels called upon to declare the basis on which it is proceeding in a relatively unexplored field of litigation.

41. Thus, the mission which the Appeals Chamber set itself in *Tadić* was to identify the elements of individual criminal responsibility for a crime collectively perpetrated, as they were to be gathered from existing law; the Chamber was careful to say that "[t]o identify these elements one

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[56] *See, e.g.*, *Ntakirutimana* Appeal Judgement, fn. 783 (noting that the terminology "common purpose" is interchangeable with "joint criminal enterprise") and para. 468; *André Rwamakuba v. Prosecutor*, Case No. ICTR-98-44-AR72-4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para. 6 & fn. 13 (referring to "common purpose" and "common design") and para. 31; *Joseph Nzirorera v. Prosecutor*, Case No. ICTR-98-44-AR72.3, Decision on Validity of Appeal of Joseph Nzirorera Regarding Joint Criminal Enterprise Pursuant to Rule 72(E) of the Rules of Procedure and Evidence, 11 June 2004, paras. 9-10 (quoting an indictment that refers to a "common plan, strategy, or design" and subsequently refers back to that plan, strategy, or design as "such joint criminal enterprise").

[57] *See* Judgement of the Appeals Chamber, para. 172.

[58] *See, e.g.*, Smith & Hogan, *Criminal Law*, 10th ed. (London, 2002), p. 160, para. 8 (speaking of "a joint criminal enterprise").

must turn to customary international law,"[59] several cases being examined, including some from international criminal adjudication. The Appeals Chamber did not see its task as extending to the invention of a new head of liability: it is a misapprehension to suggest otherwise. What is in issue is not "JCE" as such, but the law on which it is based. It is understandable that there is a preference for another legal basis, but it is prudent to be wary of a "doctrinal disposition to come out differently"[60]. A preference for another doctrine is not the same as asserting that there is no legal basis for the doctrine on which the Tribunal now acts.

### 2. Co-perpetratorship

42. When another legal basis is suggested, it has however to be looked at carefully. Apart from JCE, there is at least one other theory of "commission". It is appropriate for an international criminal tribunal to take respectful notice of it if its judges, who are from various national jurisdictions, are to identify a jurisprudence which belongs to all. The theory[61] is that of co-perpetratorship (including indirect perpetratorship[62]). It is subscribed to by several countries. Attention to it has been invited by my distinguished colleague Judge Schomburg. Acknowledging my deficiencies in grasping its elements, the theory seems to be as follows.

43. In *Tadić*, the ICTY Appeals Chamber said that "the foundation of criminal responsibility is the principle of personal culpability."[63] In contemporary times, that seems to be a universally accepted principle. To respect the principle, it is necessary in every case to establish that the accused himself did the crime. The obvious difficulty in conforming to that requirement in the case of a group crime which the accused member of the group himself did not personally accomplish requires proof of a link between the accused and the perpetration of the crime so as to show that the crime could not have been committed without his participation.

44. However, "in general, there is no specific legal requirement that the accused make a substantial contribution to [a] joint criminal enterprise."[64] Exceptionally such a requirement may exist, but only "to determine whether [the accused] participated in the joint criminal enterprise."[65] It

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[59] *Tadić* Appeal Judgement, para. 194.
[60] *See Lewis v. Attorney General of Jamaica and Another* [2001] 2 AC 50 at 90, Lord Hoffmann, dissenting.
[61] There is a somewhat magisterial proposition that one should not speak of "the theory of control". However, the term is used in chapter VII of *Videla and others*, National Appeals Court (Criminal Division) for the Federal District of Buenos Aires, Docket No. 13, 9 December 1985.
[62] See the *Politbüro* case (BGHSt, 40, pp. 236ff, 26 July 1974), which concerned the criminal responsibility of East German high political officials for the killings of escaping citizens, and *Videla and others*, National Appeals Court (Criminal Division) for the Federal District of Buenos Aires, Docket No. 13, 9 December 1985, which concerned the criminal responsibility of Argentine leaders for "disappearances". Both cases involved accused who were "behind the scenes".
[63] *Tadić* Appeal Judgement, para. 186.
[64] *Kvocka* Appeal Judgement, para. 97, footnotes omitted.
[65] *Ibid.*

is therefore apparent that, in a JCE, "the Prosecutor need not demonstrate that the accused's participation is a *sine qua non*, without which the crimes could or would not have been committed."[66] In other words, the accused could "participate" in a JCE without bearing a substantial individual link to the perpetration of the actual crime. But to visit him with individual criminal responsibility in such a case is to *impute* to him the criminality of the member who in fact committed the crime. The culpability of the accused would be *derived*, not *personal*;[67] that is not the same as saying that he should only be culpable for what he himself has done, which is the leading principle of individual criminal responsibility.

45. The object of co-perpetratorship theory is to establish a juridical link which would make the accused liable for the crime on the basis that he had personally committed it. The link rests on the view that he would personally have "committed" the crime if it could only have been committed on fulfilment by him of his assigned role in the group; on that reasoning, it could be said that he was in "control" of the commission of the crime even though the actual crime was in fact perpetrated by another member or other members of the group. He could therefore be said to be personally linked to the commission of the crime.

46. The theory was considered by several jurists, including Claus Roxin. Speaking of "the bank robber with the gun or the perpetrator of the murder holding the victim", he said:

> The co-perpetrator can achieve nothing on his own: the intimidation of the bank employees and the seizing of the victim do not ensure success. The plan only "works" if the accomplice works with the other person. That other person is just as helpless however; if the bank employees are not fully controlled, he will be arrested; and if no one seizes the victim, he will defend himself or flee. Both are therefore in the same position: they can only realize their plan in so far as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act. [68]

Thus, by carrying out his part of the bargain, a party exercises "control" over the act visualised by the group plan. He could prevent the act, as planned, from being realised. This establishes a direct link between him and the actual commission of the crime; he could therefore be made personally culpable for it.

47. Comparing co-perpetratorship with JCE, I reached the conclusion two years ago that, in the case of the latter, the "focus is not on whether [the accused] had power to prevent [his colleagues] from acting as they did; the focus is on whether, even if he could not prevent them from acting as they did, he could have withheld his will and thereby prevented their act from being regarded as

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[66] *Ibid.*, para. 98, footnotes omitted.
[67] G. P. Fletcher, *Rethinking Criminal Law* (Oxford, 2000), p. 642, and Andrew Ashworth, *Principles of Criminal Law*, 2nd ed. (Oxford, 1995), pp. 410, 415, 439 and 441.
[68] Claus Roxin, *Täterschaft und Tatherrschaft*, 6th ed. (Berlin and New York, 1994), p. 278.

having been done pursuant to his own will also".[69] That is how the matter still appears to me: "control" is not an element of JCE, but it seems arguable that, apart from his participation in the work of the group, the will of the accused, which is highlighted in JCE, is ultimately involved in any imaginable system of law on the subject of individual responsibility for group criminality and can therefore serve as the lowest common denominator of the law adopted by the Tribunal. However, co-perpetratorship theory merits careful evaluation; there is much force in the logic of its underlying principles. If the matter were *res integra*, I would, for my part, give renewed consideration to it. But it seems to me that, as a matter of judicial discipline, the following reasons bar inquiry by this Tribunal.

48. On 15 July 1999 the ICTY Appeals Chamber, in *Tadić*,[70] referred to "the notion of co-perpetratorship" but did not adopt it. The notion was not chosen in the recent case of *Stakić*[71] decided by the ICTY Appeals Chamber on 22 March 2006 – just four months ago. The ICTY Appeals Chamber then unanimously affirmed its preference for JCE over the co-perpetratorship mode of liability, finding that the former was "firmly established in customary international law",[72] as *Tadić* had found in 1999 after examining post-World War II cases. Many decisions have followed the *Tadić* holding; JCE is now well established in the ICTR's jurisprudence.[73] Moreover, the notion of co-perpetratorship (as a doctrine) was not referred to in the trial judgement in this case or in the appellate pleadings; the Appeals Chamber has not had the benefit of the arguments of the parties. The matter being one of intricacy,[74] it seems to me that, in the circumstances, this Appeals Chamber is not in a good position to reassess the standing case law.

49. In any case, both theories of liability show that the appellant "committed" genocide – that being the issue in this part of the case. There are differences in the workings of the two theories, but the differences are not relevant. For example, there could be guilt under the third category of JCE relating to extended liability when, under the co-perpetratorship theory (at least as understood in Germany[75]), there could not. However, there is no question of extended liability here so as to make that category relevant.

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[69] *See Vasiljević* Appeal Judgement, Separate and Dissenting Opinion, para. 32..
[70] *Tadić* Appeal Judgement, para. 201.
[71] *Stakić* Appeal Judgement, 22 March 2006, para. 62.
[72] *Ibid.*, repeating the holding of the *Tadić* Appeal Judgement, para. 220.
[73] *See Kayishema and Ruzindana* Appeal Judgement, paras. 191-193; *Rwamakuba*, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ICTR-98-44-AR72.4, 22 October 2004, para. 31; *Ntakirutimana*, Appeal Judgment, para. 468; and *Karemera*, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, ICTR-98-44-AR72.5 and ICTR-98-44-AR72.6, 12 April 2006, paras. 13, 16 and 17.
[74] *See, e.g.*.. E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague, 2003), pp.61ff, dealing with "Different Models of Participation".
[75] *See Tadić*, Appeal Judgment, para. 224, footnote 283 (citing the German Federal Court in BGH GA 85, 270).

50. Two other problems remain. First, it is said that the question is one of harmonisation of theories and not election between them. That is attractive. But there could be a question as to whether harmonisation is possible. *Tadić* referred to co-perpetratorship but did not adopt it; presumably the case recognised that both theories could not be adopted at the same time. As has been noticed, the contribution of an accused to a JCE does not have to be a *sine qua non* of the commission of the crime. Indeed, the contribution does not have to be substantial, as it has to be in the case of aiding and abetting. By contrast, under the co-perpetratorship theory, since the non-fulfilment by a participant of his promised contribution would "ruin" the accomplishment of the enterprise as visualised, the making of his contribution would appear to be a *sine qua non.* Therefore, though the two theories overlap, they arrive at a point of incompatibility touching guilt or innocence: at that point one theory is wrong, the other right. This would seem to indicate that only one of the two theories can prevail in the same legal system.[76]

51. Second, the problem of harmonisation leads to another problem. Since several states adhere to one theory while several other states adhere to the other theory, it is possible that the required state practice and *opinio juris* do not exist so as to make either theory part of customary international law. That opens the risk of there being a *non liquet* on a matter of substance in international criminal law as applied by the Tribunal. That risk was sensed in *Erdemović.*[77] There too there was a clash between domestic legal systems. The majority in the Appeals Chamber was able to avoid the risk in that case only, *on one view*, by going outside of the normal principles of international criminal law. Whether the risk in this case can be avoided by taking a less adventurous course is best left for future inquiry.

