

SUMMARY OF THE APPEAL JUDGEMENT

Aloys Simba v. The Prosecutor **Case No. ICTR- 01-76-A**

27 November 2007, 9.30 a.m.
Arusha, Tanzania

I. BACKGROUND

1. The Appellant, Aloys Simba was born in 1938 and is a retired lieutenant colonel. He was a member of parliament from 1989-1993, and a member of the “Comrades of the fifth of July”, who participated in the *coup d’état* that brought former President Juvénal Habyarimana to power in 1973. The Appellant was charged with individual criminal responsibility for his alleged participation in five massacres committed against the Tutsi population in the Gikongoro Prefecture and in the Butare Prefecture between 14 and 29 April 1994. The Trial Chamber found the Appellant guilty of genocide (Count 1) based on his participation in a joint criminal enterprise (“JCE”) to kill Tutsi civilians at Murambi Technical School and Kaduha Parish. It also convicted him of extermination as a crime against humanity (Count 3), based on the same facts underlying the count of genocide. The Trial Chamber sentenced the Appellant to 25 years’ imprisonment. Both the Appellant and the Prosecution have appealed.

II. THE GROUNDS OF APPEAL

2. I will now address the grounds of appeal in turn, beginning with the Appellant. The Appellant has divided his grounds of appeal into three categories: errors of law; errors of fact; and interlocutory decisions which he claims invalidate the proceedings. Within these categories, the Appellant has raised fourteen grounds of appeal which the Appeals Chamber has grouped together under eleven separate sections. After addressing these grounds, I will turn to the two grounds of appeal advanced by the Prosecution.

III. THE APPEAL OF ALOYS SIMBA

Alleged Errors Relating to a Series of Interlocutory Decisions

3. The Appellant challenges, on various bases, a series of interlocutory decisions made by the Trial Chamber. The Appellant specifically challenges the Trial Chamber's rejection of his requests for on-site visits to Rwanda, on 31 January and 4 May 2005; its denial of his request to admit several exhibits in a decision of 7 July 2005; its rejection of his motions requesting the investigation of Witnesses YH and KXX for crimes and false testimony and for a report on whether prosecutions were underway; and its denial of the Defence objection to the admission of Prosecution Witness KDD's testimony under oath.

4. For the reasons given in the Judgement, the Appeals Chamber upholds the Trial Chamber's exercise of discretion in determining that the requested on-site visit was not necessary. It also finds that the Appellant has failed to demonstrate how the Trial Chamber's decision to exclude the exhibits in its decision of 7 July 2005 affected the verdict. The Appeals Chamber further finds that the Appellant has failed to show any error in the Trial Chamber's decision not to direct the Prosecution to investigate either witness YH or KXX. With regard to Witness KDD, the Appeals Chamber considers the Appellant's argument that the loss of the witness's civil rights under Rwandan law warrants the *per se* preclusion of his evidence to be evidently unfounded.

5. This ground is accordingly dismissed in its entirety.

Alleged Violation of the Appellant's Right to Call Witnesses in his Defence

6. The Appellant submits that he did not receive a fair trial because he was prevented from calling two Defence witnesses known as HBK and BJK1 to testify, due to interference by Rwandan government officials. The Appeals Chamber notes that, on appeal, it is incumbent on the Appellant to demonstrate, first, that such interference has in fact taken place and, second, that he has exhausted all available measures to secure the taking of the witness's testimony.

7. The Appeals Chamber finds that the Appellant has failed to demonstrate that any interference in fact took place with regard to BJK1. With regard to HBK, the Trial Chamber did find that interference by Rwandan authorities had occurred. However, the Appeals Chamber finds that the Appellant failed to exhaust all available measures to secure the taking of the witness's testimony and upholds the Trial Chamber's conclusion that, in any event, HBK's failure to testify did not cause the Appellant material prejudice.

8. For the foregoing reasons, and others provided in the Judgement, this ground is dismissed.

Alleged Defects in the Form of the Indictment

9. The Appellant makes several submissions to the effect that the Indictment failed to clearly plead the theory of JCE as well as the material facts supporting that theory. The Appellant further contends that the Trial Chamber erred in law by making findings on several material facts not pleaded in the Indictment.

10. The Appeals Chamber observes at the outset that the Appellant was explicitly charged for his participation in a JCE under each count of the Indictment.

