

DELIVERY OF APPEAL JUDGEMENT

Emmanuel Rukundo v. The Prosecutor, Case No. ICTR-2001-70-A, 20 October 2010, 14:00 p.m.,
Courtroom I

I. INTRODUCTORY REMARKS

Mr. Rukundo and the Prosecutor appealed from the Trial Judgement rendered in this case on 27 February 2009 by Trial Chamber II. As indicated in the Scheduling Order issued on 21 September 2010 and pursuant to Rule 118(D) of the Rules of Procedure and Evidence of the Tribunal, today the Appeals Chamber will deliver its judgement in the case of *Emmanuel Rukundo versus The Prosecutor*. Following the practice of the Tribunal, I will not read out the text of the judgement, except for the disposition. Instead, after recalling the main issues raised on appeal, I will summarise the findings of the Appeals Chamber. I should emphasize that the following summary is not an integral part of the Judgement. The only authoritative account of the Appeals Chamber's conclusions and the related reasoning is to be found in the written judgement, copies of which shall be made available to the parties at the end of this hearing.

II. BACKGROUND OF THE CASE

The events giving rise to these appeals took place in Gitarama Prefecture in Rwanda, in 1994. During the relevant period, Emmanuel Rukundo was a military chaplain for the Rwandan army. The Trial Chamber 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. In addition, it convicted Rukundo for committing murder as a crime against humanity for the killing of Madame Rudahunga and for extermination as a crime against humanity for his participation in the abduction and killing of Tutsis from the Saint Léon Minor Seminary. The Trial Chamber sentenced Rukundo to a single term of 25 years of imprisonment.

III. THE APPEALS

Both parties appealed the Trial Judgement. I will start with the grounds of appeal raised by Mr. Rukundo, followed by the Prosecution's appeal.

IV. RUKUNDO'S APPEAL

Rukundo has divided his arguments into five categories. Within these categories the Appeals Chamber has identified nine grounds of appeal, which it has considered in relation to each or the main events.

1. Alleged Error Relating to the Pleading of Commission (Ground 1)

Under his first ground of appeal, Rukundo argues that the Trial Chamber erred in law in convicting him for “committing” under Article 6(1) of the Statute for the crimes of genocide and crimes against humanity relating to Saint Joseph’s College and the Saint Léon Minor Seminary because he lacked adequate notice that he was being prosecuted on this basis.

The Appeals Chamber finds that, although the introductory paragraphs of the Indictment mention all forms of responsibility under Article 6(1) of the Statute, the specific paragraphs related to the relevant crimes underpinning Rukundo’s convictions are more limited and expressly refer only to ordering, instigating, and aiding and abetting. Thus, the Appeals Chamber finds that these paragraphs clearly show that Rukundo was not accused of “committing” the crimes in connection with the abductions and killings related to Saint Joseph’s College and the Saint Léon Minor Seminary, as the Indictment specifically charged him with ordering, instigating, or aiding and abetting them, but did not plead “committing” as a form of individual criminal responsibility.

By convicting Rukundo of “committing” the crimes of genocide and murder and extermination as crimes against humanity for the killing of Madame Rudahunga and the beating of her two children and two other Tutsi civilians and for the abduction and subsequent killing of Tutsi refugees from the Saint Léon Minor Seminary, the Trial Chamber erred in law by expanding the charges against Rukundo to encompass an unpleaded form of responsibility. Even if the failure to plead “committing” with respect to these events could be cured, as the Prosecution suggests, a review of the Prosecution’s opening statement reveals that “committing” was not part of its case at the commencement of the case. Accordingly, the Appeals Chamber grants Rukundo’s First Ground of Appeal, in part, and sets aside Rukundo’s convictions for these crimes on this basis.

Nonetheless, the Appeals Chamber notes that the above findings do not exclude Rukundo being held responsible for the other modes of liability for which he was charged under Article 6(1) of the Statute. The Appeals Chamber notes that the Indictment alleges Rukundo’s responsibility for aiding and abetting, ordering, or instigating the crimes charged. The Trial Chamber did not assess Rukundo’s alleged responsibility for these forms of liability given that it found him guilty of committing. For reasons explained in its Judgement, the Appeals Chamber concludes that, based on

the Trial Chamber's findings, Rukundo's acts are properly characterized as aiding and abetting the murder of Madame Rudahunga and causing serious bodily harm to two of her children and two other Tutsi civilians. In addition, the Appeals Chamber finds that Rukundo's acts for the abductions and killings of Tutsi refugees from the Saint Léon Minor Seminary are most properly characterized as aiding and abetting genocide and extermination as a crime against humanity. The Appeals Chamber therefore finds Rukundo responsible for aiding and abetting these crimes, and affirms his convictions for genocide and murder and extermination as crimes against humanity on this basis.

