

459/H

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UNITED NATIONS  
NATIONS UNIES

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

ICTR-01-70-A

4<sup>th</sup> June 2010

{459/H - 451/H}

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mehmet Güney  
Judge Liu Daqun  
Judge Theodor Meron  
Judge Carmel Agius

**Registrar:** Mr. Adama Dieng

**Decision of:** 4 June 2010

**EMMANUEL RUKUNDO**

v.

**THE PROSECUTOR**

Case No. ICTR-2001-70-A

**DECISION ON RUKUNDO'S MOTION FOR THE ADMISSION OF  
ADDITIONAL EVIDENCE ON APPEAL**

**Counsel for Emmanuel Rukundo:**

Ms. Aïsha Condé  
Mr. Benoît Henry

**The Office of the Prosecutor:**

Mr. Hassan Bubacar Jallow  
Mr. Alex Obote-Odora  
Ms. Christine Graham  
Mr. Abdoulaye Seye  
Mr. Shamus Mangan

ICTH Appeals Chamber  
Date: 4<sup>th</sup> June 2010  
Action: R Jura  
Copied To: Concours of Judges, SLOs, LOs, ALOs  
Parties, CSE, LSS.

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**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**  
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME  
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NAME/NOM: KOFFI KUMELIO A. AFANDE  
SIGNATURE: *[Signature]* DATE: 04 JUNE 2010

458/H

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 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seised of Emmanuel Rukundo's motion to admit additional evidence on appeal, filed confidentially on 19 May 2010.<sup>1</sup> The Prosecution has not yet filed a response. The Appeals Chamber has decided to consider the Motion without awaiting a response in view of the urgency of this matter and the lack of prejudice to the Prosecution.

#### A. Background

2. On 27 February 2009, Trial Chamber II of the Tribunal convicted Rukundo for committing genocide through his participation in the killing of Madame Rudahunga and the causing of serious bodily harm to four other Tutsis who were abducted from Saint Joseph's College, the abduction and killing of Tutsis from the Saint Léon Minor Seminary, and the sexual assault of a Tutsi woman at the seminary.<sup>2</sup> In addition, it convicted Rukundo for committing murder as a crime against humanity for the killing of Madame Rudahunga<sup>3</sup> and for extermination as a crime against humanity for his participation in the abduction and killings of Tutsis from the Saint Léon Minor Seminary.<sup>4</sup> The Trial Chamber sentenced Rukundo to a single term of 25 years of imprisonment.<sup>5</sup>

3. Rukundo filed his Notice of Appeal on 6 November 2009, challenging his convictions and sentence,<sup>6</sup> and his Appellant's brief on 19 January 2010.<sup>7</sup> The Prosecution responded on 1 March 2010.<sup>8</sup> With the filing of Rukundo's Reply brief on 10 May 2010,<sup>9</sup> the briefing in this case has concluded.<sup>10</sup> The hearing is scheduled for 15 June 2010.<sup>11</sup>

<sup>1</sup> *Requête aux fins d'admission de moyens de preuve supplémentaires en application de l'article 115 du règlement de Procédure et de Preuve*, 19 May 2010 ("Motion").

<sup>2</sup> *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Judgement, dated 27 February 2009 and filed on 13 March 2009 ("Trial Judgement"), paras. 569, 573, 576.

<sup>3</sup> *Ibid.*, para. 585.

<sup>4</sup> *Ibid.*, para. 590.

<sup>5</sup> *Ibid.*, paras. 591, 608.

<sup>6</sup> *Acte d'appel d'Emmanuel Rukundo du jugement rendu le 27 février 2009*, 6 November 2009.

<sup>7</sup> *Mémoire d'appel de la Défense*, 19 January 2010.

<sup>8</sup> Prosecutor's Respondent's Brief, 1 March 2010.

<sup>9</sup> *Memoire [sic] en duplique de l'appelant*, 10 May 2010.

<sup>10</sup> The Prosecution also appealed Rukundo's sentence. It filed its Notice of Appeal on 14 April 2009 and its Appellant's brief on 14 May 2009. See Prosecutor's Notice of Appeal, 14 April 2009; Prosecutor's Appellant's Brief, 14 May 2009. Rukundo responded on 13 October 2009, and the Prosecution replied on 22 October 2009. See *Réponse de l'intimé Emmanuel Rukundo à l'appel du Procureur de la peine imposée par jugement rendu le 27 février 2009*, 13 October 2009; Prosecutor's Brief in Reply, 22 October 2009.