52. For these reasons, I am of the view that the Appeals Chamber is not at this stage in a good position to pursue the co-perpetratorship theory.

### F. Aiding and abetting the murder of tenants

53. This part concerns an appeal by the prosecution. Count 4 of the indictment charged Mr Gacumbitsi ("appellant") with murder as a crime against humanity in that he "did kill persons, or cause persons to be killed, ... as follows:

[76] *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 77*, p. 90, dissenting opinion of Judge Anzilotti stating that it "is clear that, in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences ... [E]ither the contradiction is only apparent ... or else one [rule] prevails over the other ..."; and see, *ibid.*, at p. 105 per Judge Urrutia, also dissenting. See also Judge Abi-Saab in *Prosecutor v. Tadić*, (1994-1995) 1 ICTY JR 529, where he took a position similar to that taken by Judge Anzilotti.
[77] *Erdemović*, IT-96-22-A, 7 October 1997, para. 57.

> *Pursuant to Article 6(1) of the Statute:* by virtue of his affirmative acts in planning, instigating, ordering, committing, or otherwise *aiding and abetting*[78] the planning, preparation or execution of the crime charged ...".

The question raised is whether these averments were enough to give the appellant notice that the indictment for murder included an allegation that he aided and abetted it.

54. The Appeals Chamber correctly notes that in "considering whether the Appellant received clear and timely notice, the Indictment must ... be considered as a whole."[79] In other words, the indictment is not to be read as rigidly compartmentalised between the different counts. Read properly, it showed that, consequent on the death of President Habyarimana on 6 April 1994, there was to be a "fight" against "the Rwandese Patriotic Front (RPF), a predominantly Tutsi politico-military opposition group"[80]; that "fight" involved general genocide by Hutus against Tutsis. The indictment clearly indicated to the average reader that it was alleged that the appellant took part in that general genocidal campaign as a prominent local Hutu.[81]

55. It is against this background that the indictment relating to the deaths of the former tenants has to be seen. In ordering the two Tutsi sisters to vacate his home, according to the indictment, the appellant announced that "his home was not CND, a reference to the cantonment of RPF soldiers in Kigali".[82] Thus, the indictment may be reasonably understood to mean that the appellant knew, as the Trial Chamber found, that, by expelling them, "he was exposing them to the risk of being targeted by Hutu attackers on grounds of their ethnic origin".[83] In turn, the Appeals Chamber correctly understood the indictment that way, stating that its other "paragraphs ... detail the context of the genocidal campaign, which ensured that in expelling the tenants under these circumstances, the Appellant was exposing them to a high probability of death".[84] Predictably, the two sisters were killed the night following their eviction earlier in the day. There was no acceptable proof that the appellant "ordered" that killing, and the indictment on this point was dismissed; but the indictment gave due notice that an allegation was that he did aid and abet the killing – by whomsoever the killing was ordered or done.

56. In another case, the Appeals Chamber said that it is "advisable"[85] for the prosecution to be specific,[86] and not simply to quote the charging provisions of the Statute. That advice is valuable. However, I would hesitate to elevate it to a universal procedural requirement, more particularly as

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[78] Italics added.
[79] Judgement of the Appeals Chamber, para. 123.
[80] Indictment, para. 3.
[81] *Ibid.*, para. 4.
[82] *Ibid.*, para. 36.
[83] Trial Judgement, para. 197.
[84] Judgement of the Appeals Chamber, para. 123.
[85] *Semanza* Appeal Judgement, para. 259.

the Appeals Chamber recognised that "it has long since been the practice of the Prosecution to merely quote the provisions of Article 6(1) of the Statute in the charges, leaving it to the Trial Chamber to determine the appropriate form of participation under" that provision.[87] An existing practice of long standing is not terminated by an injunction as to what is "advisable".

57. In my view, the general reason for the practice is that, for the purpose of conviction, aiding and abetting is not a separate crime in itself, though it is often spoken of as if it were; it is merely a method of perpetrating the crime with which the article 6(1) of the Statute is concerned; [88] it forms part of an indictment for that crime, in this case, murder – which was charged. In one jurisdiction, when "indicting a secondary party to an offence (i.e. an aider, abettor, counsellor or procurer), there is no need to indicate, either in the statement of offence or particulars, that such was his role."[89] In other words, a charge for the main crime includes a charge for aiding and abetting it. The position was criticised *obiter* in *Maxwell*,[90] but the indictment practice has not noticeably altered.[91] True, the practice in that jurisdiction has come about through a statute, but, for the foregoing reasons, it may be thought that the understanding which the statute evidences is applicable here.

58. In cases in which the accused may be misled by the terms of the indictment, specificity has been enjoined.[92] But each case turns on its own facts. In this case, the indictment expressly and distinctly mentioned "aiding and abetting" after charging that the appellant "did ... cause persons to be killed." Also, the indictment pleaded material facts that supported a conviction for aiding and abetting the murder of the appellant's tenants. With knowledge of these things, the appellant failed to raise any question at the trial about sufficiency of notice that he was being charged with aiding and abetting their murder.

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[86] *See Maxwell v. DPP for Northern Ireland* (1979) 68 Cr. App. R. 128 at 143, 147 and 151, HL.

[87] *See* Judgement of the Appeals Chamber, para. 122, citing *Semanza* Appeal Judgement, para. 259. The existing practice of merely citing the applicable charging provision is not entirely unsupported. "In Queensland it is sufficient to describe an offence in the words of the ... statute ...which defines the offence". John B. Bishop, *Criminal Procedure*, 2nd ed. (Sydney, 1998), p. 428. In Canada, a count in an indictment may be "in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence." Criminal Code of Canada, (R.S., 1985, c. C-46), s. 581(2)(b).

[88] Difficult issues have arisen on methods of participation in the commission of a crime. One question is whether (a) article 6(1) of the Statute visualises the existence of only one crime which can be perpetrated by any or all of the stipulated modes; or (b) article 6(1) visualises the existence of several crimes each corresponding to one of the stipulated modes. In my view, at the level of *conviction*, (a) is correct. But (a) means that, in the case of a mode (such as aiding and abetting) which does not involve actual perpetration of the crime, the criminality of the perpetrator is being imputed to the accused. Because of this derived nature of the responsibility, a conviction for perpetrating the crime by aiding and abetting will, in sentencing, be regarded (save in exceptional circumstances) as being less serious than a conviction for actual perpetration of the crime. In other words, at the level of *sentencing*, aiding and abetting tends to be regarded as a separate crime: effectively, the accused is being sentenced for a crime constituted by his conduct in assisting another to commit a crime and not for the latter crime itself. Thus, at the level of sentencing, (b) is also involved.

[89] *Blackstone's Criminal Practice 2006* (Oxford, 2005), p. 1407, para. D10.12.

[90] *See Maxwell v. DPP for Northern Ireland* (1979) 68 Cr. App. R. 128 at 143, 147 and 151, HL.

[91] *Blackstone's Criminal Practice 2006* (Oxford, 2005), p. 1407, para. D10.12.

[92] *Maxwell v. DPP for Northern Ireland* (1979) 68 Cr. App. R. 128 at 143, 147 and 151, HL.

59. The case of the tenants concerns aiding and abetting *murder*. It is to be noticed that, so far as aiding and abetting *genocide* was concerned, virtually the same indictment formula was employed, the second paragraph of count 1 reading:

> *Pursuant to Article 6(1) of the Statute:* by virtue of his affirmative acts in ordering, instigating, commanding, participating in and *aiding and abetting*[93] the preparation and execution of the crime charged [i.e., genocide]...

It was on the basis of this indictment that the Trial Chamber held that –

> Sylvestre Gacumbitsi aided or abetted in the perpetration of the massacres, thereby encouraging the commission of the crime of genocide in Rusumo *commune* in April 1994.[94]

60. The Trial Chamber's formal "Verdict" merely found that the appellant was guilty of "Genocide",[95] it being understood that this comprised its express finding, made elsewhere, that the appellant was "responsible for planning, instigating, ordering the communal police, committing and aiding and abetting in the killing of members of the Tutsi ethnic group, as part of a scheme to perpetrate the crime of genocide".[96] This conviction, which thus includes aiding and abetting genocide, is affirmed by the Appeals Chamber. I see no material basis for any procedural distinction so far as aiding and abetting the *murder* of the tenants was concerned.

61. In the circumstances of this case, it appears to me that, as the Appeals Chamber has found,[97] the appellant had adequate notice that the charge against him included an allegation that he aided and abetted the murder of his tenants. The Trial Chamber incorrectly failed to record an appropriate conviction. Its reasoning does not appear. Its silence falls to be construed as a judgement acquitting the appellant of aiding and abetting. The Appeals Chamber correctly sets aside that implied acquittal and enters a conviction in its place.

## G. Conclusion

62. Throughout this case, as in others, there has been concern with fairness to the accused. That concern is of course proper: the liberty of the accused is important. As it was said, "the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time".[98] That remark, though made in a different context, is generally useful.

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[93] Italics added.
[94] Trial Judgement, para. 286.
[95] *Ibid.*, para. 334.
[96] *Ibid.*, para. 288.
[97] Judgement of the Appeals Chamber, para. 123.
[98] *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 141 (1937) (Sutherland, J., dissenting).

63. Thus, fairness to the accused has to be honoured, however inconvenient may be the consequences for the prosecution. The scope of a trial is fixed by the indictment; on a fair reading, the indictment, either original or as cured, must tell the accused exactly what he is charged with. A court must insist on that. Yet, it seems to me that it is the substance which matters: sophistication in applying the relevant standards cannot be extended to the point of rendering the task of the prosecution unreasonably hazardous.

64. At all material times, the appellant knew from the indictment that he was charged with having committed genocide (*inter alia* by killing Mr. Murefu) and aiding and abetting murder. I am confident that his right to a fair trial was in every way protected by the Trial Chamber. I respectfully support the judgement now handed down by the Appeals Chamber. If anything, I consider that it could be strengthened in the places to which I have referred.

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

Mohamed Shahabuddeen

Signed in The Hague 28 June 2006,
and delivered in Arusha, Tanzania, 7 July 2006

**[Seal of the Tribunal]**

1699/H

# VI. JOINT SEPARATE OPINION OF JUDGES LIU AND MERON

1. We write separately to explain our disagreement with the Majority's conclusion that, though the killing of Mr. Murefu "was not specifically alleged in the Indictment",[1] the Trial Chamber could nonetheless have convicted Gacumbitsi of committing genocide solely on the basis of its finding that Gacumbitsi killed this individual.

2. The Appeals Chamber's Judgement does not dispute that, if the Prosecution intended this killing to be the basis of a finding that Gacumbitsi committed offences, the killing should have been mentioned in the indictment.[2] Indeed, this proposition is beyond dispute. "[C]riminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible 'the identity of the victim, the time and place of the events and the means by which the acts were committed.'"[3] The Majority, however, is willing to excuse the Prosecution's failure to comply with our pleading requirements because a vague chart-entry summarizing the anticipated testimony of one witness mentions, *inter alia*, the killing of Mr. Murefu and the fact that the witness's testimony "relate[s] to the charge of genocide."[4] In our view, serious flaws in the indictment are not so easily remedied.

