Summary of the Judgement of the Appeals Chamber

Good morning. Let me call this session of the International Criminal Tribunal for Rwanda to order. Can everyone hear and understand me? I would like to open this hearing by asking the Registrar to please call the case . . . Thank you.

The Judgement is being delivered today in the absence of our distinguished colleague, the Honourable Judge Meron, pursuant to Rule 15 *bis* (A) of the Rules of Procedure and Evidence.

Now, I would like to ask for the appearances of the parties. First, Counsel for the Appellant . . . Thank you. Second, the Prosecution . . . Thank you. The Appeals Chamber of the International Criminal Tribunal for Rwanda will now deliver its Judgement in the case of *The Prosecutor v. Sylvestre Gacumbitsi*.

In this case, the Appeals Chamber was presented with appeals by both the Prosecution and the Appellant, Mr. Gacumbitsi, from the Judgement of Trial Chamber III rendered on 17 June 2004. During 1994, the Appellant was the *bourgmestre*, the highest-ranking local administrative official, of Rusumo Commune in Kibungo Prefecture in Rwanda. The Trial Chamber convicted the Appellant of genocide as well as extermination and rape as crimes against humanity, and sentenced him to thirty years' imprisonment. These convictions were based on events taking place in Kibungo Prefecture, including the massacre of Tutsi refugees at Nyarubuye Parish.

In summarizing today's Judgement of the Appeals Chamber, I will proceed first through the Appellant's grounds of appeal, then through the Prosecution's. Please note that this oral summary does not constitute any part of the official and authoritative Judgement of the Appeals Chamber, which is rendered in writing and will be distributed to the parties at the end of this session. In addition, not every point in the Judgement will be mentioned in this Summary, which will focus on the main issues.

I shall invite my colleagues to help me with the reading of this summary. I turn first to Judge Güney.

I. Mr. Gacumbitsi's Appeal

A. <u>Interlocutory Decisions (Ground of Appeal 1)</u>

JUDGE GÜNEY: Under his first ground of appeal, the Appellant challenges a number of procedural decisions made by the Trial Chamber over the course of the trial. First, he challenges a decision issued on 25 July 2002 concerning the specificity of the Indictment against him. He argues that the Trial Chamber should have held that the Indictment's references to acts committed "on or about" a certain date violated his rights under Article 20(4)(a) of the Statute. The Appeals Chamber rejects

this sub-ground of appeal. The dates of specific incidents alleged in the Indictment are for the most part provided with sufficient precision. As to certain other incidents, the dates are 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. Furthermore, the Appellant does not contest the Trial Chamber's holding that the Pre-Trial Brief cured any vagueness in paragraph 36 of the Indictment.

The Appellant next challenges decisions of 28 July 2003 and 28 August 2003 rejecting his requests to postpone the commencement of the trial and of the defence case, respectively. The Appeals Chamber notes that trial scheduling is subject to the Trial Chamber's discretion and that the Appeals Chamber will only reverse scheduling decisions upon a showing of abuse of discretion rendering the trial unfair. The Appellant has not made such a showing. He agreed to the starting dates in question, and moreover does not show that he was allotted insufficient time to prepare his defence. His defence team had billed thousands of hours before the trial and had contacted over 200 witnesses. The Appeals Chamber rejects this sub-ground of appeal.

Next, the Appellant challenges the Trial Chamber's Decision of 1 August 2003 concerning a disclosure matter. However, he has not shown that the material he claims should have been disclosed even existed. The Appeals Chamber rejects this sub-ground of the appeal.

Finally, the Appellant challenges the Trial Chamber's Decisions of 11 and 18 November 2003 concerning certain proposed expert witnesses for the defence. The 11 November decision admitted into evidence the report of two experts, Professor Lecomte and Dr. Vorhauer, and held that they did not need to testify because the Prosecution had waived its right to cross-examine them. This determination was in accordance with Rule 94 *bis* and the Appellant shows no error in it. The Decision also denied the status of expert witness to another proposed expert, Mr. Ndengejeho, and excluded his proposed report, but allowed him to testify as a fact witness. The Appeals Chamber agrees with the Appellant that the Prosecution's Motion for Exclusion of Expert itself was untimely according to Rule 94 *bis*. However, nothing in that rule implies that, absent a timely motion from the party opposing an expert, a Trial Chamber is obligated to admit expert testimony. Rather, the determination of whether an expert witness is qualified is subject to the Trial Chamber's general discretion under Rule 89 concerning matters relating to admission of evidence. The Trial Chamber thus had discretion *proprio motu* to reject Mr. Ndengejeho's qualification as an expert. The Appellant has furthermore not shown that the Trial Chamber abused its discretion in concluding that Mr. Ndengejeho's background did not qualify him as an expert under the circumstances of the case. Finally, the Appellant has not shown that he was prejudiced by the exclusion of the report.