11. With respect the Appellant's submission that the Indictment fails to indicate the category of JCE on which the Prosecution intended to rely, the Appeals Chamber recalls that the three categories of JCE vary only with respect to the *mens rea* element, not with regard to the *actus reus*. Accordingly, an accused will have sufficient notice of the category of JCE with which he is being charged where the indictment pleads the *mens rea* element of the respective category. In the instant case, the Appeals Chamber is satisfied that the specific state of mind required for the first category of JCE, the category on the basis of which the Appellant was found guilty, was explicitly pleaded. Consequently, the Appellant had sufficient notice that he was being charged on that basis.

12. The Appellant further submits that the Trial Chamber erred by making findings on the following material facts not pleaded in the Indictment: the Appellant's stature as an aggravating factor; distribution of weapons; motive; formulation of a genocidal plan; and presence and utterances at Kaduha Parish as a sign of approval of the attackers' conduct. For the reasons given in the Judgement, the Appeals Chamber finds these submissions to be without merit. Accordingly this ground is dismissed in its entirety.

Alleged Error in the Assessment of the Prosecution Evidence

13. The Appellant submits that the Trial Chamber committed errors of law and fact in finding that he was present during and participated in the attacks at Murambi Technical School and Kaduha Parish on 21 April 1994. The Appeals Chamber declines to address some of the Appellant's submissions, either because they are advanced without any supporting argument and therefore do not meet the minimum criteria for a challenge on appeal, or because no factual findings are based on the evidence challenged.

14. The Appellant's main arguments relate to the respective weight accorded by the Trial Chamber to oral and documentary evidence; the Appellant's presence at and

participation in the attacks at Murambi Technical School and Kaduha Parish; the impossibility of driving between these two places in a lapse of time compatible with the evidence; and the speech given by the Appellant at a public meeting in Ntyazo Commune on 22 May 1994. The Appeals Chamber considers these arguments in turn.

1. Alleged Error Relating to the Hierarchy of Evidence

15. As a preliminary matter, the Appellant contends that the Trial Chamber erred in law in giving more weight to the testimony of Prosecution witnesses than to documentary evidence used to confront them during cross-examination. The Appeals Chamber rejects the assertion that the rule for assessing evidence ranks documentary evidence above oral evidence and notes that, contrary to the Appellant's submissions, there is a general, though not absolute, preference for live testimony before this Tribunal.

2. Alleged Errors Relating to the Appellant's Presence at and Participation in the Attack at Murambi Technical School on 21 April 1994

16. I will now turn to the Appellant's arguments relating to his presence and participation in the attack at Murambi Technical School and the alleged errors made in the assessment of the respective testimonies of Witnesses KSY and KEI.

17. Beginning with Witness KSY, the Appeals Chamber finds the Trial Chamber's assessment of his credibility to be consistent with the evidence on the record and that, contrary to the Appellant's contention, Witness KSY's in-court testimony was in general conformity with his prior statement.

18. With regard to Witness KEI, the Appellant alleges that the Trial Chamber erred by minimising the inconsistencies between his testimony and prior statements in which he did not implicate the Appellant in the distribution of weapons at Murambi; by relying on Witness KEI's testimony despite its doubts about his credibility; and by failing to take into account existing contradictions between Witnesses KEI's and KSY's respective testimonies. The Appeals Chamber finds these claims to be without merit. The Trial Chamber considered Witness KEI's evidence with caution and concluded that in view of Witness KEI's questionable credibility, it would only accept his testimony if corroborated. The Appeals Chamber sees no error in this approach and notes that the Trial Chamber's findings related to the events at Murambi Technical School are primarily based on evidence given by Witness KSY, a witness whose credibility has not been successfully challenged on appeal. In preferring the evidence of Witness KSY where it differed from

that of Witness KEI, the Trial Chamber clearly took into account differences in the testimony of the two witnesses. Accordingly, these sub-grounds are dismissed.

3. Alleged Errors Relating to the Appellant's Presence at and Participation in the Attack at Kaduha Parish on 21 April 1994

19. With regard to the Appellant's presence and participation in the attack at Kaduha Parish, the Appellant specifically argues that the Trial Chamber erred in assessing the evidence of Witnesses YH, KXX and KSK and that the testimonies of Witnesses YH and KXX are contradictory with respect to the time of his arrival at Kaduha Parish.