<sup>11</sup> Scheduling Order, 19 May 2010, p. 1.

457/H

4. Rukundo requests the admission of additional evidence relating to the credibility of Prosecution Witness BLP, who gave evidence concerning the crimes connected to Saint Joseph's College, as well as the hearing of the testimonies of Defence Witnesses SLB and SLZ, which concern the events at the Saint Léon Minor Seminary.<sup>12</sup>

### B. Applicable Law

5. Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules") provides a mechanism for admission of additional evidence on appeal where a party is in possession of material that was not before the Trial Chamber and which is additional evidence of a fact or issue litigated at trial.<sup>13</sup> This must be done no later than 30 days from the date of filing of the brief in reply unless good cause is shown for a delay. According to Rule 115(A) of the Rules, a motion for additional evidence shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. In addition, Rule 115(B) of the Rules provides that the additional evidence must not have been available at trial and must be relevant and credible.

6. When determining the availability of evidence at trial, the Appeals Chamber will consider whether the party tendering the evidence has shown that it sought to make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence [...] before the Trial Chamber."<sup>14</sup> Counsel is therefore expected to apprise the Trial Chamber of all difficulties that he encounters in obtaining the evidence in question.<sup>15</sup> Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine in accordance with Rule 115(B) of the Rules whether it *could* have been a decisive factor in reaching the decision at trial.

<sup>12</sup> Motion, paras. 4, 12-15, p. 6.

<sup>13</sup> *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Decision on Zigiranyirazo's Motion for Admission of Additional Evidence on Appeal, 16 September 2009 ("Zigiranyirazo Appeal Decision of 16 September 2009"), para. 5; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on a Request to Admit Additional Evidence, 27 April 2007 ("Muvunyi Appeal Decision of 27 April 2007"), para. 6, citing *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006 ("Nahimana et al. Appeal Decision of 8 December 2006"), para. 4. See also *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić's Second Motion to Admit Additional Evidence on Appeal, 29 April 2010 ("Šainović et al. Appeal Decision of 29 April 2010"), paras. 5, 6; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Dragomir Milošević's Third Motion to Present Additional Evidence, 8 September 2009 ("Dragomir Milošević Appeal Decision of 8 September 2009"), paras. 6, 7.

<sup>14</sup> *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9 (internal citations omitted). See also *Zigiranyirazo Appeal Decision of 16 September 2009*, para. 6; *Muvunyi Appeal Decision of 27 April 2007*, para. 6; *Nahimana et al. Appeal Decision of 8 December 2006*, para. 5. See also *Šainović et al. Appeal Decision of 29 April 2010*, para. 6; *Dragomir Milošević Appeal Decision of 8 September 2009*, para. 7.

<sup>15</sup> *Šainović et al. Appeal Decision of 29 April 2010*, para. 6.

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456/H

7. Furthermore, in accordance with established jurisprudence, where the evidence is relevant and credible, but was available at trial or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party can establish that the exclusion of it *would* amount to a miscarriage of justice.<sup>16</sup> That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.<sup>17</sup>

8. In both cases, the applicant bears the burden of identifying with precision the specific finding of fact made by the Trial Chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the Trial Chamber's verdict. A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.<sup>18</sup>

9. Finally, the Appeals Chamber has repeatedly recognised that the significance and potential impact of the tendered material is not to be assessed in isolation, but in the context of the evidence presented at trial.<sup>19</sup>

### C. Discussion

#### 1. Witness BLP

10. The Trial Chamber convicted Rukundo based, in part, on his role in the killing of Madame Rudahunga and the beating of two of her children and two other Tutsi civilians, all of whom were abducted from Saint Joseph's College at Kabgayi in Gitarama Prefecture.<sup>20</sup> In particular, the Trial Chamber found that, sometime in April 1994, Madame Rudahunga, a Tutsi woman, was abducted from Saint Joseph's College by Rukundo, acting with unknown soldiers, and was taken to her home nearby, where she was shot and killed.<sup>21</sup> It also found that the same group of soldiers returned to the college about 20 minutes later and took away two of her children and two other Tutsi civilians,

<sup>16</sup> *Zigiranyirazo* Appeal Decision of 16 September 2009, para. 7; *Muvunyi* Appeal Decision of 27 April 2007, para. 7; *Nahimana et al.* Appeal Decision of 8 December 2006, para. 6. See also *Šainović et al.* Appeal Decision of 29 April 2010, para. 9; *Dragomir Milošević* Appeal Decision of 8 September 2009, para. 10.