2. Alleged Errors Relating to the Events at Saint Joseph's College (Ground 2)

Under his second ground of appeal, Rukundo submits that the Trial Chamber erred in law and in fact in convicting him for committing genocide and murder as a crime against humanity 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.

In particular, Rukundo first argues that the Trial Chamber erred in treating the murder of Madame Rudahunga and the serious bodily harm caused to her children and the two other Tutsi civilians as a single criminal transaction. The Appeals Chamber considers that the Trial Chamber used the term "criminal transaction" to encompass and describe the circumstantial evidence of the series of acts which led up to the murder of Madame Rudahunga and the beating of the four others and finds that this term had no specific legal import in these circumstances. The Appeals Chamber finds no error on the part of the Trial Chamber in this regard.

Second, Rukundo argues that the Trial Chamber erred in finding that the constituent elements of murder and causing serious bodily harm had been proven and that there exists a causal link between his acts and the death of Madame Rudahunga and the beating of the others. The Appeals Chamber recalls that it has found that the Trial Chamber erred in convicting Rukundo for "committing" these crimes and has instead found that Rukundo's actions amounted to aiding and abetting genocide and murder as a crime against humanity, which does not require a causal link. The Trial Chamber was nonetheless reasonable in its finding regarding his involvement in the incident.

Third, Rukundo argues that the Trial Chamber erred in finding that the *chapeau* elements of crimes against humanity had been proven. The Appeals Chamber finds no error in the Trial Chamber's finding that the killing of Madame Rudahunga, a Tutsi, was part of a widespread and systematic attack against Tutsi civilians on ethnic grounds and that Rukundo was aware of the existence of a widespread or systematic attack on a civilian population.

Fourth, Rukundo argues that the Trial Chamber erred in finding that Rukundo had the intent to commit genocide. The Appeals Chamber has determined that Rukundo's actions in relation to these crimes constitute aiding and abetting, not committing, under Article 6(1) of the Statute. Therefore, it is not required that Rukundo possess genocidal intent, only knowledge that the principal perpetrators possessed it. In this case, the relevant findings underpinning the Trial Chamber's conclusion that Rukundo possessed the *mens rea* for genocide are equally applicable to the question of whether the principal perpetrators had this intent and that he was aware of this fact.

Finally, the Appeals Chamber finds that Rukundo has failed to demonstrate that the Trial Chamber committed any error in the assessment of the evidence which would occasion a miscarriage of justice.

Accordingly, the Appeals Chamber dismisses Rukundo's Second Ground of Appeal in its entirety.

3. Alleged Error Relating to the Exclusion of Witness BLJ's Evidence (Ground 3)

Under his third ground of appeal, Rukundo argues that the Trial Chamber erred in law by only excluding the part of Witness BLJ's evidence concerning the intimidation and abduction of Tutsi patients at Kabgayi hospital whereas it should also have excluded her testimony relating to the presence of Rukundo at the hospital. Rukundo further argues that Witness BLJ's evidence regarding the presence of Rukundo's vehicle near Madame Rudahunga's house should also be excluded as it was not referred to in the Indictment.

The Appeals Chamber finds that the Trial Chamber did not abuse its discretion in the admission of this evidence. The Trial Chamber did not convict Rukundo based on this evidence but instead reasonably relied on it as further support of the material facts which are pleaded in the Indictment.

The Appeal Chamber therefore dismisses Rukundo's Third Ground of Appeal.

4. Alleged Errors Relating to the Recantation of Witness BLP and the Haguma Report (Ground 4)

Under his fourth ground of appeal, Rukundo submits that the Trial Chamber committed a number of errors in dealing with Witness BLP's alleged recantation of his testimony and that the Trial Chamber should have rejected his testimony in its entirety.