For these reasons, the Appeals Chamber dismisses the Appellant's first ground of appeal in its entirety.

B. Genocide (Ground of Appeal 2)

Under his second ground of appeal, the Appellant brings several challenges to his conviction for genocide. First, he claims that the Trial Chamber, in holding that genocidal intent can be inferred from his acts and their factual context, failed to apply the requirement of *dolus specialis* or specific intent. The Appeals Chamber sees no error. The Trial Chamber properly noted that under Article 2(2) of the Statute the Prosecution must prove that the accused possessed the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The Tribunal's jurisprudence conclusively establishes that this intent can be proven through inference from the facts and circumstances of a case. Here, the Trial Chamber reasonably held that the Appellant's numerous public statements urging the mass killing and rape of Tutsis were sufficient to establish his genocidal intent beyond reasonable doubt.

The Appellant further argues that the Trial Chamber improperly relied on the "acts of other perpetrators" to prove the Appellant's genocidal intent. But the Trial Chamber in fact relied principally on the Appellant's own actions and utterances. The Trial Chamber did cite "the scale of the massacres" in support of its finding that the Appellant "acted with intent to destroy a substantial part of the targeted group", but this, too, is consistent with established jurisprudence. The Appeals Chamber dismisses this sub-ground of appeal.

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, and thereby "committed" genocide. The Appellant argues that this killing was not alleged in the Indictment and, as such, should not have been the basis of a conviction. The Appellant is correct that the killing was not mentioned in the Indictment. The Appeals Chamber, by majority, Judge Shahabuddeen and Judge Schomburg dissenting, finds that this constituted a defect in the Indictment. When the Prosecution seeks a conviction based on a particular incident in which the accused personally, physically perpetrated a crime, it must plead the material facts related to that incident in the Indictment. The Appeals Chamber holds that it did not do so here, and so the Indictment was defective.

However, the Appeals Chamber unanimously upholds the Appellant's conviction for "committing" genocide. This is for two different reasons reached by differently constituted majorities. First, the Appeals Chamber, Judges Liu and Meron dissenting, holds that any defect in the Indictment's pleading of the killing of Mr. Murefu was cured by the Prosecution's submission of a Chart of Witness, annexed to its Pre-Trial Brief, in which the summary of the proposed testimony of Witness TAQ detailed the material facts concerning the killing of Mr. Murefu and specified that the witness's testimony was in relation to the genocide charge. Thus, the Prosecution provided "timely, clear, and consistent information" sufficient to put the Appellant on notice of the charges against him. Under established jurisprudence, this is sufficient to cure a defective Indictment.

Second, the Appeals Chamber, Judge Güney dissenting, also holds that even if the Appeals Chamber were to set aside the killing of Mr. Murefu, the remaining factual findings of the Trial Chamber would be sufficient to support a conviction for "committing" genocide. The crime of genocide does not consist merely of killing, and an accused can participate directly and physically in genocide without personally killing another individual. The Trial Chamber found that the Appellant was present at the scene of the Nyarabuye massacres and personally supervised them, including separating the Tutsi refugees from the Hutu so that they could be killed. Taken together, these actions, which were clearly pleaded in the Indictment, amounted to "committing" genocide through direct participation.

Next, the Appellant raises a number of challenges to the findings of fact underlying his conviction for genocide. Many of these amount to mere claims that the Prosecution's witnesses were not credible, that there were minor discrepancies in their testimony, or that their testimony contradicted evidence introduced by the defence, without showing that the Trial Chamber was unreasonable in crediting them. Others are based on a misunderstanding of the Trial Chamber's holdings or reasoning. The Appeals Chamber's reasons for rejecting each of these factual challenges are detailed in the Judgement and need not be discussed here.

For the foregoing reasons the Appeals Chamber dismisses this ground of appeal in its entirety.