3. We fully agree with the ICTY Appeals Chamber's holding in *Kupreškić* that "in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[5] This holding, however, had an important caveat: "in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category."[6] Indeed, in order to protect the accused's right to be fully aware of the charges he or she faces, and to ensure that each accused can defend against the Prosecution's charges, it is imperative to apply strictly the rule that only "timely, clear and consistent information" can remedy defects in an indictment. Recognizing this fact – even as it held that a particular defect in the indictment was cured by a witness statement taken together with "unambiguous information" contained in the Pre-Trial Brief and its annexes[7] – the Appeals

[1] Judgement of the Appeals Chamber, para. 48.
[2] Judgement of the Appeals Chamber, para. 49.
[3] *Ntakirutimana* Appeal Judgement, para. 32 (quoting *Kupreškić et al.* Appeal Judgement, para. 89).
[4] Judgement of the Appeals Chamber, para. 56.
[5] *Kupreškić et al.* Appeal Judgement, para. 114. The indictment is the principal charging instrument at the Tribunal. We are therefore disturbed at frequency with which the Prosecution has recently sought to argue that defects in its indictments were cured by subsequently provided information. Clarity in the indictment is the best means of guaranteeing a fair and efficient trial.
[6] *Kupreškić et al.* Appeal Judgement, para. 114.
[7] *Ntakirutimana* Appeal Judgement, para. 48.

Chamber made clear in *Ntakirutimana* that the Prosecution cannot be deemed to have charged an accused for every incident described in a document that it makes available to him.[8]

4. Here, in concluding that Gacumbitsi had "clear and consistent" notice that he was alleged to have committed genocide by killing Mr. Murefu, the Majority points to only one document, and indeed, just one small section of a document – namely, the entry on Witness TAQ's anticipated testimony in the Prosecution's Summary of Anticipated Witness Evidence.[9] Indeed, in this case, unlike in *Ntakirutimana*, the Prosecution never mentioned the killing of Mr. Murefu in the body of its Pre-Trial Brief. Nor did the Prosecution allege in its Opening Statement that Gacumbitsi killed Mr. Murefu.[10] Hence, as the Majority implicitly acknowledges, the key question is whether the chart-entry, taken alone, provided "clear and consistent" notice that Gacumbitsi was alleged to have committed genocide by killing Mr. Murefu.[11] It did not.

5. First, we question whether notice provided only once can ever be "consistent" notice. Not only does the term "consistent" suggest that there must not be deviation in the material terms of the notice, but "consistent" also could reasonably be read to suggest that there must be some repetition – arguably, a document or statement providing notice is only "consistent" if there is another relevant document or statement that it is consistent with.[12] Such a reading of the term "consistent" would be in accordance with the purposes of the "clear and consistent" notice requirement: safeguarding the accused's right to be clearly and unequivocally informed of the charges against him in a situation where material facts were omitted from the indictment, the place where the accused would expect to find them.

6. Regardless of whether notice provided only once can ever satisfy the "clear and consistent" standard, the notice provided in the chart-entry on Witness TAQ fails to meet this standard, as it was far from clear. The chart shows that Witness TAQ's testimony would relate to the charges of genocide, extermination, and rape.[13] Yet the chart-entry never mentions any mode of liability, let alone explains which aspects of Witness TAQ's testimony would support a conviction for any of

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[8] *See Ntakirutimana* Appeal Judgement, para. 27 (citing *Prosecution v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62).

[9] Judgement of the Appeals Chamber, paras 56, 58.

[10] T. 28 July 2003 pp. 17-22.

[11] As the Majority points out, *see* Judgement of the Appeals Chamber, para. 55, the Prosecution Response notes that Gacumbitsi was also provided with the witness statement of Witness TAQ, and that this statement mentions the killing of Mr. Murefu, Prosecution Response, paras 149-157. The Prosecution Response, however, never suggests that this witness statement indicated the charge that the allegations about Mr. Murefu's death would be used to prove. Prosecution Response, paras 149-157. The majority is therefore right not to assert that the witness statement of Witness TAQ might have helped to inform Gacumbitsi that he was alleged to have committed genocide by killing Mr. Murefu.

[12] The Oxford English Dictionary defines "consistent" as: "[a]greeing or according in substance or form; congruous, compatible". III The Oxford English Dictionary 773 (2d ed. 1989).

[13] Prosecution Pre-Trial Brief, Appendix 3, p. 10.

the charges pursuant to a particular mode of liability.[14] This omission is all the more serious given how much ground the chart said that witness TAQ's testimony would cover.[15] According to the chart, Witness TAQ was to testify about a lengthy series of events in which Gacumbitsi took part over the course of several days. The killing of Mr. Murefu was just one small part of this series of events.[16] Given that – in relation to the genocide charge – the Prosecution pursued theories of responsibility based on Gacumbitsi's entire course of conduct during this period,[17] Gacumbitsi could reasonably have believed that the killing of Mr. Murefu was mentioned only as part of this course of conduct. Alternatively, as the Prosecution charged Gacumbitsi with instigating genocide, and as the chart-entry says that the killing of Mr. Murefu was immediately followed by a grenade attack on refugees gathered in the church that Mr. Murefu was killed in front of, Gacumbitsi could reasonably have believed that this killing would be used to argue that he instigated genocide. He might also have reasonably believed that the Prosecution viewed this incident only as evidence of his *mens rea* for genocide – evidence that could be rebutted with *mens rea* evidence unrelated to this particular killing. Any of the abovementioned inferences would have been logical ones for Gacumbitsi to have made – indeed, they were likely more logical than the inference that he was charged with committing genocide on the basis of this killing – given that "criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically",[18] and given that the Murefu killing was never mentioned in the indictment.

7. Not surprisingly, the chart does not appear to have led Gacumbitsi to deduce that the Murefu killing was alleged as a basis for the charge that he committed genocide. Discussion of this killing in the Rule 98 *bis* filings makes clear that, even after the completion of the Prosecution's case at trial, the Appellant was still under the impression that the incident had been alleged with respect to the murder charge. Yet not even at this point in the proceedings did the Prosecution clarify that it felt Gacumbitsi should be convicted of committing genocide on the basis of this killing. In fact, the Prosecution waited until the close of the trial to finally make clear that it intended to rely upon the evidence of the killing to support a conviction for genocide. This is not timely notice. We cannot agree to the entry of a conviction on the basis of allegations that were only made clear at the end of trial.

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[14] Prosecution Pre-Trial Brief, Appendix 3, pp. 10-12.
[15] It bears noting that the block quote in paragraph 56 of the Judgement contains only one of the six paragraphs of text in the chart-entry on Witness TAQ.
[16] Prosecution Pre-Trial Brief, Appendix 3, pp. 10-12. In fact, the description of the killing covers just four lines in a chart-entry almost two pages long.
[17] *See* Indictment, count I & paras 1-25. *See also* Prosecution's Opening Statement, T. 28 July 2003 pp. 20-21(alleging that Gacumbitsi "executed" a genocidal plot through his course of conduct in Rusumo Commune in April 1994); Prosecution Pre-Trial Brief, para. 2.16 (stating, under the section heading "Executing", that "[d]uring the month of April 1994, Sylvestre Gacumbitsi used his position ... to execute the campaign of looting, raping, and killing" and that he "instigated, led, and supervised ... attacks" occurring as part of this campaign (emphasis omitted)).
[18] *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreškić et al.* Appeal Judgement, para. 89.

8. According to the Majority, these circumstances "are materially indistinguishable from"[19] circumstances under which the ICTY Appeals Chamber recently found that the Prosecution had cured an indictment defect. We disagree. The Majority refers to the *Naletilić and Martinović* case, and in particular, the ICTY Appeals Chamber's finding that the Prosecution had cured the indictment's failure to provide information about the beating of an individual known as "the Professor". This finding rested in part on an entry in a similar chart of witnesses – although the chart-entry suggested that the witness at issue would be testifying to a few discrete incidents, and the chart-entry was far less lengthy than the one at issue in the present case. Yet the Appeals Chamber also rested its finding on the fact that the relevant "details were specifically reiterated by the Prosecution in its Opening Statement."[20] Indeed, the Prosecution's Opening Statement in *Naletilić and Martinović* not only mentions the beating of "the Professor",[21] it clearly states the counts in the indictment that the allegation relates to.[22] Hence, at the start of his trial, Martinovic knew what the Prosecution was trying to prove with its allegations about "the Professor".[23] The value of this second piece of clear, detailed information about the Prosecution's allegation with regard to "the Professor" – like the value of the information in the Pre-Trial Brief that together with the chart of witnesses cured the indictment defect in *Ntakirutimana* – should not be underestimated. In the present case, where the indictment makes absolutely no mention of the killing of Mr. Murefu – it does not just omit some material facts related to the killing – it is particularly problematic that neither the Prosecution's Pre-Trial Brief nor its Opening Statement reiterated and clarified the information on the killing provided in the chart-entry on Witness TAQ.

9. In conclusion, because the provision of "timely, clear and consistent information" is necessary to cure defects in an indictment, we cannot agree that the Prosecution cured its failure to mention the killing of Mr. Murefu in the indictment, and we therefore cannot agree that Gacumbitsi could be convicted of committing genocide on the basis of this killing alone. Nonetheless, because we agree with the Judgement's conclusion that "[t]he Trial Chamber convicted the Appellant of "ordering" and "instigating" genocide on the basis of findings of fact detailing certain conduct that ... should be characterized not just as "ordering" and "instigating" genocide, but also as

[19] Judgement of the Appeals Chamber, para. 58.
[20] *Naletilić and Martinović* Appeal Judgement, para. 45.
[21] *Naletilić and Martinović*, Case No, It-98-34-T, Tr. 1851 (10 September 2001).
[22] *Naletilić and Martinović*, Case No, It-98-34-T, Tr. 1849 (10 September 2001) (stating that the Prosecution would next be discussing counts 9-12 in the indictment).
[23] Another indictment defect at issue in the *Naletilić and Martinović* case – one relating to forcible transfer – was, as another separate opinion in the present case points out, found to have been cured solely on the basis of information provided in a chart of witnesses. With regard to each of the two instances of forcible transfer at issue, however, the Appeals Chamber pointed to multiple chart-entries (each pertaining to a different witness) in concluding that Martinović had adequate notice. *See Naletilić and Martinović* Appeal Judgement, paras 64-65 & fns. 165, 168. In this case, as already mentioned, the Judgement relies on only one chart-entry.

"committing" genocide",[24] we support the decision not to vacate the finding that Gacumbitsi committed genocide.