In particular, Rukundo submits that his right to cross-examine Witness BLP was violated and that, in the absence of cross-examination of the witness on the issue of his recantation, the Trial Chamber should not have given any weight to Witness BLP's evidence. The Appeals Chamber finds that the Trial Chamber erred in law in failing to allow Rukundo the opportunity to cross-examine Witness

BLP upon the issue of his recantation. Nonetheless, for reasons expressed in its Judgement, the Appeals Chamber is not convinced that the Trial Chamber's error invalidates the Trial Judgement.

The Appeals Chamber can also identify no abuse of the Trial Chamber's discretion in the manner in which the Defence was permitted to examine Mr. Jean Haguma, who was tasked with investigating the alleged false testimony by Witness BLP.

The Appeals Chamber further considers that the Trial Chamber should have heard the testimony of Mr. Léonidas Nshogoza, the Defence investigator who took the statement in which Witness BLP purported to recant his testimony, on the events leading up to the alleged recantation. In this respect, the Trial Chamber had informed the Defence on a number of occasions that it would hear Mr. Nshogoza's testimony. However, the fact that his version of the events was placed before the Trial Chamber in an annex to the request to hear his testimony and formed part of Mr. Haguma's investigative report mitigates the fact that he was not called to testify. Therefore, the Appeals Chamber does not find that the Trial Chamber's decision not to hear Mr. Nshogoza was so unfair or unreasonable as to constitute an abuse of its discretion and, therefore, dismisses this argument.

Finally, for reasons expressed in its Judgement, the Appeals Chamber dismisses the remainder of Rukundo's arguments. For the foregoing reasons, the Appeals Chamber dismisses Rukundo's Fourth Ground of Appeal in its entirety.

5. Alleged Error Relating to the Pleading of Paragraph 12 of the Indictment (Ground 5)

Under his fifth ground of appeal, Rukundo submits that the Trial Chamber erred in law in convicting him for genocide and extermination as a crime against humanity based on his role in the abductions and killings of Tutsi refugees taken from the Saint Léon Minor Seminary because paragraph 12 of the Indictment was insufficiently precise. In particular, Rukundo argues that paragraph 12 of the Indictment did not specify the identity of the victims abducted, the dates of the abductions and killings of the refugees from the Saint Léon Minor Seminary, the specific date on which he had a list to select the Tutsi refugees to be abducted and the number of times he was accompanied by soldiers and *Interahamwe* when he visited the Saint Léon Minor Seminary.

Given the significant number of victims, the Appeals Chamber considers that the identification of the victims as Tutsi refugees taken from the Saint Léon Minor Seminary was sufficiently precise to allow Rukundo to prepare his defence. Concerning the date of the abductions and killings, the Appeals Chamber finds that the date range of April and May 1994 was not unreasonably broad, given that abductions were recurring and that Rukundo was involved on at least four occasions.

Regarding the date on which Rukundo had a list, while the Appeals Chamber agrees that there is a discrepancy between paragraph 12 of the Indictment and the evidence concerning the number of times when Rukundo was in possession of a list, the Appeals Chamber is not convinced that this variance is significant in the context of this case. In a similar vein, the Appeals Chamber considers that the discrepancy between the pleading and the evidence concerning the number of times Rukundo was accompanied by soldiers and *Interahamwe* is so minor that it could not have prejudiced his ability to prepare his case.

For the foregoing reasons, the Appeals Chamber dismisses Rukundo's Fifth Ground of Appeal.

6. Alleged Errors Relating to the Events at the Saint Léon Minor Seminary (Ground 6)

Under his sixth ground of appeal, Rukundo submits that the Trial Chamber erred in law and in fact in convicting him for committing genocide and extermination as a crime against humanity based on his role in the abductions and killings of Tutsi refugees from the Saint Léon Minor Seminary at Kabgayi in Gitarama Prefecture.

In particular, Rukundo first argues that, in relation to his conviction for extermination as a crime against humanity, the Trial Chamber failed to specify the relevant form of responsibility under Article 6(1) of the Statute for his participation in the attack. The Appeals Chamber considers that the Trial Chamber's failure to mention the specific form of liability relating to Rukundo's conviction for extermination as a crime against humanity does not invalidate the verdict. Furthermore, the Appeals Chamber recalls it has determined that Rukundo's action in relation to these crimes constitutes aiding and abetting, not, committing, under Article 6(1) of the Statute.