<sup>17</sup> *Zigiranyirazo* Appeal Decision of 16 September 2009, para. 7; *Muvunyi* Appeal Decision of 27 April 2007, para. 7, citing *Nahimana et al.* Appeal Decision of 8 December 2006, para. 6. See also *Šainović et al.* Appeal Decision of 29 April 2010, para. 9; *Dragomir Milošević* Appeal Decision of 8 September 2009, para. 10.

<sup>18</sup> *Šainović et al.* Appeal Decision of 29 April 2010, para. 10; *Dragomir Milošević* Appeal Decision of 8 September 2009, para. 11.

<sup>19</sup> *Šainović et al.* Appeal Decision of 29 April 2010, para. 11; *Dragomir Milošević* Appeal Decision of 8 September 2009, para. 12.

<sup>20</sup> Trial Judgement, paras. 171, 569, 585, 591.

<sup>21</sup> *Ibid.*, para. 171.

455/H

Justin and Jeanne.<sup>22</sup> All four victims were severely beaten and injured by the soldiers and left for dead.<sup>23</sup>

11. In making these findings, the Trial Chamber relied on the accounts of Prosecution Witnesses BLP, BLJ, BLC, and CCH.<sup>24</sup> With respect to Witness BLP, the Trial Chamber discussed several issues impacting on his credibility, noting his confession to Rwandan authorities, subsequent provisional release, admitted participation in attacks at Saint Joseph's College, making him a potential accomplice, as well as his lack of mention in Rwandan Gacaca proceedings of Rukundo's role in the attack.<sup>25</sup> Based on these and other considerations, the Trial Chamber "treat[ed] Witness BLP's evidence with caution and [relied] on it only if it [was] corroborated by, or itself corroborate[d], other reliable evidence."<sup>26</sup>

12. Rukundo seeks the admission of several documents relating to Witness BLP's judicial record in Rwanda.<sup>27</sup> He submits that a review of the dossier reveals several inconsistencies between the information contained therein and the witness's testimony concerning the events at the *Imprimerie de Kabgayi* and the Kabgayi Major Seminary.<sup>28</sup> In Rukundo's view, these discrepancies show that none of his statements could have been viewed as true.<sup>29</sup> In addition, Rukundo argues that the witness's implication of Emmanuel Gahutu and Antoine Misago Rutegesha in searches and abductions at various places suggests that these individuals were also responsible for the crimes committed against Madame Rudahanga and the four other Tutsis abducted from Saint Joseph's College, consistent with the Defence's theory of the case.<sup>30</sup> Rukundo contends that, had this material been available at trial and used during cross-examination, the Trial Chamber would have rejected the witness's testimony in its entirety.<sup>31</sup>

13. With respect to the availability of this material at trial, Rukundo submits that he only received Witness BLP's judicial documents from the Rwandan authorities on 6 May 2010.<sup>32</sup> He claims that, before the witness appeared, he requested the Prosecution to disclose this material, but it did not.<sup>33</sup> According to Rukundo, the Prosecution's obligations to disclose prior statements of its

<sup>22</sup> *Idem*.

<sup>23</sup> *Idem*.

<sup>24</sup> *Ibid.*, paras. 165-172.

<sup>25</sup> *Ibid.*, paras. 144, 145. See also *ibid.*, paras. 139-143 (discussing his alleged recantation and misidentification of Rukundo in court).

<sup>26</sup> *Ibid.*, para. 146.

<sup>27</sup> Motion, p. 6.

<sup>28</sup> *Ibid.*, paras. 6, 7.

<sup>29</sup> *Ibid.*, para. 8.

<sup>30</sup> *Ibid.*, paras. 9, 10.

<sup>31</sup> *Ibid.*, para. 24.

<sup>32</sup> *Ibid.*, para. 5.

<sup>33</sup> *Ibid.*, paras. 5, 17.

454/H

witnesses in accordance with Rule 66(A) of the Rules encompass statements given to Rwandan authorities.<sup>34</sup> Consequently, he argues that the Prosecution's failure to provide this information made it unavailable at trial.<sup>35</sup>

14. The Appeals Chamber is not convinced that Rukundo exercised due diligence in obtaining Witness BLP's judicial records. The Appeals Chamber has previously held that the Prosecution has no obligation to obtain judicial material related to its witnesses from Rwanda.<sup>36</sup> As Rukundo has not shown that the Prosecution was in possession of this material, there is no merit to his assertion that the Prosecution's failure to obtain them made them unavailable at trial. Furthermore, Rukundo has provided no information as to when he requested the Registrar to assist him in obtaining this material or demonstrated any efforts on his part to raise this issue with the Trial Chamber in order to seek judicial assistance.<sup>37</sup>