PRESIDING JUDGE SHAHABUDDEEN: Thank you, Judge Güney. I will now ask Judge Liu to continue with the Appellant's third ground of appeal.

Crimes against Humanity: Extermination (Ground of Appeal 3)

JUDGE LIU: Under his third ground of appeal, the Appellant challenges his conviction for extermination as a crime against humanity. The Appellant first argues that "[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." The Appeals Chamber rejects this contention. The existence of a policy or plan can be evidentially relevant, but it is not a separate legal element of a crime against humanity in general or of extermination in particular. The same can be said of "tolerance of such act by the State." The Trial Chamber properly found 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." It further found that his actions from 15 to 17 April, discussed above with respect to the genocide count, revealed his "intention to participate in a large scale massacre in Nyarubuye", which is sufficient to establish the requisite mental state for extermination. It also found that the Appellant took steps between 8 and 15 April 1994 to plan the extermination of Tutsis in Rusumo Commune. None of the Appellant's arguments demonstrate an error in these findings of fact.

The Appellant next argues that the Trial Chamber should not have convicted him for extermination because the Prosecution failed to prove that the individuals specifically mentioned in paragraph 28 of the Indictment were killed at Nyarubuye Parish. The Appeals Chamber disagrees; such a showing was not required for an extermination conviction. Although Paragraph 28 of the Indictment lists certain specific victims, it explicitly does so 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 that many refugees were killed as a consequence of the Appellant's orders or instructions. This was pleaded in the Indictment and supported by the Trial Chamber's findings.

The Appellant reiterates many of the factual challenges discussed above with respect to the genocide count, and points to additional supposed contradictions in the testimony of Prosecution witnesses. In the Appeals Chamber's view, these are explained by differences in vantage point or are relatively minor, and the Appellant has not shown that the Trial Chamber erred in crediting the witnesses' testimony. Likewise, the Appellant has not shown that the Trial Chamber erred in discrediting the contrary testimony of defence witnesses, or that it used unfair double standards in assessing the credibility of witnesses.

The Appellant challenges the estimates given by witnesses Fergal Keane and Alison Des Forges as to the number of people killed at Nyarubuye Parish. Even if his argument is correct (which the Appeals Chamber need not decide), the Appellant has not demonstrated how the variation in the numbers would affect the Judgement.

For these reasons, this ground of appeal is dismissed in its entirety.

Crimes against Humanity: Rape (Ground of Appeal 4)

Under his fourth ground of appeal, the Appellant challenges his conviction for rape as a crime against humanity. First, he submits that the rapes in question were not committed in the course of a widespread and systematic attack because there was no "deliberate act or plan", in that the Prosecution did not prove the existence of preparatory meetings. As noted above, a "plan" is not a required element. The Trial Chamber correctly elucidated the definition of "widespread or systematic" established by the Tribunal's jurisprudence.

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 of rape. But it is not rape *per se* that must be shown to be widespread or systematic, but rather the attack itself (of which the rapes formed part). This criterion was met here. Second, the Appeals Chamber rejects the Appellant's contention that the rape of Witness TAQ was isolated, and moreover that he could not have instigated it, because she knew her attacker previously. The genocide and extermination campaign in Rwanda was characterized in significant part by neighbours killing and raping neighbours. 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." Nor does it follow that the Appellant could not have instigated the rape; the question in that respect is whether his actions substantially contributed to the crime. The Trial Chamber correctly applied these standards in light of the totality of the evidence, and the Appellant has demonstrated no error.

The Appellant raises certain other factual challenges dealt with in more detail in the Judgement, but has not shown that it was unreasonable to rely on the testimony of Witness TAQ or other Prosecution witnesses.

For these reasons, this ground of appeal is dismissed in its entirety.

Sentencing (Ground of Appeal 5)

The Appellant submits that his sentence should be reduced to fifteen years, setting forth various arguments about aggravating and mitigating circumstances in his Appeal Brief. However, in his Reply Brief, he expressly concedes the Prosecution's point that he has not demonstrated any error on the Trial Chamber's part. He explains that he did not intend to articulate a ground of appeal with respect to the sentence or to assert error, but rather to request that the Appeals Chamber reduce his sentence on "humanist" grounds. The Appeals Chamber rejects this request. 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.

II. THE APPEAL OF THE PROSECUTION

In discussing the Prosecution's appeal, I will begin with the second ground of appeal and return at the end to the first ground of appeal concerning the sentence.