Rukundo also argues that the evidence does not demonstrate that he played a role in the abductions and killings and points to various accounts by witnesses attributing these crimes to other persons. The Appeals Chamber notes that the basis of the Trial Chamber's finding of Rukundo's involvement in the crime is his identification of Tutsi refugees to be killed. The Trial Chamber did not find that he specifically abducted individuals or killed them. Therefore, the fact that some witnesses might not have stated that Rukundo was responsible for specific abductions or killings or that others also participated in these crimes at the seminary does not undermine the reasonableness of the Trial Chamber's conclusions with respect to Rukundo's involvement.

Second, Rukundo submits that the Trial Chamber erred in finding that the abduction and killing of refugees from the Saint Léon Minor Seminary constituted genocide because the Trial Chamber failed to establish that the victims were Tutsis or targeted on that basis. The Appeals Chamber finds

that Rukundo has not demonstrated that the Trial Chamber erred in finding that members of the Tutsi ethnic group were killed and that the perpetrators acted with genocidal intent.

Third, Rukundo argues that the Trial Chamber erred in convicting him of extermination as a crime against humanity. He submits that the evidence does not demonstrate that the crimes that formed the basis of that conviction were part of a widespread or systematic attack on national, political, ethnic, racial, or religious grounds because the ethnicity of the victims was never identified. He further contends that the crime of extermination requires the killing of “named or specifically described persons”. In his view, “Tutsi refugees” does not satisfy this requirement. Rukundo further submits that the Trial Chamber erred in finding that a mass killing occurred and that he intended to participate in such a crime.

The Appeals Chamber recalls that the crime of extermination is the act of killing on a large scale, but that the expression “on a large scale” does not suggest a numerical minimum.

The Appeals Chamber finds that Rukundo has not demonstrated any error on the part of the Trial Chamber in finding that the attack formed part of a widespread and systematic attack on ethnic grounds and that he was aware of this. The Appeals Chamber is equally unconvinced by Rukundo’s contention that the crime of extermination requires the killing of “named or specifically described persons”.

With respect to the element of killing on a large scale, for the reasons expressed in its Judgement, the Appeals Chamber is not convinced that Rukundo has shown any error in the Trial Chamber’s findings concerning the large number of refugees abducted from the Saint Léon Minor Seminary.

Finally, Rukundo has failed to demonstrate that the Trial Chamber committed any error in the assessment of the evidence related to this event which would occasion a miscarriage of justice.

Accordingly, the Appeals Chamber dismisses Rukundo’s Sixth Ground of Appeal.

7. Alleged Error in Refusing to Hear Witness SLB by Video-Link (Ground 7)

Under his seventh ground of appeal, Rukundo submits that the Trial Chamber erred in law and violated his right to a fair trial by refusing to hear Witness SLB’s testimony by video-link. For reasons explained in its Judgement, the Appeals Chamber considers that Rukundo has failed to advance any argument to demonstrate that the Trial Chamber committed a discernible error in exercising its discretion not to allow Witness SLB to testify by video-link. Accordingly, the Appeals Chamber dismisses Rukundo’s Seventh Ground of Appeal.

8. Alleged Errors Relating to the Sexual Assault of Witness CCH at the Saint Léon Minor Seminary (Ground 8)

Under his eighth ground of appeal, Rukundo submits that the Trial Chamber erred in convicting him of committing genocide by causing serious mental harm to Witness CCH when he sexually assaulted her towards the end of May 1994 at the Saint Léon Minor Seminary. The Appeals Chamber recalls that inferences drawn from circumstantial evidence must be the only reasonable inference available.

In the particular context of this case, the Appeals Chamber, Judge Pocar dissenting, considers that genocidal intent is not the only reasonable inference to be drawn from Rukundo's assertion, prior to the incident, that Witness CCH's "entire family had to be killed for assisting the *Inyenzi*". In particular, the Appeals Chamber, Judge Pocar dissenting, observes that Rukundo's language can plausibly be interpreted as expressing anger that a former friend was affiliated with the "*Inyenzi*", without signifying a personal desire to destroy Tutsis. This interpretation is supported by the fact that Rukundo's statement did not frighten Witness CCH; according to her evidence, she only became frightened when Rukundo locked her in his room prior to assaulting her. The Appeals Chamber also notes that, after they entered the room together, Rukundo told Witness CCH that if he could have hidden her, he would have done so.