15. The Appeals Chamber is also not convinced that the exclusion of this material *would* amount to a miscarriage of justice. The contradictions highlighted by Rukundo relate to collateral aspects of his testimony that the Trial Chamber did not accept.<sup>38</sup> Furthermore, it follows from the Trial Judgement that the Trial Chamber was clearly aware of various inconsistencies between Witness BLP's testimony and statements that he gave to Rwandan authorities, specifically about the events at Saint Joseph's College.<sup>39</sup> At most, the issues raised by Rukundo might have provided further justification for the caution, which the Trial Chamber already applied to Witness BLP's testimony for a number of reasons. Furthermore, his submissions in the Motion do not address what possible impact the complete rejection of Witness BLP's evidence would have had on the Trial Chamber's assessment of the three other Prosecution witnesses who implicated him in the crimes. Consequently, Rukundo has not demonstrated that additional evidence of other contradictory statements made by Witness BLP *would* have had an impact on the verdict. The main question is whether the Trial Chamber properly assessed the evidence of Witness BLP in light of the existing issues surrounding his testimony at trial, which will be addressed on its merits in the Appeal Judgement.

16. Accordingly, the Appeals Chamber denies the admission of the additional evidence related to Witness BLP.

<sup>34</sup> *Ibid.*, para. 18.

<sup>35</sup> *Ibid.*, para. 19.

<sup>36</sup> *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006, para. 45. *See also* *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 263.

<sup>37</sup> *See* *Šainović et al.* Appcl Decision of 29 April 2010, para. 6; *Dragomir Milošević* Appeal Decision of 8 September 2009, para. 7.

<sup>38</sup> *See* Trial Judgement, paras. 92, 93, 547, 551.

<sup>39</sup> *Ibid.*, para. 144.

453/H

## 2. Witnesses SLB and SLZ

17. The Trial Chamber convicted Rukundo based on his role in the killings of a large number of Tutsi refugees abducted from the Saint Léon Minor Seminary at Kabgayi in Gitarama Prefecture.<sup>40</sup> In particular, the Trial Chamber determined that, on at least four occasions between mid-April and the end of May 1994, Rukundo used a list to identify Tutsi refugees to the soldiers and *Interahamwe* who accompanied him.<sup>41</sup> The Trial Chamber found that, after Rukundo left the seminary, the soldiers and *Interahamwe* removed the refugees and killed them at an unknown location.<sup>42</sup> In addition, the Trial Chamber convicted Rukundo for sexually assaulting Witness CCH at the seminary towards the end of May 1994.<sup>43</sup>

18. On 16 August 2007, Rukundo filed a motion requesting that a number of Defence witnesses, including Witness SLB, be heard by video-link.<sup>44</sup> On 11 September 2007, the Trial Chamber dismissed the request concerning Witness SLB.<sup>45</sup> The Trial Chamber noted that Witness SLB was expected to refute allegations of Rukundo's involvement in the killings of Tutsi refugees at the Saint Léon Minor Seminary and the sexual assault of Witness CCH.<sup>46</sup> While the Trial Chamber recognised the importance of Witness SLB's potential evidence, it concluded that the Defence had failed to provide sufficient justification of the need for Witness SLB to testify by video-link.<sup>47</sup> On 3 October 2007, the Trial Chamber denied a second motion to hear this witness by video-link on the same grounds.<sup>48</sup> Witness SLB ultimately did not testify. Rukundo did not call Witness SLZ. However, the Trial Chamber expressly discussed the accounts of two other Defence witnesses concerning the events at the Saint Léon Minor Seminary.<sup>49</sup>

19. Rukundo requests the Appeals Chamber to hear the testimonies of Witnesses SLB and SLZ as additional evidence during the hearing.<sup>50</sup> He submits that these witnesses were at the Saint Léon Minor Seminary and that, contrary to many of the Prosecution witnesses, knew him well.<sup>51</sup>

<sup>40</sup> *Ibid.*, paras. 573, 590, 591.

<sup>41</sup> *Ibid.*, paras. 364, 570.

<sup>42</sup> *Ibid.*, para. 364.

<sup>43</sup> *Ibid.*, paras. 574, 576, 591.

<sup>44</sup> *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, *Requête aux fins d'autoriser des témoins à décharge à déposer par voie de vidéoconférence (Article 71 du Règlement de Procédure et de Preuve)*, filed confidentially on 16 August 2007.