20. With regard to Witness YH, the Appellant alleges that the Trial Chamber erred in finding his testimony credible with respect to the Appellant's presence and participation in the attack at Kaduha Parish on 21 April 1994. The Appeals Chamber recalls that because the witness was an alleged accomplice of the Appellant, the Trial Chamber resolved that his testimony would be viewed with appropriate caution. While acknowledging certain problematic aspects of Witness YH's testimony, the Trial Chamber concluded nonetheless that these did not call into question Witness YH's first-hand account at trial. The Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber exceeded its discretion in this respect.

21. With regard to Witness KSK, the Appellant submits that the Trial Chamber erred in relying on his evidence to conclude that the Appellant was at Kaduha on 21 April 1994 and in finding that Witness KSK was credible and corroborative of Witness KXX. The Appeals Chamber observes that, contrary to the Appellant's assertion, the Trial Chamber did not rely on Witness KSK's testimony to find that the Appellant was at Kaduha Parish on 21 April 1994.

22. With regard to the assessment of Witness KXX, the Appeals Chamber notes that as Witness KXX was an alleged accomplice of the Appellant, the Trial Chamber stated that it viewed his testimony with "appropriate caution". It also identified a number of problems with Witness KXX's testimony, and stated that it would "only accept his testimony, if it was adequately corroborated, such as where it was consistent with Witness YH's account". The Trial Chamber, however, ignored its own holding by finding that the Appellant arrived at Kaduha Parish "around 9 a.m.", thereby relying solely on the testimony given by Witness KXX as far as the time of his arrival is concerned.

23. The Appeals Chamber finds that the Trial Chamber committed an error of law in making this finding. While a trier of fact is not obliged to detail every step of its reasoning, in view of its concerns regarding the credibility of Witness KXX and its decision to accept his testimony only where corroborated, the Trial Chamber was compelled to explain why it relied on the uncorroborated account of Witness KXX instead of Witness YH's testimony with regard to the time of the Appellant's arrival at Kaduha Parish.

24. However, as will now be discussed, this error did not affect The Trial Chamber's findings relating to the Appellant's participation in the attacks at Murambi Technical School and Kaduha Parish on 21 April 1994 within the time frame emerging from the relevant and reliable evidence.

4. Alleged Errors Relating to the Possibility of the Appellant's Presence at Both Murambi Technical School and Kaduha Parish on 21 April 1994 in the Lapse of Time Accepted by the Trial Chamber

25. The Appellant alleges that, by finding that he took part in the massacres at Murambi Technical School and Kaduha Parish on 21 April 1994, the Trial Chamber ignored his submissions that it was physically impossible for him to be present at both sites within the time frame which emerges from the relevant testimonies.

26. The Appeals Chamber notes that the material fact at issue at trial was whether the Appellant was present at Murambi Technical School and Kaduha Parish in the early morning of 21 April 1994. The issue to be resolved by the Appeals Chamber is therefore whether the Trial Chamber erred in fact by finding that the evidence presented by the Appellant did not cast any reasonable doubt on the Appellant's presence at the two places. The Trial Chamber's findings that the Appellant was successively at Murambi Technical School and then Kaduha Parish on that morning indicate that it did not view the evidence introduced by the Appellant on this point as being sufficient to cast any reasonable doubt on his presence at either site.

27. However, the Trial Chamber did not explicitly address the issues of distance and driving times in the Trial Judgement, merely noting that Murambi Technical School, Kaduha Parish and Cyanika Parish were "geographically proximate locations". The Appeals Chamber notes that findings on both the distance between and the time necessary to travel from one site to the other were of importance as they directly affected whether it would have been possible for the Appellant to participate in the massacres at

both sites in the relatively short time-frame at issue. Relying on Witness KSY, the Trial Chamber concluded that the Appellant was at Murambi around 7:00 a.m. on 21 April 1994. There is no specific finding as to when the Appellant left the area, but the Trial Chamber observed that Witness KSY saw the Appellant for around 15 minutes. On the basis of the testimony of Witness KXX, the Trial Chamber found that the Appellant arrived at Kaduha Parish around 9:00 a.m. the same day, discarding the earlier arrival time (around 8:20 a.m.) suggested by Witness YH. As already mentioned, the Trial Chamber erred in relying solely on Witness KXX to make this finding.

28. Having made these findings as to times of arrival at the two massacre sites, the Trial Chamber failed to expressly discuss Defence evidence suggesting that it was impossible for the Appellant to travel from Murambi Technical School to Kaduha Parish within this time-frame. The issue was clearly controversial and the evidence presented by the parties in this respect was contradictory. However, the failure to be more explicit does not necessarily indicate the lack of a reasoned judgement.