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

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. However, the Trial Chamber considered these findings insufficient to establish the Appellant's responsibility for their murder.

The Prosecution first argues that the Trial Chamber erred in not finding that the Appellant ordered the tenants' murder, and specifically in failing to place the testimony of Prosecution Witness TAS, which the Trial Chamber dismissed as uncorroborated hearsay, in the context of the wider genocidal campaign that was unfolding and the Appellant's participation in it. The Prosecution claims that this circumstantial evidence supports a conviction for "ordering" murder.

The Appeals Chamber finds first that the Trial Chamber did not misunderstand the law. It did not suggest that there was an absolute legal barrier to relying on uncorroborated hearsay, but held that under the circumstances the testimony in question was insufficient to prove guilt beyond a reasonable doubt. The Prosecution has not demonstrated that this was in error. Second, the Appeals Chamber finds that the Prosecution has not shown that, based on the circumstantial evidence, no reasonable Trial Chamber could have failed to conclude that the fact that the Appellant ordered the tenants' murder was established beyond a reasonable doubt. This sub-ground of appeal is therefore dismissed.

The Prosecution next argues that the Appellant should have been convicted for aiding and abetting the murders of Marie and Béatrice. The Trial Chamber did not discuss this theory; the Appellant claims this is because the Prosecution failed to plead or argue it at trial.

By majority, the Appeals Chamber (Judge Güney and Judge Meron dissenting), holds that the aiding and abetting theory was pleaded in the Indictment, that the Trial Chamber erred by failing to consider it, and that it should have convicted the Appellant of aiding and abetting murder.

The preamble to Count 4 of the Indictment lists aiding and abetting among the ways that the Appellant committed murder. This is in the course of quoting the provisions of Article 6(1) of the Statute, which is the Prosecution's longstanding practice. The Appeals Chamber finds this language sufficient when taken in combination with subsequent paragraphs of the Indictment that detail the necessary material facts to support an aiding and abetting allegation; it notes that the Indictment must be taken as a whole. Paragraph 36 states:

> 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.

Although the second sentence of this paragraph alleges that the Appellant directly ordered the killing, the first sentence alleges a distinct and lesser step—expelling the tenants from their home--that, taken in the context of other allegations in the Indictment detailing the ongoing genocidal campaign, amounts to aiding and abetting murder. Moreover, although the Trial Chamber did not enter a 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 Appellant, 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." On the basis of these findings of

fact, the Appeals Chamber, by majority, will enter a new conviction for aiding and abetting murder. This sub-ground of appeal is upheld.

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

Although the Appellant was convicted of eight rapes under Count 5 of the Indictment, the Trial Chamber acquitted him of certain other rapes. Under its third ground of appeal, 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. The Appeals Chamber agrees with the Prosecution that there is no such requirement, but finds that the Trial Chamber did not hold otherwise. It simply said there had to be a "causal connection", general language that is consistent with the correct requirement that the instigation must have substantially contributed to the crime. In this case, the Trial Chamber found "no evidence of a link" between the Appellant's words and the rapes in question—that is, no link of any kind, whether a "substantial contribution" or a "*sine qua non*". There was no error of law.

The Prosecution next argues that the Trial Chamber erred in fact by failing to conclude that the Appellant's instigation substantially contributed to all of the alleged rapes. The Appeals Chamber disagrees. The Prosecution did not prove that the rape of witness TAS, as well as the rapes of Witness TAP and her mother, took place on or after 17 April 1994, the date that Appellant drove around the *secteur* instigating rape. As to the rapes recounted by Witness TAO, the Prosecution did not establish that the only reasonable conclusion based on the evidence was that the perpetrators were aware of the Appellant's utterances of 17 April 1994.

For the same reason, the Appeals Chamber rejects the Prosecution's alternative theory that the Appellant aided and abetted the rapes in question. As with instigation, with aiding and abetting the Prosecution must prove that the acts of the accused substantially contributed to the commission of the crime. It failed to do so.

The Prosecution finally argues that the Appellant should have been convicted for these rapes under Article 6(3) of the Statute, and challenges the Trial Chamber's holding that the Appellant lacked superior authority over the perpetrators. 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.