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

Liu Daqun
Judge

Theodor Meron
Judge

Signed on the 28th day of June 2006 at The Hague, The Netherlands,
and issued this 7th day of July 2006 at Arusha, Tanzania.

**[Seal of the International Tribunal]**


[24] Judgement of the Appeals Chamber, para. 59.

# VII. SEPARATE OPINION OF JUDGE SCHOMBURG ON THE CRIMINAL RESPONSIBILITY OF THE APPELLANT FOR COMMITTING GENOCIDE

## A. Introduction

1. I am in general agreement with the outcome of the Judgement. However, in relation to the Appellant's criminal responsibility for committing genocide, I am concerned about several issues. First, I wish to offer some remarks on committing genocide and the pleading of "committing" genocide which slightly deviate from the opinion of the majority of my distinguished colleagues. Following that, I will concentrate especially on the question whether it was necessary for the Appellant's conviction for committing genocide to plead the killing of Mr. Murefu in the Indictment. Finally, I will discuss the majority's treatment of the Appellant's responsibility for committing genocide in general.

## B. Does Committing Refer Generally to the Direct and Physical Perpetration of the Crime by the Offender?

2. The Trial Chamber found the Appellant guilty, *inter alia*, of committing genocide on the basis that he killed Mr. Murefu. The Trial Chamber stated:

> "Committing" refers generally to the direct and physical perpetration of the crime *by the offender himself*. In the present case, the Accused killed Murefu, a Tutsi. The Chamber therefore finds that he committed the crime of genocide, within the meaning of Article 6(1) of the Statute.[1]

Much to my dismay, the majority of the Appeals Chamber has decided to leave this holding of the Trial Chamber in principle[2] undisturbed despite the fact that it stands in striking contrast to the jurisprudence of both *ad hoc* Tribunals and to modern principles of criminal law and therefore is an error of law which required correction *proprio motu*.

3. Crimes under international law, *e.g.*, those listed in the Statutes of ICTR and ICTY, are often committed by a plurality of co-operating persons. Not necessarily all these persons carry out the crimes by their own hand; nevertheless, in general, they are not less culpable. On the contrary, within the context of international macro criminality, the degree of criminal responsibility

[1] Trial Judgement, para. 285 (footnote omitted) (emphasis added).

[2] In para. 60 of this Judgement, the Appeals Chamber only holds: "In the context of genocide, however, 'direct and physical perpetration' need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime." (footnote omitted). However, the Appeals Chamber does not offer any justification at all as to why this holds true only in the context of genocide (*see, e.g.*, in the context of extermination, para. 90 of this Judgement where the Appeals Chamber abstains from convicting the Appellant for committing extermination, but later on (paras. 158-179) examines the Appellant's responsibility for committing extermination based on joint criminal enterprise).

frequently grows as distance from the actual act increases. As the ICTY Appeals Chamber found in *Tadić*:

> Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act [...], the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question.
>
> Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.[3]

Both *ad hoc* Tribunals have therefore accepted that "committing" – in general and not only in the context of genocide – is not limited to direct and physical perpetration.[4]

4. However, instead of correcting the Trial Chamber's above-indicated error, the majority of the Appeals Chamber follows the misleading trail all the way back to the Indictment, which it finds defective because the killing of Mr. Murefu was not pleaded therein.

### C. General Remarks on the Pleading of "Committing" Genocide

5. For both *ad hoc* Tribunals, the only authority is their Statute. There can be no interpretation of the Statute beyond the wording of its provisions. Even within the scope of the Statute, any interpretation may not exceed what is recognized by international law. For a charge of criminal responsibility under the Statute, it is therefore necessary to plead a specific crime and a specific mode of participation as expressly contained in one of the provisions of the Statute.

6. Looking at the wording of Article 6(1) of the ICTR Statute and Article 7(1) of the ICTY Statute,[5] I first wish to point out that it would have been possible to interpret these provisions as following a monistic model (*Einheitstäterschaft*) in which each participant in a crime is treated as a perpetrator irrespective of his or her degree of participation.[6] This would have allowed the Prosecution to plead Article 6(1) of the ICTR Statute or Article 7(1) of the ICTY Statute,

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[3] *See Tadić* Appeal Judgement, paras. 191, 192.
[4] *See* only *Ntakirutimana* Appeal Judgement, para. 546.
[5] *See* ICTR Statute, Art. 6(1) and ICTY Statute, Art. 7(1): A person who planned, instigated, ordered, committed or *otherwise* aided and abetted [...] (emphasis added).
[6] *See*, for example, *Strafgesetzbuch* (Austria), Sec. 12: „Treatment of all participants as perpetrators"; for further details, *see* W. Schöberl, *Die Einheitstäterschaft als europäisches Modell* (2006), pp. 50-65; 197-227. *See* also *Straffeloven* (Denmark), Sec. 23(1), reprinted in Danish and in German translation in K. Cornils and V. Greve, *Das Dänische Strafgesetz*, 2nd edn. (2001); for further details, *see* K. Cornils, *ibid.*, p. 9. *See* especially also *Straffelov* (Norway), Sec. 58; for further details regarding Norway, *see* W. Schöberl, *Die Einheitstäterschaft als europäisches Modell* (2006), pp. 67-102; 192-227.

respectively, in their entirety without having to choose a particular mode of participation. It would have left it to the Judges to assess the significance of an accused's contribution to a crime under the Statutes at the sentencing stage, thereby saving the Tribunals the trouble of developing an unnecessary "participation doctrine". However, as the Tribunals' jurisprudence favours a distinction between principal and accessory (*Täterschaft und Teilnahme*) for the determination of individual criminal responsibility it must also accept the consequences which follow from this approach. It is impossible to make a difference in terms of substantive law between planning, instigating, ordering, committing or aiding and abetting without acknowledging that, in principle, each of these modes warrants distinction on the sentencing level as well. The difference in individual criminal responsibility must be mirrored in the sentence.[7] In this respect, I wish to add my regrets that the *ad hoc* Tribunals have decided to not compel the Prosecution as a matter of fairness to plead its case based on a specific mode of participation or to specify such at least at the end of the presentation of the Prosecution's case.

7. Since the Statute is the only authority for both *ad hoc* Tribunals, it is, on the other hand, sufficient to plead a specific crime and a specific mode of participation as expressly contained in one of the provisions of the Statute. In particular, the Prosecution is not required to plead any legal interpretation or legal theory concerning a mode of participation, which does not appear in the Statute – be it named, for example, direct or indirect perpetratorship, co-perpetratorship, joint principals,[8] joint criminal enterprise,[9] or the like.

8. Consequently, an indictment containing the charge "committing" genocide puts the accused on notice of the legal nature of the allegations against him.[10] According to established case law of both *ad hoc* Tribunals, the Prosecution has to plead in the indictment all material facts underpinning such a charge, but not the evidence by which the material facts are to be proven.[11] Among others, this includes facts which establish whether the accused individually committed the alleged crime or whether it was committed by several persons (including the accused) acting together. However, it

[7] In *Krstić*, the Appeals Chamber reduced the sentence from 46 years to 35 years of imprisonment mainly because the nature of the Accused's responsibility for genocide and other crimes was re-qualified from "committing" to "aiding and abetting"; *see Krstić* Appeal Judgement, para. 268. *See* also *Vasiljević* Appeal Judgement, para. 182. *See also* para. 61 of this Judgement.

[8] *See* D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 168.

[9] As to this, *see Karemera, Ngirumpatse and Nzirorera* Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, 18 May 2006, para. 8 and para. 5. In the case at hand I regard the appeal brought by the prosecutor and its lengthy discussion on how to plead JCE in paras. 158 - 179 to be absolutely superfluous.

[10] In my opinion, the modes of liability for genocide are exhaustively listed in Art. 2(3) of the Statute (Art. 4(3) of the ICTY Statute). I accept that some of my colleagues also hold Art. 6(1) of the Statute (Art. 7(1) of the ICTY Statute) applicable, but wish to note that there appears to be some tension between Art. 6(1) of the Statute and Art. 2(3) of the Statute as the scope of the former extends beyond that of the latter. It seems doubtful whether such an approach amounted to customary international law already at the time the crimes before the ICTR and the ICTY were committed. Thus, as regards some details, there is a risk of infringing the *nullum crimen sine lege* principle.

must be emphasised once more that the Prosecution is not required to plead a legal theory to be applied to these facts.

9. Furthermore, although the Prosecution is generally obliged to plead the identity of individual victims with the greatest possible precision,[12] this is not required in the case of genocide. The reason for this lies in the protected legal value of the prohibition of genocide which – unlike murder, for example – is not the individual, but the targeted national, ethnical, racial or religious group as such. It is thus not necessary to plead the names of particular victims in the Indictment just like it is irrelevant whether the Appellant killed someone by his or her own hand. Such an approach would miss the reason behind the prohibition of genocide. It would overlook that the persons most responsible for the killing of at least 800,000 Tutsi in Rwanda in 1994 were those who acted behind the scenes, who organized and planned this genocide, and who instructed, ordered and instigated others to carry it out. They committed genocide on an unimaginable scale. What else should these persons be called, but perpetrators? For a correct pleading of "committing" genocide it therefore suffices to plead the fact that at least one person was killed by acts imputable to the accused acting with *dolus specialis* (special intent).

10. In the instant case, the allegation against the Appellant of having "committed" genocide was pleaded in a manner quite inapprehensible.[13] Nevertheless, the Indictment fulfilled its main functions in that it provided the Appellant with sufficient information about the nature of the charges against him and limited the personal and factual scope of the Prosecution's case. The crime charged was "genocide"; "committing" was the charged mode of participation. The Appellant was put on notice of this charge and the material facts underpinning it. In contrast to what the majority of the Appeals Chamber found, it was neither necessary for the Prosecution to plead the killing of Mr. Murefu nor to plead joint criminal enterprise.

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[11] *See* this Judgement, para. 49. *See* also *Naletilić and Martinović* Appeal Judgement, para. 23.
[12] *See* this Judgement, para. 49.
[13] Under Count 1, the Indictment charged the Appellant pursuant to Art. 2(3)(a) of the Statute (committing genocide) and Art. 6(1) of the Statute ("participating in [...] the [...] execution" of genocide; "[participation] à la commission"). Thus, neither in its English nor in its French version does the Indictment adhere to the wording of Art. 6(1) of the Statute which was also criticized by the Trial Chamber; *see* Trial Judgement, para. 267. Only the French version of the Indictment ("participé à la commission") amounts to an adequate reference to "committing". However, the original Indictment was the (less clear) English version. Nevertheless, based on the circumstances of the case, the Appellant was put on notice that he was charged as a perpetrator of genocide. The Defence was working with the French version of the Indictment, and it is apparent from the trial record as well as from Defence submissions during the Appeals Hearing that the Appellant was informed about the nature of the charges against him. The same conclusion was reached by the Trial Chamber, *see* Trial Judgement, para. 269. Furthermore, *see* para. 37 of this Judgement,.