29. The Appeals Chamber notes that both Witness KSY and Witness YH gave only approximate times of their respective sightings of the Appellant on 21 April at Murambi Technical School. Witness KSY testified that he saw the Appellant arriving at Murambi Technical School at “around” 7:00 a.m. on 21 April 1994 and that he observed the Appellant during a period of “about” 15 minutes. Similarly, Witness YH did not give a precise time for the arrival of the Appellant at Kaduha Parish. Witness YH first indicated during the examination-in-chief that he (Witness YH) arrived at Kaduha Parish “between about 8:00 and 9:00 in the morning of the 21 April 1994” and that the Appellant arrived 20 minutes after his arrival at Kaduha Parish. The Trial Chamber duly acknowledged the fact that these witnesses intended, in general, to provide approximations.

30. Likewise, nothing in Defence Witness AJT1’s testimony indicates that she intended to provide an exact calculation of the minimum travel time required to go from Kaduha to Murambi. The Appeals Chamber finds that in light of the approximations given by the witnesses (attributable to the troubling context of the events reported and the long period of time that elapsed between the events and the taking of the testimony), a reasonable trier of fact could have found beyond a reasonable doubt that the indicated times were, in fact, quite flexible and created a window during which Simba could have been present at both Murambi and Kaduha on the morning of 21 April 1994. The Appellant has not demonstrated that the Trial Chamber erred in so finding.

5. The Ntyazo Public Meeting of 22 May 1994

31. The Appeals Chamber dismisses without consideration the Appellant's contention that the Trial Chamber erred in finding that the Appellant made an inflammatory speech against Tutsi at a public meeting in Ntyazo Commune on 22 May 1994, since this finding does not underlie any conviction, nor does it support any subsequent finding in relation to the sentence.

32. For the foregoing reasons, and others provided in the Judgement, this ground is dismissed.

Alleged Errors in the Assessment of the Defence Evidence

33. The Appellant submits that the Trial Chamber committed errors of law and fact in its assessment of Defence evidence. As a preliminary matter, the Appeals Chamber notes that a number of the arguments advanced by the Appellant are, as further explained in the Judgement, dismissed summarily or considered elsewhere. The Appeals Chamber recalls that arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits. I will now address the remaining arguments in turn.

1. Alleged Failure to Consider Report by Defence Expert Witness Dr. Pascal Ndengejeho

34. The Appellant contends that the Trial Chamber erred in failing to consider the Defence Expert Report of Dr. Pascal Ndengejeho in relation to a number of issues: the massacres that occurred at various sites; the physical impossibility of committing the crimes charged because of the distance between Murambi Technical School and Kaduha Parish; the Appellant's alibi; and his motive.

35. As already mentioned, while required to give a reasoned opinion, the trier of fact is not obliged to articulate every step of its reasoning. In that light, the Appellant clearly fails to demonstrate how the Trial Chamber erred in not considering the Defence Expert Report in explicit terms. The Appeals Chamber further recalls its finding that the evidence provided in the Defence Expert Report did not necessarily contradict the evidence that the Appellant was present at the two massacre sites within the relevant time-frame. Regarding the issue of the alibi, the Defence Expert Report was of limited assistance to the Trial Chamber since it provided no expert opinion which could have assisted the Trial Chamber

in its analysis, but instead ventured beyond the scope of the expertise and provided an opinion on the ultimate issue on the case.

36. This first sub-ground is dismissed.

2. Alleged Errors in Relation to the Alibi

37. Under the second sub-ground, the Appellant makes several submissions to the effect that the Trial Chamber erred in relation to the alibi. First, the Appellant contends that the Trial Chamber impermissibly reversed the burden of proof with respect to the alibi evidence. The Appeals Chamber is satisfied, however, that the Trial Chamber both correctly set out the legal standard on alibi evidence and applied it in its subsequent findings on alibi.

38. Second, the Appellant submits that the Trial Chamber made a number of errors in its assessment of the alibi evidence given by Defence Witnesses. For the reasons given in the Judgement, the Appellant's submissions in this regard are all dismissed.