The Appeals Chamber notes first that even though the Appellant was convicted for some rapes under Article 6(1), it is nonetheless appropriate to consider whether a conviction for other rapes should be entered under Article 6(3). In this regard, the Trial Chamber held that there was no evidence of a superior-subordinate relationship. The Trial Chamber indeed focused exclusively on the Appellant's *de jure* authority and his position within a "formal administrative hierarchy." But the Appeals

Chamber has held that 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." The Trial Chamber therefore erred in this respect.

Nonetheless, the Appeals Chamber cannot conclude that had the Trial Chamber applied the correct legal standard, it would have convicted the Appellant. The Trial Chamber's findings of fact refer to 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. 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. And the Prosecution advances no arguments concerning effective control over the particular perpetrators. This ground of appeal is dismissed.

PRESIDING JUDGE SHAHABUDDEEN: Thank you, Judge Liu. I will now ask Judge Schomburg to continue.

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

JUDGE SCHOMBURG: The Prosecution's fourth ground of appeal seeks a clarification of the law relating to rape as a crime against humanity. It 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, consent should be considered an affirmative defence. It argues, *inter alia*, that when rape occurs in the context of genocide, armed conflict, or a widespread or systematic attack against a civilian population, genuine consent is impossible.

Although this issue did not affect the judgement, the Appeals Chamber considered it on the grounds that it is a matter of general significance for the Tribunal's jurisprudence. It wishes to distinguish between two related questions. First, what are the elements of rape? Second, how may those elements be proven?

The Appeals Chamber considers that the first question was settled by the *Kunarac* case, in which the ICTY Appeals Chamber held that rape consists of certain acts of sexual penetration occurring "without the consent of the victim" and with the "knowledge that it occurs without the consent of the victim." Thus, non-consent and knowledge thereof are elements of rape and must be proven by the Prosecution beyond reasonable doubt. This is distinct from an affirmative defence approach in which the accused would bear, at least, the burden of production.

Although Rule 96 of the Rules does refer to consent as a "defence", the Appeals Chamber agrees with the Trial Chamber in the *Kunarac* case that the term "defence" in Rule 96 is used in a non-technical sense. Rather than changing the definition of the crime by turning an element into a defence, which the Rules of Procedure have no power to do, Rule 96 simply redefines the circumstances under which evidence of

consent will be admissible. Thus, it speaks to the second question: how may non-consent be proven?

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 prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. It is not necessary for the Prosecution to introduce evidence concerning the words or conduct of the victim or her relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent as well as knowledge thereof from the background circumstances. Indeed, the Trial Chamber did so in this case.

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

Joint Criminal Enterprise (Ground of Appeal 5)

The Prosecution's fifth ground of appeal concerns the Appellant's liability for murder, genocide, extermination and rape under "basic" and "extended" theories of joint criminal enterprise or JCE. The Trial Chamber held that JCE was not pleaded clearly in the Indictment.

The Prosecution first argues that paragraphs 22 and 25 of the Indictment alleged JCE sufficiently by stating that the Appellant acted "in concert with" others in pursuit of a "common scheme, strategy, or plan". The Appeals Chamber notes that this language pertains only to the genocide count; the Prosecution points to no analogous language under the other counts.

In *Kvocka*, the ICTY Appeals Chamber established that a JCE theory must be pleaded in the indictment or the indictment is defective. Neither this nor any other precedent establishes that the exact words "joint criminal enterprise" must be pleaded, however. The language must simply be sufficient to provide fair notice to the accused. The Appeals Chamber holds that the words "acted in concert with" are not sufficient if taken alone. But under some circumstances, an allegation that the Appellant acted "in concert with" others in pursuit of a "common scheme, strategy, or plan", as alleged in paragraph 25 of the Indictment, *would* be sufficient to plead a JCE theory, if taken together with allegations of the material facts necessary to support such a theory.

However, the Appeals Chamber, by majority (Judge Shahabuddeen and Judge Schomburg dissenting) holds that in the context of this Indictment, that language was not sufficient. After using that language, Paragraph 25 proceeds 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". This language could be read to invoke three established modes of liability other than JCE: "committing" through direct, personal perpetration, 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 thus did not receive 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.

A defect in an Indictment may be cured by the Prosecution's submission of "timely, clear, and consistent" information. The Prosecution argues that it cured any defect in this case through 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, strategy, design, or scheme, or even "acting in concert", and in no other way gave any indication that the Prosecution was pursuing a JCE theory. Likewise, the defect was not cured by the Prosecution's reference in its Opening Statement to acting "in concert with others as part of the common scheme". This statement was not further developed or connected to specific factual allegations that supported the JCE claim. Nor did it specify to which category of JCE it meant to allude. 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.