## D. The Criminal Responsibility of the Appellant for "Committing" Genocide Based on his Killing of Mr. Murefu

11. The majority of the Appeals Chamber blithely assumes the correctness of the Trial Chamber's approach to the Appellant's responsibility for "committing" genocide and holds:

> The Prosecution should have expressly pleaded the killing of Mr. Murefu, particularly as it had this information in its possession before the Indictment was filed. The Appeals Chamber thus finds by majority [...] that the Indictment was defective in this respect.[14]

12. With all due respect, this holding is erroneous.

13. Contrary to what the majority of the Appeals Chamber asserts, the Appellant was not charged with Mr. Murefu's killing.[15] This omission on the part of the Prosecution is most unfortunate and incomprehensible given that it had information about this killing long before the beginning of trial.[16] Irrespective of that, the Appeals Chamber is seized of a charge of "committing" genocide. In this respect, the killing of Mr. Murefu is neither a charge nor a material fact underpinning such, but one – albeit most abhorrent – piece of evidence that a genocidal campaign was conducted in which the Appellant participated and which caused the death of at least one victim. According to settled jurisprudence of both *ad hoc* Tribunals evidence does not need to be pleaded.[17] This understanding also underlies the Trial Judgement. The Trial Chamber correctly made a distinction between the allegations of murder and genocide. In relation to the killing of Mr. Murefu, it declined to convict the Appellant for murder because the Indictment did not contain a charge to that effect,[18] but it entered a conviction for genocide.[19]

## E. The Criminal Responsibility for "Committing" in General

14. As pointed out before, the problem lies in the Trial Chamber's finding that "committing" in general requires direct and physical perpetration of the crime by the offender himself. The Trial Chamber correctly found that the Appellant played a major role in the genocidal campaign against the Tutsi population.[20] It should have therefore convicted the Appellant of "committing" genocide

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[14] Para. 50 of this Judgement (footnote omitted).
[15] But *see* para. 50 of this Judgement.
[16] For the murder of Mr. Murefu, the Appellant should have been cumulatively charged under Art. 2 of the Statute and under Art. 3(a) of the Statute (murder as a crime against humanity). *See* the detailed description of this heinous crime by Witness TAQ, T. 29 July 2003 pp. 52, 53; T. 30 July 2003 pp. 20-24, p. 40. *See* also the testimony of Witness TAO, T. 30 July 2003 pp. 53, 54, 61, 62. In a legal system applying the principle *iuria novit curia*, the Appellant could be convicted also under Art. 3(a) of the Statute even if such a charge is not pleaded in the Indictment, provided that the Bench gives a judicial hint to that extent.
[17] *See Naletilić and Martinović* Appeal Judgement, para. 23.
[18] *See* Trial Judgement, para. 176.
[19] *See* Trial Judgement, para. 285.
[20] *See* also Trial Judgement, para. 261: "The Trial Chamber is persuaded that the Accused played a leading role in conducting and, especially, supervising the attack [on the Nyarubuye compound]."

on the basis of his overall control over the massacre at Nyarubuye compound. In this context, it is irrelevant whether the Appellant killed specific persons by his own hand as his superior role in the massacre requires imputing the commission of all killings to him.

15. Based on the Prosecution's fifth Ground of Appeal, the Appeals Chamber unnecessarily[21] examines whether the Appellant incurs liability under the first and third category of joint criminal enterprise for "committing", *inter alia*, genocide,[22] but concludes that joint criminal enterprise was not pleaded properly in the Indictment and that this defect of the Indictment was not subsequently cured.[23] As already explained, I do not support specific pleading requirements for mere legal theories or interpretations as to the meaning of "committing". With regard to the charge of "committing" genocide, the Indictment was not defective, but precisely put the Appellant on notice of the allegations against him: the Prosecution sufficiently specified the date of the Nyarubuye massacre, its location, the Appellant's criminal acts and the means by which he carried them out, the criminal acts of other perpetrators which must be imputed to the Appellant, as well as the targets of these criminal acts.[24] Also, at various points, the Indictment alludes to concerted action undertaken by the Appellant and others.[25] From this point of view, it becomes clear that the killing of Mr. Murefu was only the starting point of the massacre the Appellant is responsible for in whole. On this reasoning alone, the Appeals Chamber could have established the Appellant's responsibility for "committing" genocide. The discussion of joint criminal enterprise at least in the context of committing genocide in the case at hand is, to say the least, misleading.[26]

16. The concept of joint criminal enterprise is not expressly included in the Statute[27] and it is only one possibility to interpret "committing" in relation to the crimes under the ICTR and ICTY Statutes.[28] In various legal systems, however, "committing" is interpreted differently. Since Nuremberg and Tokyo, national as well as international criminal law has come to accept, in

[21] As a general rule, a judgement should always directly argue the case to the conclusion and avoid venturing outside the wording of the Statute to finally arrive at the same result in the context of genocide.
[22] *See* paras. 158-179 of this Judgement.
[23] *See* paras. 165-178 of this Judgement.
[24] *See*, in particular, Indictment, paras. 12-19.
[25] *See*, paras. 22 to 25 of the Indictment. In my opinion, the wording used in these paragraphs, *inter alia*, "acted/acting in concert with [others]", would have been sufficient to put the Appellant on notice even if specific pleading of joint criminal enterprise was required. It is obvious that these allegations refer to the entire charge of genocide (and complicity in genocide).
[26] *See*, in particular, paras. 158, 177 of this Judgement.
[27] *See Karemera, Ngirumpatse and Nzirorera* Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, 18 May 2006, para. 5.
[28] *See* paras. 158-179 of this Judgement.

particular, co-perpetratorship[29] and indirect perpetratorship (perpetration by means)[30] as a form of "committing".

17. Co-perpetration in general requires "*joint functional* control over a crime". Co-perpetrators must pursue a common goal, either through an explicit agreement or silent consent, which they can only achieve by co-ordinated action and shared control over the criminal conduct. Each co-perpetrator must make a contribution essential to the commission of the crime.[31] The worldwide accepted legal scholar, *Claus Roxin*, provides the following typical example:

> If two people govern a country together - are joint rulers in the literal sense of the word - the usual consequence is that the acts of each depend on the co-perpetration of the other. The reverse side of this is, inevitably, the fact that by refusing to participate, each person individually can frustrate the action.[32]

18. Indirect perpetration (perpetration by means) requires that the indirect perpetrator uses the direct and physical perpetrator as a mere "instrument" to achieve his goal, *i.e.*, the commission of the crime. In such cases, the indirect perpetrator is criminally responsible because he exercises control over the act and the will of the direct and physical perpetrator.[33]

19. Especially the notion of indirect perpetration has been employed in cases concerning organized crime, terrorism, white collar crime or state induced criminality. For example,

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[29] *See*, for example, *Código Penal* (Colombia), Art. 29: "Son coautores los que, mediando un acuerdo común, actúan con división del trabajo criminal atendiendo la importancia del aporte [...]"; *Código Penal* (Paraguay), Art. 29(2): "También será castigado cómo autor el que obrara de acuerdo con otro de manera tal que, mediante su aporte al hecho, comparta con el otro el dominio sobre su realización."; *Strafgesetzbuch* (Germany), Sec. 25(2): "If a number of persons commit the crime jointly, each shall be punished as a perpetrator (co-perpetrator)." *Rikoslaki/Strafflag* (Finland), Sec. 3 (unofficial translation): "If two or more persons jointly commit a crime with intention, each of them shall be punished as a perpetrator."
For detailed references to further national jurisdictions (in particular, Argentina, France, Spain and Switzerland), *see* Héctor Olásolo and Ana Pérez Cepeda, 4 *International Criminal Law Review* (2004), pp. 475-526 (p. 500, fn. 71).

[30] *See*, for example, *Código Penal* (Colombia), Art. 29: "Es autor quien realice la conducta punible por sí mismo o *utilizando a otro como instrumento.*" (emphasis added); *Código Penal* (Paraguay), Art. 29(1): "Será castigado como autor el que realizara el hecho obrando por sí o valiéndose para ello de otro."; *Código Penal* (Spain), Art. 28: "Son autores quienes realizan el hecho por sí solos, conjuntamente *o por medio de otro del que se sirven como instrumento.*" (emphasis added); *Model Penal Code* (American Law Institute 1985), Sec. 2.06 (2): "A person is legally accountable for the conduct of another person when: (a) [...] *he causes an innocent or irresponsible person to engage in such conduct* [...]." (emphasis added); *Strafgesetzbuch* (Germany), Sec. 25(1): "Whoever commits the crime himself or *through another person* shall be punished as a perpetrator." (emphasis added). *Rikoslaki/Strafflag* (Finnland), Sec. 4 (unofficial translation): "Whoever intentionally commits a crime by employing another person, that cannot be held criminally responsible due to mental incapacity, lack of *mens rea* or any other reason concerning the establishment of individual criminal responsibility, as an instrument, shall be punished as a perpetrator." *See* also *Corpus Juris* (2000), Art. 11 (previously Art. 12): "Any person may be held responsible for the offences defined above (Articles 1 to 8) as a main offender, inciter or accomplice: - as a main offender if he commits the offence by himself, jointly with another person or organisation (Article 13) *or by means of an innocent agent* [...]." (emphasis added).
*See* also G.P. Fletcher, *Rethinking Criminal Law* (2000), p. 639: "Virtually all legal systems [...] recognize the institution of perpetration by means." *See* also G. Werle, *Principles of International Criminal Law* (2005), marginal no. 354.

[31] *See* C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), pp. 275-305. *See* also K. Ambos, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Art. 25 marginal no. 8.

[32] *See* C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), p. 279.

Argentinean Courts have entered convictions for crimes committed by members of the Junta regime based on indirect perpetratorship.[34] In one of its leading cases, the *Politbüro* Case, the German Federal Supreme Court (*Bundesgerichtshof*) held three high-ranking politicians of the former German Democratic Republic responsible as indirect perpetrators for killings of persons at the East German border by border guards.[35]

20. Modern criminal law has come to apply the notion of indirect perpetration even where the direct and physical perpetrator is criminally responsible ("perpetrator behind the perpetrator").[36] This is especially relevant if crimes are committed through an organized structure of power in which the direct and physical perpetrator is nothing but a cog in the wheel that can be replaced immediately. Since the identity of the direct and physical perpetrator is irrelevant, the control and, consequently, the main responsibility for the crimes committed shifts to the persons occupying a leading position in such an organized structure of power.[37] These persons must therefore be regarded as perpetrators irrespective of whether the direct and physical perpetrators are criminally responsible themselves or (under exceptional circumstances) not. This approach was applied, for example, by German courts in cases concerning killings at the East German border: as far as border guards who had killed persons were identified and brought to trial, they were generally convicted as perpetrators. This, however, did not reduce the criminal responsibility of those who had acted "behind the scenes". As the German Federal Supreme Court (*Bundesgerichtshof*) held in the aforementioned *Politbüro* Case:

> [I]n certain groups of cases, however, even though the direct perpetrator has unlimited responsibility for his actions, the contribution by the man behind the scenes almost automatically brings about the constituent elements of the offence intended by that man behind the scenes. Such is the case, for example, when the man behind the scenes takes advantage of certain basic conditions through certain organisational structures, where his contribution to the event sets in motion regular procedures. Such basic conditions with regular procedures are found particularly often among organisational structures of the State [...] as well as in hierarchies of command. If the man behind the scenes acts in full awareness of these circumstances, particularly if he exploits the direct perpetrator's unconditional willingness to bring about the constituent elements of the crime,

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[33] *See* C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), pp. 142-274. *See* also K. Ambos, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Art. 25 marginal no. 9.