In addition, the Appeals Chamber, Judge Pocar dissenting, considers that the "general context of mass violence" cited by the Trial Chamber is insufficient to justify a finding of genocidal intent with respect to this incident. The Appeals Chamber, Judge Pocar dissenting, observes that the crime committed against Witness CCH was qualitatively different from the other acts of genocide perpetrated by Rukundo. Contrary to the events at Saint Joseph's College and the Saint Léon Minor Seminary, the Appeals Chamber, Judge Pocar dissenting, considers that Rukundo's sexual assault of Witness CCH appears to have been unplanned and spontaneous. While this analysis does not alter the highly degrading and non-consensual nature of the act committed, the Appeals Chamber, Judge Pocar dissenting, considers that it supports the inference that Rukundo's sexual assault, while taking place during a genocide, was not necessarily a part of the genocide itself.

The Appeals Chamber, Judge Pocar dissenting, therefore finds that no reasonable trier of fact could find that the only reasonable inference available from the evidence was that Rukundo possessed genocidal intent in relation to the sexual assault of Witness CCH. Accordingly, the Appeals Chamber, Judge Pocar dissenting, grants Rukundo's Eighth Ground of Appeal and reverses his conviction for genocide, in part, for causing serious mental harm to Witness CCH.

I now turn to the grounds of appeal concerning the sentence imposed by the Trial Chamber.

9. Rukundo's Sentencing Appeal (Ground 9)

With respect to Rukundo's ninth ground of appeal, the Appeals Chamber finds that Rukundo has failed to demonstrate that the Trial Chamber committed a discernible error in assessing his sentence. The Appeals Chamber dismisses Rukundo's Ninth Ground of Appeal.

V. PROSECUTION'S APPEAL

Under its sole ground of appeal, the Prosecution submits that the Trial Chamber erred in law in its assessment of Rukundo's sentence and requests the Appeals Chamber to increase the sentence to life imprisonment or remand the matter to the Trial Chamber for further consideration. For reasons expressed in its Judgement, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber committed a discernible error in assessing the sentence. The Appeals Chamber dismisses the Prosecution's appeal in its entirety.

VI. IMPACT OF APPEALS CHAMBER'S FINDINGS ON THE SENTENCE

Finally, the Appeals Chamber recalls that it has set aside Rukundo's conviction for *committing* genocide and murder and extermination as crimes against humanity in relation to the events related to Saint Joseph's College and for the killing of Tutsi refugees abducted from the Saint Léon Minor Seminar and instead found him responsible for *aiding and abetting* these crimes. In addition, the Appeals Chamber, Judge Pocar dissenting, has reversed Rukundo's conviction for genocide in relation to the causing of serious mental harm to Prosecution Witness CCH. The change in Rukundo's form of responsibility for his crimes, as well as the reversal of his conviction for genocide by causing serious mental harm, result in a reduction in his culpability. Rukundo, however, remains convicted of very serious crimes.

VII. DISPOSITION

I shall now read in full the Disposition of the Appeal Judgement. Mr. Rukundo would you please rise.

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 15 June 2010;

SITTING in open session;

GRANTS, in part, Rukundo's First Ground of Appeal, **SETS ASIDE** Rukundo's conviction for committing genocide and murder and extermination as crimes against humanity in relation to the killing of Madame Rudahunga and the beating of four other Tutsis taken from Saint Joseph's College and for the killings of Tutsi refugees abducted from the Saint Léon Minor Seminary, **FINDS** Rukundo responsible for aiding and abetting these crimes, and **AFFIRMS** his convictions for genocide and murder and extermination as crimes against humanity on this basis;

GRANTS Rukundo's Eighth Ground of Appeal, Judge Pocar dissenting, and **REVERSES** his conviction for genocide by causing serious mental harm;

DISMISSES Rukundo's Appeal in all other respects;

DISMISSES the Prosecution's Appeal in all respects;

REDUCES, Judge Pocar dissenting, the sentence of 25 years of imprisonment imposed on Rukundo by the Trial Chamber to 23 years of imprisonment to run as of this day, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 12 July 2001;

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

ORDERS that, in accordance with Rule 103(C) and Rule 107 of the Rules, Rukundo is to remain in the custody of the Tribunal pending the finalization of arrangements for his transfer to the State where his sentence will be served.

Judge Pocar appends a partially dissenting opinion.