Only in its Closing Brief did the Prosecution provide further details on its JCE theory, and that submission obviously came too late. Accordingly, by majority, the Appeals Chamber holds that the Trial Chamber did not err in refusing to consider the JCE theory, and this ground of appeal is dismissed in its entirety.

Authority for Ordering (Ground of Appeal 6)

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* in his commune. Under its sixth ground of appeal, the Prosecution argues first 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. The Appeals Chamber agrees with the Prosecution that ordering does not require the existence of a formal superior-subordinate relationship. But the Trial Chamber specifically recognized as much in paragraphs 282 and 283 of its Judgement. 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. The Trial Chamber did not err in law.

Next, the Prosecution alleges that the Trial Chamber erred in fact by failing to conclude that the Appellant had the necessary authority and that his statements were perceived as orders. The Appeals Chamber agrees. 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 on all residents. 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. The Trial Chamber pointed to several instances in which the Appellant "instructed", "ordered", or "directed" the attackers in general, not just the communal policemen. 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. On the basis of the Trial Chamber's own findings, no reasonable trier of fact could conclude otherwise. The Appeals Chamber notes that the present case is not materially distinguishable from the *Semanza* case, in which the Appeals Chamber reversed the Trial Chamber's failure to enter a conviction for ordering, and the *Kamuhanda* case, in which the Appeals Chamber affirmed the entry of such a conviction.

Accordingly, this ground of appeal is upheld.

Sentencing (Ground of Appeal 1)

We now return to the Prosecution's first ground of appeal on sentencing.

First, the Prosecution claims that the Trial Chamber should have considered the Appellant's use of the communal police as an aggravating factor. The Appeals Chamber finds that the Trial Chamber already implicitly did so when it considered the Appellant's abuse of his powers as *bourgmestre*, to which it gave weight. The Appeals Chamber finds no discernible error.

Second, the Prosecution argues that the Trial Chamber erred in considering the fact that the Appellant's formal status as a superior was confined to the communal police. As the Appeals Chamber has overturned this finding above, it will take this error into account in its consideration of the sentence.

The Prosecution submits next that the Trial Chamber accorded undue weight in mitigation to the Appellant's prior good character and accomplishments. 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*, and that in any case these factors are of no importance in light of the Appellant's crimes. The Appeals Chamber recalls its dismissal of similar arguments in the *Semanza* case, and finds that under the circumstances there is no evidence that the Trial Chamber abused its discretion by giving these factors excessive weight.

Third, the Prosecution asserts that the Trial Chamber erred in considering that the good relationships of the Appellant's family with its neighbors constituted a factor in mitigation. The Appeals Chamber agrees. While there is no exhaustive list of what constitutes a mitigating circumstance, 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 in

sentencing. Nevertheless, it is unclear what weight, if any, the Trial Chamber gave to this factor.

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

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. It submits that the Appellant deserves the highest penalty available at the Tribunal.

The Trial Chamber properly stated the legal principles on which the Prosecution relies. After noting that the crimes committed were very serious, 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."

Nonetheless, the Appeals Chamber agrees with the Prosecution that the Trial Chamber failed to apply these principles properly in the present case 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 abetting genocide and extermination in his commune of Rusumo, where thousands of Tutsis were killed or seriously harmed. The Trial Chamber also found the Appellant guilty of instigating rape as a crime against humanity, noting that the Appellant had exhibited particular sadism in specifying that where victims resisted, they should be killed in an atrocious manner. The Appellant was thus convicted of extremely serious offences. Moreover, unlike most of the other cases in the Tribunal in which those convicted for genocide have received less than a life sentence, there were no especially significant mitigating circumstances.

The Appeals Chamber is 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 thirty years' imprisonment only. The Appeals Chamber therefore upholds this sub-ground of the Prosecution's appeal.

PRESIDING JUDGE SHAHABUDDEEN: Thank you, Judge Schomburg.

I will now read the Disposition in this case. Mr. Gacumbitsi, please rise.

DISPOSITION

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.

Mr. Gacumbitsi, you may be seated. I now request the Registrar to deliver copies of the Judgement to the parties in this case. This hearing of the Appeals Chamber of the International Criminal Tribunal for Rwanda stands adjourned.