[34] *See* Argentinean National Appeals Court, *Judgement on Human Rights Violations by Former Military Leaders* of 9 December 1985. For a report and translation of the crucial parts of the judgement, see 26 *ILM* (1987), pp. 317-372. The Argentinean National Appeals Court found the notion of indirect perpetratorship to be included in Art. 514 of the Argentinean Code of Military Justice and in Art. 45 of the Argentinean Penal Code. The Argentinean Supreme Court upheld this judgement on 30 December 1986.
*See* also K. Ambos and C. Grammer, *Tatherrschaft qua Organisation. Die Verantwortlichkeit der argentinischen Militärführung für den Tod von Elisabeth Käsemann*, in: T. Vormbaum (ed.), 4 JAHRBUCH FÜR JURISTISCHE ZEITGESCHICHTE (2002/2003), pp. 529-553 (official Legal Opinion on the Responsibility of the Argentinean Military Leaders for the Death of Elisabeth Käsemann, commissioned by the (German) Coalition against Impunity). On the (German) Coalition against Impunity, *see* <http://www.fdcl-berlin.de>.

[35] German Federal Supreme Court (Bundesgerichtshof), Judgement of 26 July 1994, *BGHSt* 40, pp. 218-240.

[36] As indirect perpetratorship focuses on the indirect perpetrator's control over the will of the direct and physical perpetrator, it is sometimes understood to require a particular "defect" on the part of the direct and physical perpetrator which excludes his criminal responsibility.

[37] *See* C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), pp. 242 - 252.

> and if he wills the result as that of his own actions, then he is a perpetrator by indirect perpetration. He has control over the action [...]. In such cases, failing to treat the man behind the scenes as a perpetrator would not do justice to the significance of his contribution to the crime, especially since responsibility often increases rather than decreases the further one is from the scene of the crime [...].[38]

21. For these reasons, the notion of indirect perpetratorship suits the needs also of international criminal law particularly well.[39] It is a means to bridge any potential physical distance from the crime scene of persons who must be regarded as main perpetrators because of their overall involvement and control over the crimes committed. This was recognized upon the establishment of the International Criminal Court whose Statute, in Article 25(3)(a), includes both the notion of co-perpetration and indirect perpetration ("perpetrator behind the perpetrator"):

> [A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person] (a) Commits such a crime, whether as an individual, *jointly with another or through another person*, regardless of whether that other person is criminally responsible".[40]

Given the wide acknowledgement of co-perpetratorship and indirect perpetratorship, the ICC Statute does not create new law in this respect, but reflects existing law.

22. As an *international* criminal court, it is incumbent upon this Tribunal not to turn a blind eye to these developments in modern criminal law and to show open-mindedness by accepting internationally recognized legal interpretations and theories such as the notions of co-perpetration and indirect perpetration. Co-perpetratorship and indirect perpetratorship differ slightly from joint criminal enterprise with respect to the key element of attribution.[41] However, both approaches widely overlap and should therefore be harmonized by both *ad hoc* Tribunals. Such harmonization could especially provide the third category of joint criminal enterprise with sharper contours by combining objective and subjective components in an adequate way. In general, harmonization will lead to greater acceptance of the Tribunal's jurisprudence by international criminal courts in the

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[38] German Federal Supreme Court (Bundesgerichtshof), Judgement of 26 July 1994, *BGHSt* 40, pp. 218-240, p. 236.

[39] This appears to be acknowledged also by Pre-Trial Chamber I of the International Criminal Court, who stated in a recent decision:

> In the Chamber's view, there are reasonable grounds to believe that, given the alleged hierarchical relationship between Mr Thomas Lubanga Dyilo and the other members of the UPC and the FPLC, *the concept of indirect perpetration which, along with that of co-perpetration based on joint control of the crime* referred to in the Prosecution's Application, *is provided for in article 25(3) of the Statute*, could be applicable to Mr Thomas Lubanga Dyilo's alleged role in the commission of the crimes set out in the Prosecution's Application.

*Prosecutor v. Thomas Lubanga Dyilo*, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06, 24 February 2006, Annex I: Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, para. 96 (emphasis added).

[40] (Emphasis added).

[41] While joint criminal enterprise is based primarily on the common state of mind of the perpetrators (subjective criterion), co-perpetratorship and indirect perpetratorship also depend on whether the perpetrator exercises control over the criminal act (objective criterion).

future and in national systems which understand imputed criminal responsibility for "committing" to mean co-perpetratorship and/or indirect perpetratorship. It is important to note that neither the law of Rwanda nor the law of the former Yugoslavia and the law of the States on the territory of the former Yugoslavia employs the theory of joint criminal enterprise.

23. In my opinion, this approach towards interpreting "committing" is reconcilable with the *Tadić* Appeal Judgement, which introduced joint criminal enterprise into ICTY jurisprudence. The *Tadić* Appeal Judgement does not only refer to "common (criminal) design", but also – expressly – speaks of co-perpetrators.[42] Furthermore, the *Tadić* Appeals Chamber noted that in many post-World War II trials, courts "did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration."[43]

## F. Conclusion

24. The concept of joint criminal enterprise is established ICTY jurisprudence in order to deal with allegations of "committing" by way of acting in concert with others based on a common purpose or design. Nevertheless, when interpreting the meaning of "committing" based on imputed liability, it is the noble obligation of an international criminal tribunal to merge and harmonize the major legal systems of the world and to accept also other recognized developments in criminal law over the past decades.

25. A person who participated in the commission of a crime in concert with others is responsible for having "committed" that crime irrespective of whether he or she carried out the criminal act by his or her own hand (co-perpetrator, co-principal, first category of joint criminal enterprise).

26. A person who has effective control over the act and the will of the direct and physical perpetrator (the brain of the crime with "white gloves") must be held responsible for having "committed" the crime in question despite the fact that he or she did not act by own hand (indirect perpetrator).

27. If an accused is alleged to have been a perpetrator of a crime under the Statute by way of acting together with others, it is sufficient if the indictment charges "committing" as the relevant mode of participation and if the underlying material facts pleaded in the indictment reveal that the accused acted together with others to commit the crime charged.

[42] *See Tadić* Appeal Judgement, paras. 192, 220.
[43] *See Tadić* Appeal Judgement, para. 201 with further references.

28. Apart from the killing of Mr. Murefu, it is abundantly clear that the Appellant had a leading role in the commission of the genocidal campaign against the Tutsi population. He controlled the heinous crimes to be committed, in particular at Nyarubuye compound. He had strong influence not only on his subordinates, but on people living in his *commune* in general. He used this influence to ensure that the genocidal campaign against the Tutsi population would be implemented successfully. Taking into account his predominant role in the genocidal campaign, the Appellant's conduct is best described as indirect perpetration; in some respect the Appellant was also acting as a co-perpetrator.

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

Signed on the 28th day of June 2006 in The Hague,
issued on the 7th day of July 2006 in Arusha.

W. Schomburg

Wolfgang Schomburg
Judge

**[Seal of the Tribunal]**

# VIII. PARTIALLY DISSENTING OPINION OF JUDGE GÜNEY

1. I regret that I am not able to agree with some of the holdings of the majority of the Appeals Chamber. There are two matters in relation to which my own view differs from that of the majority. The first matter is one of substance, and relates to the issue of "committing" genocide. The second matter relates to the Appellant's responsibility for aiding and abetting the murders of his tenants.

## A. "Committing" Genocide

2. I agree with the present judgement that the Appellant committed genocide through his killing of Mr. Murefu. However, I disagree with the conclusion that "even if the killing of Mr. Murefu were to be set aside, the Trial Chamber's conclusion that the Appellant 'committed' genocide would still be valid"[1] because the Appellant "was present at the crime scene to supervise and direct the massacre, and participated in it actively by separating the Tutsi refugees so that they could be killed".[2]

3. The central element in the majority's reasoning seems to be that "[i]n the context of genocide, however, 'direct and physical perpetration' need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime."[3] With all due respect, I am of the view that the majority sets aside the established jurisprudence and gives a new meaning to "committing", without providing convincing reasons for doing so.

4. According to the *Tadić* Appeal Judgement, "committing" refers to a) "the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law"; or b) "participation in the realization of a common design or purpose" (or participation in a joint criminal enterprise).[4] Until the present case, "committing" has always been understood in one of those two ways,[5] and attempts to extend the meaning of "committing" further have not been accepted.[6]

5. Pursuant to this jurisprudence, the Appellant will have "committed" genocide if a) he physically perpetrated one of the acts listed at Article 2(2) of the Statute (with the relevant intent); or b) he participated in a joint criminal enterprise to commit genocide. In the present case, a

[1] Appeal Judgement, para. 59.
[2] Appeal Judgement, para. 61.
[3] Appeal Judgement, para. 60 (footnote omitted).
[4] *Tadić* Appeal Judgement, para. 188.
[5] *See, e.g., Kayishema and Ruzindana* Appeal Judgement, para. 187; *Semanza* Trial Judgement, para. 383; *Kunarac et al.* Trial Judgement, para. 390; *Kordić and Čerkez* Trial Judgement, para. 376; *Krstić* Trial Judgement, para. 601; *Kvočka et al.* Trial Judgement, para. 251; *Krnojelac* Trial Judgement, para. 73; *Vasiljević* Trial Judgement, para. 62.
[6] *See Stakić* Appeal Judgement, para. 62 (rejecting the theory of co-perpetratorship as a form of commission).

majority of the Appeals Chamber concludes that joint criminal enterprise was not properly pleaded, and that the Appellant can therefore not be convicted on this basis, a conclusion with which I agree. As to physical perpetration, the Appellant can be convicted of having committed genocide pursuant to Article 2(2)(a) of the Statute for the killing of Mr. Murefu. However, even if the Appellant was present at Nyarubuye Parish, played a leading role in conducting and supervising the attack and directed the Tutsi and Hutu refugees to separate, this does not entail that, in addition to "ordering" and "instigating" genocide, he also "committed" genocide. Plainly, "playing a leading role in conducting and [...] supervising" the attack and directing the refugees to separate do not constitute the physical perpetration by the Appellant of one of the acts listed at Article 2(2) of the Statute.[7]

6. In finding that the Appellant committed genocide by his actions at Nyarubuye (other than his killing of Mr. Murefu), the majority thus misapplies, or departs from, the established jurisprudence as to the meaning of "committing". If the intent was to identify a new form of commission, this should have been said openly, and cogent reasons should have been provided.[8] In the case at hand, no reasons or authorities have been provided to justify the departure from the previous jurisprudence.[9] While I concede that various domestic legal systems may recognize other forms of commission than the two forms identified until now in the Tribunal's jurisprudence,[10] I am concerned by the fact that the majority in this case offers no discussion whatsoever to show that any of these forms of commission are recognized in customary international law.[11] Indeed, no analysis of customary international law is provided to show that "committing" goes beyond the physical perpetration of a crime or the participation in a joint criminal enterprise. Further, the majority does not explain clearly how "committing" is now to be understood; it merely states that "other acts can

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[7] Article 2(2) of the Statute reads as follows:

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

[8] *See Aleksovski* Appeal Judgement, paras. 107-111.