39. Third, the Appellant submits that the Trial Chamber erred in law and in fact by holding that certain witnesses were credible with respect to the Appellant's presence in Kigali in April 1994 but not with respect to the Appellant's stay in Gitarama, and also by failing to accept the evidence of the alibi witnesses in their entirety. For the reasons given in the Judgement, the Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber erred in not accepting the evidence of alibi witnesses in their entirety or in noting the personal and family ties between certain witnesses and the Appellant.

40. Fourth, the Appellant submits that the Trial Chamber erred in finding that it could "eliminate the possibility that the Appellant remained in Gitarama after 16 April" on the basis of, *inter alia*, his purported influence on military and administrative authorities. Specifically, the Appellant appears to allege that the Trial Chamber erred in finding that the Appellant's stature in Rwandan society allowed him to obtain the assistance of authorities to facilitate movement and that he admitted that he had little fear of roadblocks in Gikongoro.

41. The Appeals Chamber notes that the Trial Chamber's findings with respect to the Appellant's stature and influence rest on multiple observations: the Appellant was able to travel on 16 April 1994, he dared to assert his authority in the face of an assailant at a

roadblock between Kigali and Gitarama, and he managed to obtain the assistance of gendarmes and other authorities in order to facilitate his movements and the movements of others. The Trial Chamber took into consideration not only his past military and governmental career but also elements contemporaneous to the events which were demonstrative of his prominence. The Appellant has not demonstrated that no reasonable trier of fact could have found on the basis of the evidence that, due to his notoriety, the Appellant had little fear of roadblocks in the Gikongoro area.

42. The Appeals Chamber finds no error in the Trial Chamber's approach. The Appellant's submissions are accordingly dismissed.

3. Alleged Errors Relating to the Assessment of Defence Witnesses NGJ2 and SBL1

43. Under the third sub-ground, the Appellant's submissions to the effect that the Trial Chamber erred in its assessment of the testimonies of Defence Witnesses SBL1 and NGJ2 are dismissed for the reasons explained in the Judgement.

4. Alleged Differential Treatment of Prosecution and Defence Witnesses

44. Under the fourth sub-ground, the Appellant submits that the Trial Chamber showed bias in applying different approaches to Prosecution and Defence evidence. Overall, the Appellant submits that the Trial Chamber was more lenient towards Prosecution witnesses than towards Defence alibi witnesses.

45. The Appeals Chamber recalls that it has already addressed the Appellant's allegations of error relating to the assessment of both Prosecution and Defence evidence and has dismissed all but one. While it found that the Trial Chamber erred in relying on Witness KXX with regard to the time of the Appellant's arrival at Kaduha Parish on 21 April 1994, this error does not demonstrate any bias in the Trial Chamber's assessment of the evidence. The Appellant's submissions with respect to the biased or differential treatment of Prosecution and Defence evidence are dismissed.

46. For the foregoing reasons, and other provided in the Judgement, this ground is dismissed in its entirety.

Alleged Distortion of Facts

47. The Appellant alleges that the Trial Chamber distorted the facts relating to his stature in Rwandan society and his relationship with governmental and military authorities.

The Appeals Chamber considers that the Trial Chamber provided a detailed analysis and took into consideration numerous factors in finding that the Appellant was a prominent former political and military figure in Rwandan society. In light of the overall evidence before the Trial Chamber, the Appellant has not demonstrated that no reasonable trier of fact could have reached this same finding.

Alleged Errors in Convicting the Appellant pursuant to JCE for Crimes Committed at Murambi Technical School and Kaduha Parish

48. The Appellant contends that the Trial Chamber erred in convicting him for genocide and extermination as a crime against humanity pursuant to a JCE.

49. The Appeals Chamber is satisfied that, contrary to the Appellant's assertions, the Trial Chamber held the Appellant responsible for genocide and extermination as a crime against humanity pursuant to the first category of JCE, rather than the third category. Further, as all convictions were entered pursuant to the first category of JCE, the Appeals Chamber will not address the Appellant's further challenges concerning the third category.

50. The Appellant submits that proof of a "a pre-conceived JCE" is a precondition for a conviction pursuant to JCE, and stresses that in the present case the Trial Chamber found that the Appellant was not involved in the prior planning of the JCE. The Appeals Chamber recalls that it is well-established that it is not necessary for a participant to have participated in the planning of a JCE in order to be convicted for participation in it. The Appellant's argument is therefore without merit.

51. Thirdly, the Appellant submits that his responsibility based on the first category of JCE was not established during trial, and that the Trial Chamber erred in finding that he "shared the common purpose of killing Tutsi" in Murambi and Kaduha merely as a result of his presence and conduct there, and that, in any event the Prosecution did not prove his presence there beyond reasonable doubt.