<sup>45</sup> *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Decision on the Defence Motions for Additional Time to Disclose Witnesses' Identifying Information, to Vary its Witness List and for Video-Link Testimony, and on the Prosecution's Motion for Sanctions, 11 September 2007 ("Decision of 11 September 2007"), p. 7.

<sup>46</sup> Decision of 11 September 2007, para. 24.

<sup>47</sup> *Idem.*

<sup>48</sup> *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Motion for Video-Link Testimony for Witness SLB, 3 October 2007, para. 5.

<sup>49</sup> Trial Judgement, paras. 321-331, 370-371.

<sup>50</sup> Motion, para. 30, p. 6.

<sup>51</sup> *Ibid.*, paras. 12, 13, 15, 26-28.

452/H

According to the witnesses' anticipated testimony, they did not see Rukundo at the seminary during the relevant events and thus would have raised doubt about the Prosecution evidence.<sup>52</sup> Rukundo submits that in refusing to allow Witness SLB to testify by video-link the Trial Chamber was responsible for his unavailability at trial.<sup>53</sup> Rukundo notes that Witness SLZ categorically refused to testify at trial when approached by the Defence, but that his personal situation changed since the pronouncement of the Trial Judgement.<sup>54</sup>

20. The Appeals Chamber is not persuaded that Rukundo exercised due diligence in his attempts to present the evidence of Witnesses SLB and SLZ at trial. Although in some circumstances a party's unsuccessful efforts to hear a witness by video-link might satisfy the requirements of diligence,<sup>55</sup> Rukundo fails to appreciate that the Trial Chamber denied his request because he failed to substantiate it adequately.<sup>56</sup> In his Motion, Rukundo does not challenge this determination. Moreover, Witness SLZ's refusal to testify does not mean that he was unavailable at trial since there is no indication that Rukundo sought the assistance of the Trial Chamber in compelling Witness SLZ's testimony.<sup>57</sup>

21. Furthermore, Rukundo has not advanced any argument demonstrating that not hearing the testimonies of Witnesses SLB and SLZ *would* amount to a miscarriage of justice. In this respect, the Appeals Chamber notes that Rukundo called two witnesses in relation to the events at the Saint Léon Minor Seminary: Witness SLA, via video-link, and Witness SLD. Witness SLA testified that although he saw Rukundo at the Saint Léon Minor Seminary on at least two occasions, he did not see him being involved in the abductions, which he attributed to Sub-Prefect Misago.<sup>58</sup> He further testified that Rukundo had a small room at the Minor Seminary, but that he never saw him using it.<sup>59</sup> Witness SLD testified that he knew Rukundo and never heard his name mentioned in connection with the crimes at the Saint Léon Minor Seminary.<sup>60</sup> Further, he specifically attributed the abductions to others.<sup>61</sup> Consequently, Rukundo has not demonstrated how the accounts of Witnesses SLB or SLZ would have differed from those of the two witnesses who did testify and would have been more persuasive. The main question is whether the Trial Chamber properly assessed this evidence which will be addressed on its merits in the Appeal Judgement.

<sup>52</sup> *Ibid.*, paras. 27-29.

<sup>53</sup> *Ibid.*, para. 20.

<sup>54</sup> *Ibid.*, paras. 14, 21.

<sup>55</sup> See, e.g., *Zigiranyirazo* Appeal Decision of 16 September 2009, para. 38.

<sup>56</sup> See *supra*, para. 18.

<sup>57</sup> See *Šainović et al.* Appeal Decision of 29 April 2010, para. 6; *Dragomir Milošević* Appeal Decision of 8 September 2009, para. 7.

<sup>58</sup> Trial Judgement, paras. 323-325.

<sup>59</sup> *Ibid.*, paras. 326, 371.

<sup>60</sup> *Ibid.*, para. 328.

<sup>61</sup> *Ibid.*, para. 330.



451/H

22. Accordingly, the Appeals Chamber denies the request to hear Witnesses SLB and SLZ.

**D. Conclusion**

23. For the foregoing reasons, the Appeals Chamber **DENIES** the Motion. The Appeals Chamber emphasises that the present conclusion pertains merely to the admissibility of the proffered material and is in no way indicative of the Appeals Chamber's assessment of the merits of Rukundo's appeal.

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

Done this 4th day of June 2010,  
At The Hague,  
The Netherlands.



[Seal of the Tribunal]

A handwritten signature in black ink, appearing to read "Fausto Pocar", written over a horizontal line.

Judge Fausto Pocar  
Presiding