[9] In this connection, the Appeals Chamber notes "that the selection of prisoners for extermination played an integral role in the Nazi genocide" (*see* Appeal Judgement, footnote 145). This is not disputed. But this reference does not suffice to show that "committing" according to Article 6(I) of the Statute goes beyond physical perpetration of a crime or participation in a joint criminal enterprise.

[10] On this subject see, *e.g.*, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, Separate Opinion of Judge Iain Bonomy, paras. 28-30.

[11] In fact, as noted above, the Appeals Chamber has rejected co-perpetration as a form of commission: *see Stakić* Appeal Judgement, para. 62.

constitute direct participation in the *actus reus* of the crime."[12] With respect, this is as vague as it is unsatisfactory, and this novel approach to "committing" arises very late in the life of the Tribunal.

7. The majority finds that the Appellant's action of directing the Tutsi and Hutu refugees to separate at Nyarubuye "is not adequately described by any other mode of Article 6(1) liability".[13] In this respect, I would like to emphasize that this action certainly constitutes a contribution to the commission of acts of genocide by others, in other words participation in a joint criminal enterprise. This shows that the expansion of "committing" as suggested by the Appeals Chamber is not necessary: the same analysis could have been made through the lenses of joint criminal enterprise. The real problem here is one of lack of adequate notice of that mode of liability.

8. Finally, even if it could be shown that customary international law recognizes forms of commission other than those outlined in *Tadić*, I would not convict the Appellant on that basis, as he was never put on notice that such a form of commission could apply in his case – this mode of liability was certainly not pleaded in the Indictment. In this connection, I recall that if the Prosecution seeks a conviction for "committing" a crime on the basis of a form of commission other than direct physical perpetration, it should state so explicitly in the indictment.[14]

9. For the above reasons, I conclude that the majority errs in finding that, through his acts at Nyarubuye (other than the killing of Mr. Murefu), the Appellant "committed" genocide. I also note that the Trial Chamber did not find that the Appellant committed genocide otherwise than by his killing of Mr. Murefu,[15] and that none of the Parties in the present appeal invited the Appeals Chamber to do so. Certainly, the Appeals Chamber is entitled to intervene *proprio motu* if it considers that a Trial Judgement needs to be reformed on a point, but I am not convinced that this was necessary in the present case: it would have been sufficient to uphold the finding that the Appellant committed genocide on the basis of his killing of Mr. Murefu. Further, I am concerned that the Appellant was never put on notice or given the opportunity to present arguments as to whether his actions at Nyarubuye (other than his killing of Mr. Murefu) could lead to a finding that he "committed" genocide there.

### B. Aiding and Abetting the Murders of Marie and Béatrice

10. In the present judgement, a majority of the Appeals Chamber finds that the Appellant could be convicted for aiding and abetting the murder of Marie and Béatrice as this mode of liability was

[12] *See* Appeal Judgement, para. 60.
[13] Appeal Judgement, para. 60.
[14] *See Kvočka et al.* Appeal Judgement, paras. 41-42 (finding that it is not sufficient to charge only for "committing" if responsibility is sought pursuant to a joint criminal enterprise).
[15] *See* Trial Judgement, para. 285.

sufficiently pleaded in the Indictment.[16] With respect, I disagree. In my view, the Appellant was never clearly informed that he would have to defend himself against a charge not just that he ordered the killing of his tenants, but also that, by expelling his tenants, he knowingly contributed to their killing a few hours later, and thus aided and abetted their murder.

11. While the preamble to Count 4 of the Indictment (Murder) states that the Appellant is charged under Article 6(1) of the Statute "by virtue of his affirmative acts in planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation or execution of the crime charged",[17] this did not make clear to which of the numerous alleged killings each mode of liability was meant to correspond. Arguably, it could have been inferred that all of the modes applied to all of the killings—yet this implication is dispelled by the specific language of paragraph 36 of the Indictment, which contains the specific allegation as to the murders of the two women and which makes reference only to ordering. Paragraph 36 of the Indictment reads as follows:

> On a date uncertain during April - June 1994, **Sylvestre GACUMBITSI** personally ordered the tenants in one of his homes to vacate the premises. After announcing that his home was not CND, a reference to the cantonment of RPF soldiers in Kigali, **Sylvestre GACUMBITSI** ordered the killing of his former tenants.

Given this language, the Appellant could reasonably infer that he was only charged with ordering those two murders. No other paragraph of the Indictment corrects that impression. Thus, the Indictment did not put the Appellant properly on notice that he could be convicted for having aided and abetted the murders of his tenants. Further, this defect in the Indictment was not cured by timely, clear and consistent information. With respect to the murders of Marie and Béatrice, the Prosecution Pre-Trial Brief exclusively argues the ordering theory.[18] Some of the witness statements in the annexes allege facts that might be read as supporting aiding and abetting – for instance, the statement of Witness TBC says that the Appellant chased Marie and Béatrice out of the house and that they were then killed on the spot.[19] But in light of the fact that the Pre-Trial Brief to which these statements were appended clearly creates the impression that the Prosecution was continuing to rely only on ordering, the statements cannot be said to have been sufficient to cure the defect.[20] Accordingly, I am of the opinion that the Appellant did not receive clear, timely, and consistent information that he was being charged with aiding and abetting his tenants' murders. As

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[16] Appeal Judgement, para. 123.
[17] Indictment, Count 4.
[18] *See* Prosecution Pre-Trial Brief, para. 2.27.
[19] *See* Prosecution Pre-Trial Brief, Appendix 3, anticipated testimony of Witness TBC; *see also ibid.*, anticipated testimony of Witness TAS (stating that Kazoba "bragged" that he had shot dead Béatrice and Marie).
[20] Further, it should be noted that, contrary to the anticipated testimony of Witness TBC (according to which Marie and Béatrice were killed "on the spot" after being expelled by the Appellant), the Trial Chamber found that the killing of Marie and Béatrice occurred several hours after they were expelled by the Appellant ("in the night of 13 April 1994": *see* Trial Judgement, para. 196).

a result, I would have concluded that the Trial Chamber did not err in declining to convict the Appellant for these crimes.

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

Signed on the 28th day of June 2006 at The Hague, The Netherlands.
Issued on the 7th day of July 2006 at Arusha, Tanzania.

Mehmet Güney

Judge

**[SEAL OF THE TRIBUNAL]**

1679/H

# IX. PARTIALLY DISSENTING OPINION OF JUDGE MERON

For the reasons expressed by Judge Güney in section B of his partially dissenting opinion, I too believe that the indictment failed to properly charge Gacumbitsi with aiding and abetting the murders of Marie and Béatrice, and that subsequent Prosecution submissions failed to cure this defect in the indictment. I therefore respectfully dissent from the judgement's conclusion[1] that Gacumbitsi should be convicted for aiding and abetting these murders.

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

Theodor Meron
Judge

Signed on the 28th day of June 2006 at The Hague, The Netherlands,
and issued this 7th day of July 2006 at Arusha, Tanzania.

**[Seal of the Tribunal]**

[1] *See* Judgement of the Appeals Chamber, paras 118-125.

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# X. ANNEX A: PROCEDURAL BACKGROUND

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

## A. Notice of Appeal and Briefs

2. The Trial Judgement was delivered in French on 17 June 2004.[1] The Prosecution and the Appellant both submitted Notices of Appeal against the Trial Judgement.

### 1. Prosecution's Appeal

3. The Prosecution submitted its Notice of Appeal on 16 July 2004 and its Appeal Brief on 28 September 2004.[2] On 29 September 2004, the Prosecution submitted a motion to vary and clarify three grounds in its Notice of Appeal.[3] The Appellant did not respond to that motion.[4] On 15 December 2004, the Appeals Chamber allowed the motion[5] and the Prosecution filed its Amended Notice of Appeal on 16 December 2004. The Appellant submitted his Response to the Prosecution Appeal Brief on 10 January 2005. On 19 January 2005, the Prosecution submitted its Reply.[6]

### 2. Appellant's Appeal

4. The Appellant submitted his Notice of Appeal on 20 July 2004 and his Appeal Brief on 4 October 2004.[7] The Prosecution filed its Response in English on 12 November 2004, and a French translation of the Prosecution Response was filed on 1 March 2005. During a Status Conference held on 8 March 2005, the Pre-Appeal Judge granted the Appellant's request for an extension of time to file his Reply by 23 March 2005.[8] On 22 March 2005, the Appellant requested a further

[1] A Judgement Corrigendum to the English version was filed on 27 October 2004.
[2] The Appellant submitted a motion (Motion for Transmission of Documents in French and for an Extension of the Time Limit, filed confidentially in French on 5 October 2004) to obtain a French translation of this document and the Pre-Appeal Judge ordered the Registrar to provide such translation to the Appellant no later than 17 November 2004 (Order Concerning Translation, 15 November 2004). The translation was filed on 17 November 2004, and communicated to the Defence on 1 December 2004 (*see* Gacumbitsi Response, para. 31).
[3] Prosecution's Motion for Variation of Three Grounds in its Notice of Appeal Pursuant to Rule 108, 29 September 2004.
[4] The French translation of the Prosecution's Motion for Variation of Three Grounds in its Notice of Appeal Pursuant to Rule 108 of the Rules was transmitted to the Appellant on 17 November 2004, and the Appellant was ordered to file his response at the latest on 29 November 2004: *Ordonnance portant calendrier*, 19 November 2004. The Appellant did not submit any response.
[5] *Décision relative à la requête du Procureur en modification de son acte d'appel*, 15 December 2004.
[6] A French translation (*Réplique du Procureur au mémoire en réponse de la Défense*) was filed on 18 April 2005.
[7] The brief was originally filed on 30 September 2004, but returned because of deficient filing.
[8] T. 8 March 2005 pp. 2, 3.

extension of time to file his Reply.[9] The Pre-Appeal Judge ordered the Appellant to file his Reply no later than 29 March 2005.[10] The Appellant filed his Reply on 1 April 2005.