52. The Appeals Chamber finds the Appellant's contention to be without merit. The Trial Chamber took into account various factors in finding generally that a common criminal purpose existed between a plurality of persons to kill Tutsi at Murambi Technical School, Cyanika Parish and Kaduha Parish. With respect to the Appellant's personal participation in the JCE, which was found to be limited to the attacks at Murambi Technical School and Kaduha Parish, the Trial Chamber found both that he was present at the two massacre sites and that his acts of assistance and encouragement provided substantial assistance

to the killings which followed. The Trial Chamber also found that the mere presence of the Appellant at both places would have been seen by the assailants as approval of their conduct. On this basis, the Trial Chamber found that the Appellant shared the intent to carry out the common purpose of killing Tutsi at Murambi Technical School and Kaduha Parish. The Appellant fails to demonstrate that the Trial Chamber committed any legal error in reaching this conclusion.

53. This ground is accordingly dismissed in its entirety.

Alleged Errors relating to the Conviction for Genocide

54. The Appellant submits numerous arguments to the effect that the Trial Chamber erred in holding him responsible for genocide with respect to the events at Murambi Technical School and Kaduha Parish when the constitutive elements of the crime, both acts and intent, were not proven beyond reasonable doubt.

55. The Appellant argues that the Trial Chamber failed to require the Prosecution to prove the existence of a plan or policy as a fundamental element of the *actus reus* of this crime. The Appeals Chamber recalls that according to the jurisprudence of this Tribunal as well as that of the ICTY the existence of an agreement or a plan is not an element required for a conviction for genocide.

56. The Appellant additionally submits that the Trial Chamber erred in finding that he possessed specific intent to commit genocide at the moment of the events. This contention is without merit. The Trial Chamber carefully considered the evidence before it in finding that the Appellant possessed the specific intent.

57. The Appeals Chamber further finds no merit to the Appellant's argument that the intent to commit genocide must be formed *prior* to the commission of genocidal acts. As correctly interpreted by the Trial Chamber, it is the existence of the intent to commit genocide at the moment of the commission of the *actus reus* of that crime that matters.

58. This ground is dismissed in its entirety.

Alleged errors relating to the Conviction for Extermination as a Crime Against Humanity

59. The Appellant alleges errors in relation to his conviction for extermination as a crime against humanity. The Appeals Chamber observes that these arguments overlap with others already addressed and therefore do not need to be revisited.

Alleged Errors relating to Cumulative Charges and Convictions

60. The Appeals Chamber finds without merit and accordingly dismisses the Appellant's submissions to the effect that the Trial Chamber erred in law in finding that cumulative charges for extermination as a crime against humanity and genocide could be brought and in entering convictions for both the crime of genocide and extermination as a crime against humanity based on the same underlying conduct. The Appeals Chamber recalls that it is established jurisprudence that cumulative charging on the basis of the same set of facts is permissible. Furthermore, it is well established that cumulative convictions entered under different statutory provisions but based on the same conduct are permissible if each statutory provision involved has a materially distinct constitutive element not contained in the other. Accordingly, convictions for genocide and extermination as a crime against humanity, based on the same facts are, as a matter of law, permissible.

Alleged Errors relating to the Sentence

61. The Appellant contends that the Trial Chamber erred in sentencing him to 25 years' imprisonment and raises a number of arguments in support of this claim. The Appellant specifically argues that the Trial Chamber erred in the exercise of its discretion in not according greater weight to mitigating circumstances. The Appeals Chamber finds that the Appellant merely presents factual assertions without showing how the Trial Chamber committed a discernible error in its assessment of the individual mitigating circumstances.

62. The Appellant further submits that the Trial Chamber misconceived his stature in Rwandan society when stating that he was a prominent former political and military leader, and erred in considering this as an aggravating circumstance. The Appeals Chamber finds no merit in this contention since the Trial Chamber implicitly found that the Appellant abused his position and influence in order to facilitate the commission of the crimes.

63. The Appellant submits that the sentence imposed is unjustified in view of the Appellant's age and health condition. The Appeals Chamber recalls that the age and state of health of an accused person may be relevant factors in sentencing, however, in the instant case the Appellant has failed to demonstrate how the Trial Chamber abused its discretion in determining the sentence. Finally, the Appellant claims that the Trial Chamber erred in sentencing him to 25 years' imprisonment, when the charges against him were not proven beyond reasonable doubt. The Appeals Chamber finds that the Appellant merely reiterates arguments already presented and dismissed elsewhere. The Appellant's appeal against the sentence is thus dismissed.