### B. Assignment of Judges

5. On 23 July 2004, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal: Judge Mohamed Shahabuddeen, Judge Florence Ndepele Mwachande Mumba, Judge Mehmet Güney, Judge Wolfgang Schomburg, and Judge Inés Mónica Weinberg de Roca.[11] Judge Weinberg de Roca was designated the Pre-Appeal Judge.[12] On 15 July 2005, Judge Fausto Pocar was assigned to replace Judge Weinberg de Roca, effective 15 August 2005.[13] On 18 November 2005, Judges Liu Daqun and Theodor Meron were assigned to replace Judges Mumba and Pocar, with immediate effect.[14]

### C. Motions to Admit Additional Evidence and Related Motions

6. On 18 July 2005, the Appellant filed a motion for the admission of additional evidence.[15] The Prosecution submitted its response on 28 July 2005.[16] A French translation of that response was filed on 6 September 2005, and the Appellant did not file a reply. On 7 September 2005, the Prosecution filed its Motion to Seek Leave to File Supplementary Material Relating to Gacumbitsi's Rule 115 Application. A French translation of that motion was filed on 22 September 2005. The Appellant filed a response on 12 October 2005.[17] The Appeals Chamber denied the Appellant's motion for the admission of additional evidence and dismissed the Prosecution's related motion as moot.[18]

[9] Extremely Urgent Motion, filed confidentially in French on 22 March 2005. The Prosecution objected to this request in its Prosecutor's Response to the *Requête en Extrême Urgence*, filed confidentially on 23 March 2005. However, this response was only received by the Appeals Chamber after the Pre-Trial Judge had issued the Order of 24 March 2005.
[10] Order, 24 March 2005.
[11] Order of the Presiding Judge Assigning Judges, 23 July 2004.
[12] *Ordonnance portant désignation d'un Juge de la mise en état en appel*, 21 September 2004.
[13] Order Replacing a Judge in a Case before the Appeals Chamber, 15 July 2005.
[14] Order Replacing a Judge in a Case before the Appeals Chamber, 18 November 2005.
[15] *Requête en extrême urgence aux fins d'admission en appel des moyens de preuves supplémentaires et d'un témoin expert*, filed confidentially on 18 July 2005.
[16] Prosecutor's Response to *Requête en extrême urgence aux fins d'admission en appel des moyens de preuves supplémentaires et d'un témoin d'expert*, 28 July 2005.
[17] *Réponse à la requête du Procureur datée du 07 septembre 2005*, 12 October 2005. That response was disregarded by the Appeals Chamber as untimely filed and incoherent. *See* Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution, 21 October 2005, para. 3.
[18] Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution, 21 October 2005.

7. On 9 December 2005, the Appellant filed a motion seeking, *inter alia*, to be provided with copies of all statements of witnesses and *parties civiles* in a Belgian court proceeding in the case of *Nzabonimana et al.*[19] The Appeals Chamber denied this request.[20]

8. On 1 February 2006, the Prosecution made a disclosure of potentially exculpatory material in the form of two documents.[21] On 9 February 2006, the Appellant moved to admit these documents as additional evidence,[22] and, on the same date, the Appeals Chamber denied this motion.[23]

### D. Hearing of the Appeals

9. Pursuant to a Scheduling Order of 8 December 2005,[24] the Appeals Chamber heard the parties' oral arguments on 8 and 9 February 2006 in Arusha, Tanzania. At the close of the hearing, the Appellant made use of the opportunity to address the Appeals Chamber.

[19] *Requête en extrême urgence*, 9 December 2005.
[20] Decision on the Appellant's Motion of 8 December 2005, 16 December 2005.
[21] Prosecutor's Urgent Pre-Appeal Disclosure of Exculpatory Information, filed confidentially on 1 February 2006.
[22] *Requête en extrême urgence aux fins d'admission de moyen de preuve supplémentaire en appel*, filed confidentially on 9 February 2006.
[23] Decision on *Requête en extrême urgence aux fins d'admission de moyen de preuve supplémentaire en appel*, filed confidentially on 9 February 2006.
[24] Scheduling Order, 8 December 2005.

# XI. ANNEX B: CITED MATERIALS/DEFINED TERMS

## A. Jurisprudence

### 1. ICTR

**AKAYESU**

*The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Trial Judgement")

*The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement")

**BAGILISHEMA**

*The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement")

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

**BIZIMUNGU**

*The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.3 and AR73.4, Decision on Mugiraneza Interlocutory Appeal against Decision of the Trial Chamber on Exclusion of Evidence, 15 July 2004 ("*Bizimungu et al.* Decision on Mugiraneza Interlocutory Appeal")

**"CYANGUGU CASE"/NTAGERURA ET AL.**

*The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004 ("*Cyangugu* Trial Judgement")

**GACUMBITSI**

*The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Judgement, 17 June 2004 ("Trial Judgement")

**KAJELIJELI**

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

**KAMUHANDA**

*The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Judgement and Sentence, 22 January 2004 ("*Kamuhanda* Trial Judgement")

*Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement")

**KAYISHEMA AND RUZINDANA**

*The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema and Ruzindana* Trial Judgement")

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

**MUSEMA**

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

**NIYITEGEKA**

*The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003 ("*Niyitegeka* Trial Judgement")

*Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement")

**NTABAKUZE**

*Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41-AR72(C), Decision, 28 October 2003 ("*Ntabakuze* Decision")

**NTAKIRUTIMANA**

*The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case Nos. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003 ("*Ntakirutimana* Trial Judgement")

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

**RUGGIU**

*The Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence, 1 June 2000 ("*Ruggiu* Sentencing Judgement")

**RUTAGANDA**

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

**RWAMAKUBA**

*André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004 ("*Rwamakuba* Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide")

**SEMANZA**

*The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 ("*Semanza* Trial Judgement")

*Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement")

**SERUSHAGO**

*The Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Sentence, 5 February 1999 ("*Serushago* Sentencing Judgement")

*Omar Serushago v. The Prosecutor*, Case No. ICTR-98-39-A, Reasons for Judgement, 6 April 2000 ("*Serushago* Appeal Judgement")

2. ICTY

**ALEKSOVSKI**

*The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

**BABIĆ**

*The Prosecutor v. Milan Babić*, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Sentencing Appeal")

**BLAŠKIĆ**

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

**BRĐANIN AND TALIĆ**

*The Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the form of the Amended Indictment, 20 February 2001 ("*Brđanin and Talić* Decision on Objections")

**"ČELEBIĆI CASE"/DELALIĆ ET AL.**

*The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići Case* Appeal Judgement")

**ČEŠIĆ**

*The Prosecutor v. Ranko Češić*, Case No. IT-95-10/1-S, Sentencing Judgement, 11 March 2004 ("*Češić* Sentencing Judgement")

**DERONJIĆ**

*The Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002 ("*Deronjić* Decision on Form of the Indictment")

*The Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Sentencing Appeal")

**ERDEMOVIĆ**

*The Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Judgement, 7 October 1997

("*Erdemović* Appeal Judgement")

*The Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998 ("*Erdemović* Sentencing Judgement")

**JELISIĆ**

*The Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement")

**JOKIĆ**

*The Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004 ("*Jokić* Sentencing Judgement")

*The Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Jokić* Sentencing Appeal Judgement")

**KORDIĆ AND ČERKEZ**

*The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement")

**KRNOJELAC**

*The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement")

**KRSTIĆ**

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

**KUNARAC ET AL.**

*The Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement")

*The Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

**KUPREŠKIĆ ET AL.**

*The Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

**KVOČKA ET AL.**

*The Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 ("*Kvočka* Decision")

*The Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement")

**MILOŠEVIĆ**

*The Prosecutor v. Slobodan Milošević*, Case No. IT-0254-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 ("*Milošević* Scheduling Appeal Decision")

**NALETILIĆ AND MARTINOVIĆ**

*The Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement")

**DRAGAN NIKOLIĆ**

*The Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Judgement on Sentencing Appeal")

**OBRENOVIĆ**

*The Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003 ("*Obrenović* Sentencing Judgement")

**STAKIĆ**

*The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement")

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

**STRUGAR**

*The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, Decision on Defence Preliminary Motion Concerning the Form of the Indictment, 28 June 2002 ("*Strugar* Decision Concerning the Form of the Indictment")

**TADIĆ**

*The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T*bis*-R117, Sentencing Judgement, 11 November 1999 ("*Tadić* Sentencing Judgement")

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

*The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000 ("*Tadić* Judgement on Allegations of Contempt")

**VASILJEVIĆ**

*The Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement")

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## B. Defined Terms and Abbreviations

**Appellant**

Sylvestre Gacumbitsi

**Gacumbitsi Appeal Brief**

Appellant's Brief, filed in French (*Mémoire de l'appelant*) on 4 October 2004

**Gacumbitsi Book of Appeal**

*Livre de l'appelant*, filed on 6 January 2006

**Gacumbitsi Closing Brief**

Closing Arguments by Defence of Sylvestre Gacumbitsi, filed confidentially in French (*Conclusions écrites de la Défense de Sylvestre Gacumbitsi*) on 9 February 2004

**Gacumbitsi Notice of Appeal**

Notice of Appeal, filed confidentially in French (*Acte d'appel*) on 20 July 2004

**Gacumbitsi Reply**

Brief in Reply, filed in French (*Mémoire en réplique*) on 1 April 2005

**Gacumbitsi Response**

Respondent's Brief, filed confidentially in French (*Mémoire de l'intimé*) on 10 January 2005

**ICTR**

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994

**ICTY**

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

**Indictment**

*The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-I, Indictment, filed on 20 June 2001

**Practice Direction on Formal Requirements for Appeals from Judgement**

Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005

**Prosecution Appeal Brief**

Appellant's Brief, filed on 28 September 2004

**Prosecution Closing Brief**

The Prosecutor's Closing Brief, filed confidentially on 23 December 2003

**Prosecution Notice of Appeal**

Prosecution's Amended Notice of Appeal, filed on 16 December 2004 pursuant to the Appeals Chamber's *Décision relative à la requête du Procureur en modification de son acte d'appel*, issued on 15 December 2004

**Prosecution Pre-Trial Brief**

The Prosecutor's Preliminary Pre-Trial Brief, filed confidentially on 16 May 2003

**Prosecution Reply**

Prosecution's Reply to Defence's Response, filed on 19 January 2005

***Prosecution Response***

Respondent's Brief, filed on 12 November 2004

**RPF**

Rwandan Patriotic Front

**Rules**

Rules of Procedure and Evidence of the Tribunal

**Statute**

Statute of the Tribunal

**T.**

Transcript. All references to the transcript are to the official, English transcript, unless otherwise indicated.

**Trial Judgement**

*The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Judgement, 17 June 2004

**Tribunal**

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994

**UNAMIR**

United Nations Assistance Mission for Rwanda