IV. THE APPEAL OF THE PROSECUTION

Ground 1: Alleged Errors in Finding that Aloys Simba was not Criminally Responsible for his Participation in the Cyanika Parish Massacre

64. Under its first ground of appeal, the Prosecution contends that the Trial Chamber erred in fact and in law by failing to find the Appellant criminally responsible for his participation in the Cyanika Parish Massacre on 21 April 1994. The Prosecution submits, first, that the Trial Chamber erred in fact by requiring proof that the Appellant was physically present at Cyanika Parish before holding him responsible for genocide and extermination as a crime against humanity for the acts that took place there; and, secondly, that it erred in law by requiring a direct and substantial contribution by the Appellant to the massacre at Cyanika Parish as a pre-condition for holding him criminally responsible for that specific massacre. These submissions will be considered in turn.

1. Alleged Errors in Requiring Proof that the Appellant was Physically Present at Cyanika Parish

65. With respect to the Prosecution's submission that the Trial Chamber erred in requiring the Appellant's presence at Cyanika, it is not entirely clear on what basis the error of fact is alleged. As the alleged error appears to more closely resemble an error of law, the Appeals Chamber will address it as such.

66. The Appeals Chamber agrees with the Prosecution that physical presence at the time a crime is committed by the physical perpetrator is not required for liability to be incurred by a participant in a JCE. However, in the instant case, the Appellant's lack of

presence at Cyanika was relevant primarily as a basis for the Trial Chamber's finding that there was no evidence to support the idea that he shared the intent to participate in the common purpose of killing Tutsi at Cyanika. As explained by the Trial Chamber, this doubt arose from the fact that there was "no direct evidence linking the Appellant to Cyanika Parish or indicating that he knew and accepted that it would also form part of the operation". The Trial Chamber's inquiry was broader than mere physical presence and the Appeals Chamber therefore sees no error in its approach.

2. Alleged Error in Requiring a Direct and Substantial Contribution by the Appellant to the Massacre at Cyanika Parish as a Pre-Condition to Holding him Criminally Responsible

67. The Prosecution further claims that the Trial Chamber erred in law in requiring a direct and substantial contribution by the Appellant to the Cyanika Parish massacre as a precondition for holding him criminally responsible for that massacre. It submits that a participant in a JCE need only perform actions that "in some way" are directed to the furtherance of the common purpose. The Prosecution adds that, although the Trial Chamber correctly noted that there is no requirement to make a substantial contribution, it erroneously required such contribution.

68. The Appeals Chamber is unable to agree that the Trial Chamber required the Appellant's participation in a JCE at Cyanika Parish to be substantial. The Appeals Chamber notes that the Trial Chamber expressly acknowledged that a showing of substantial contribution is not required as a matter of law. The Appellant's actions with respect to Cyanika Parish were clearly addressed by the Trial Chamber, which found that there was "no direct evidence linking him to Cyanika Parish or indicating that he knew and accepted that it would also form part of the operation." In so doing, it considered the Appellant's contribution to the Cyanika Parish massacre only insofar as it could have provided any evidence that would allow for a finding that he possessed the requisite *mens rea* with respect to the JCE at that site. The Prosecution has therefore demonstrated no legal error on the part of the Trial Chamber.

69. The Prosecution's first ground of appeal is therefore rejected in its entirety.

Ground 2: Alleged Errors Relating to the Sentence

70. Under its second ground of appeal, the Prosecution makes several submissions to the effect that the Trial Chamber erred in law by imposing a sentence of 25 years' imprisonment instead of imprisonment for the remainder of the Appellant's life. The Prosecution submits that the Trial Chamber abused its sentencing discretion and committed three discernible errors of law invalidating its decision: (1) in failing to consider or give proper weight to relevant aggravating factors while erroneously according weight to irrelevant factors in mitigation; (2) in imposing a sentence that is manifestly disproportionate to the gravity of the crimes and the Appellant's role; and (3) in imposing a sentence that is in disparity with the Tribunal's sentencing practice.

1. Alleged Failure to Consider or Give Proper Weight to Relevant Aggravating Factors and Erroneously According Weight to Irrelevant Factors in Mitigation.

71. The Prosecution submits that the Trial Chamber committed its first discernable error (a) by failing to accord full weight to the Appellant's stature in Rwandan society and his authority; (b) by giving undue weight in mitigation to the absence of zeal and sadism demonstrated by the Appellant while committing the crimes; and (c) according undue weight to extraneous and irrelevant considerations in mitigation.

72. The Appeals Chamber finds that the Trial Chamber did in fact fully take into account as aggravating factors the Appellant's stature in Rwanda society, as well as the abuse of the influence he derived from it. It therefore rejects the first of the Prosecution's contentions.

73. With regard to its second argument, the Appeals Chamber is unable to agree that the finding of a lack of zeal or sadism was considered in mitigation of the Appellant's sentence. Instead, the Appeals Chamber considers it to have been taken into account in the context of determining the gravity of the Appellant's crimes. With respect to the Prosecution's argument that the Trial Chamber erred in not taking into account the Appellant's sadism and zeal as an aggravating factor, the Appeals Chamber notes that these are raised for the first time in the Prosecution Appeal Brief and declines to consider it.

74. However, the Appeals Chamber holds, *proprio motu*, that the Trial Chamber erred when it assessed the gravity of the offence in light of its finding that "the manner in which Simba participated in the joint criminal enterprise did not evidence any particular zeal or sadism." The Appeals Chamber notes that the aforementioned factors are neither

elements of the crime of genocide or extermination nor factors indicating the gravity of the crimes as such. The Appeals Chamber raises this issue *proprio motu* in order to clarify that zeal and sadism are factors to be considered, where appropriate, as aggravating factors rather than in the assessment of the gravity of an offence. Nonetheless, given the fact that the Appeals Chamber has already rejected the Prosecution's claim that the Trial Chamber erred in not taking into account the Appellant's sadism and zeal in aggravation on procedural grounds in the preceding paragraph, this error cannot have any impact upon the Appellant's sentence.

75. The Prosecution's remaining contentions that the Trial Chamber erred (i) in according weight in mitigation to the selective assistance that the Appellant provided to some people, and (ii) considering in mitigation that the Appellant "might have acted out of patriotism and government allegiance rather than extremism or ethnic hatred" are dismissed for the reasons given in the Judgement.

2. Alleged Error in Imposing on the Appellant a Sentence that Was Manifestly Disproportionate to the Gravity of his Crimes and his Role in Them

76. The Prosecution submits that the Trial Chamber committed its second discernible error by failing to take sufficient account of either the inherent gravity of the crimes for which the Appellant was convicted or his individual circumstances. The Appeals Chamber observes however, that in the instant case, the Trial Chamber expressly recognised the gravity of the crimes for which the Appellant was responsible while at the same time taking into consideration his role in the commission of these crimes. The Prosecution advances a different view of the gravity of the crimes and the Appellant's role therein, apparently arguing against any discretion in sentencing where an accused is a "principal perpetrator" who has committed grave crimes. The Appeals Chamber is unable to agree that the Trial Chamber was so restricted in the exercise of its discretion and reaffirms the requirement to individualise sentences. In the instant case, the Prosecution has not demonstrated how the Trial Chamber may have committed an error in exercising its discretion or departed from the Tribunal's case law by imposing a sentence of 25 years' imprisonment.

3. The Sentence is Allegedly Inconsistent with the Tribunal's Sentencing Practice

77. Lastly, the Prosecution submits that the Trial Chamber erred by imposing a sentence that is manifestly inconsistent with the Tribunal's sentencing practice in similar

cases. This argument goes beyond the scope of the Prosecution Notice of Appeal and is accordingly dismissed without further consideration.

78. The Prosecution's appeal against the sentence is accordingly dismissed.

V. DISPOSITION

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

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

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 22 May 2007;

SITTING in open session;

DISMISSES in all respects the grounds of appeal raised by Aloys Simba, and the Prosecution in their respective appeals;

AFFIRMS the Appellant's convictions for genocide and extermination as a crime against humanity under Counts 1 and 3;

AFFIRMS, Judge Schomburg dissenting, the Appellant's sentence of twenty-five (25) years' imprisonment entered for these convictions, subject to credit being given under Rule 101(D) and Rule 107 of the Rules for the period already spent in detention since 27 November 2001;

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

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

Judge Liu Daqun appends a partially dissenting opinion.

Judge Schomburg appends a partially dissenting opinion.