

ICTR-04-81-A
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(29/A — 14/A)

29/A
14/A



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

APPEALS CHAMBER I

Before: Judge Patrick Robinson, presiding

Registrar: Mr. Adama Dieng

Date: March 30, 2010

EPHREM SETAKO

v.

THE PROSECUTOR

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NOTICE OF APPEAL

Counsel for the Appellant:

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Claire Gilchrist, Esq.
Juliette Chinaud, Esq.

Office of the Prosecutor:

Hassan Bubacar
Alex Obote-Odora

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NOTICE OF APPEAL

I. HISTORICAL BACKGROUND

1. Between 25 August 2008 and 26 June 2009, the **Appellant** stood trial before Trial Chamber I on charges set out in the Amended Indictment dated 23 June 2008
2. On 25 February 2010, judgment was pronounced orally against the **Appellant** in English. On 1 March 2010, a full written judgment in English only was entered and received by **Lead Counsel** on 2 March 2010.
3. In the Judgment, the **Appellant** was found guilty of Genocide (Count 1), Extermination as a Crime Against Humanity (Count 4) and Violence to Life as a serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto (Count 5).
4. The **Appellant** was found not guilty of Complicity in Genocide (Count 2), Murder as a Crime Against Humanity (Count 3) and Pillage as a serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto (Count 6).
5. Pursuant to Article 24 of the Statute and Rule 108 of the Rules of Procedure and Evidence, the **Appellant** hereby serves Notice of Appeal against the Conviction and Sentence on Count 1, 4 and 5 of the Judgment dated 25 February, 2010.
6. The **Appellant** sets forth his grounds of appeal against conviction and sentence pursuant to Article 24(1) of the Statute of the Tribunal as follows.

References herein are as follows:

- *A Rule refers to the Rules of Procedure and Evidence of the ICTR,*
- *An Article refers to Articles within the Statute of the Tribunal, and*
- *The Judgment refers to the Judgment of the Tribunal in the instant case*

II. *GROUND*S OF APPEAL AGAINST CONVICTION & SENTENCE

(a) ERRORS OF LAW (Article 24 (1)(a))

7. As explained in further detail in Part (b), in which the **Appellant** provides specific examples of the erroneous application of the law to the facts of the instant case, the **Appellant** here submits that the Trial Chamber erred as a matter of law in the following manner:

(1) Violations of Right to A Fair Trial

8. The Trial Chamber erred in disregarding **Appellant's** right to trial without undue delay by granting the Prosecution's motion to amend the Indictment 3 years after its initial confirmation. (Para.2)

(2) Burden of Proof

9. The Trial Chamber erred in failing to apply the correct test to the evidence before it in connection with events at Mukamira camp, namely, that it was satisfied that the guilt of the **Appellant** had been proved by the Prosecution beyond a reasonable doubt.

10. Specifically, the **Appellant** submits that the Trial Chamber erred in shifting the burden of proof to Defense witnesses, expressly and implicitly, that the Defense had to prove its case.

11. The Trial Chamber also erred in its assumption, both expressed and implied, that the Defense had to disprove the Prosecution's case.

12. The Trial Chamber erred as a matter of law in failing to require the Prosecution to prove its case beyond a reasonable doubt.

13. The Trial Chamber erred as a matter of law in its findings that Witnesses SLA and SAT were credible.
14. The Trial Chamber erred as a matter of law in applying a higher standard of proof to evidence given by Defense witnesses than that applied to evidence given by Prosecution witnesses.

(3) Criminal Responsibility (Art. 6(1) of Statute)

15. The Trial Chamber erred as a matter of law in finding **Appellant** guilty of Genocide (Count 1) and Extermination as a Crime Against Humanity (Count 4), arising out of the same single act, i.e., for ordering under Article 6(1) the killings of 30 to 40 Tutsis at Mukamira camp on 25 April 1994.
16. The Trial Chamber erred in its findings in law that **Appellant**, a judicial officer, was liable pursuant to Article 6 (1) in ordering the killings on April 25 and May 11 in the absence of any evidence, implied or otherwise, that he had the authority to order, and that the soldiers and militia at Mukamira camp were compelled to obey his orders to kill Tutsis. (Para.449, p.120)
17. The Trial Chamber erred as a matter of law in failing to require the Prosecution to establish the existence of a superior-subordinate relationship, implied or otherwise, between Appellant and the soldiers and militia at Mukamira camp pursuant to Article 6 (1). (para 449, p. 120).

(4) Trial Chamber's Duty to Provide a "Reasoned Opinion"

18. The Trial Chamber erred as a matter of law in failing to provide "a reasoned opinion."

19. The Trial Chamber erred in its findings of fact and law that **Appellant** and the assailants committed killings in furtherance of the armed conflict or under its guise in violation of Article 4(a) of the Statute and had the requisite nexus to the armed conflict between the Rwandan Governmental Forces (FAR) and the RPF or RPA. (Para.487, p.129)

(b) ERRORS OF FACT (Article 24(1)(b))

20. This part of the **Appellant's** Notice of Appeal will deal with both the incorrect application of the law to the facts of the case and the related specific incorrect factual findings.

(1) Incorrect Application of the Law

21. The Trial Chamber erred in law and fact by mischaracterizing the Defense's assertion in its Closing Brief that no killings occurred at the Ruhengeri Court of Appeal. (Para.84, p.23)

22. The Trial Chamber erred in law and fact in using the above premise to conclude that the omission of **Appellant's** name in a Gacaca proceeding did not itself raise doubt that he participated in a crime. (Para.85, p.23)

23. The Trial Chamber erred in law and fact in attaching any weight to Prosecution evidence that **Appellant's** name was mentioned in Gacaca proceedings in Ruhengeri prison in 1999, since **Appellant** was not identified as having participated in any specific allegations or in relation to any specific event. (para 84, p.24).

24. The Trial Chamber erred, as a matter of law and fact, in basing its judgment on the inconsistent and implausible testimony of Witnesses **SLA** and **SAT**. (Para.320 thru 368, pp.83-96)

25. The Trial Chamber erred as a matter of law in basing its judgment, in whole, upon the inconsistent, contradictory and conflicting testimony of murderers, liars and looters. (Fn.393, p.83; fn.398, p.85)
26. The Trial Chamber erred in law and fact in questioning the impartiality of Defence witnesses in its conclusion that they were inclined to give favorable testimony concerning Mukamira camp because each of them survived the events based on the protection of the Rwandan military. (Para.360, p.94)
27. The Trial Chamber erred, in law and fact, in concluding that Defense Witness **NBO**'s testimony carried limited weight and lacked impartiality because her husband is related to an accused before the tribunal. (Para.360, p.94)
28. The Trial Chamber erred, as a matter of law and fact, that the Defense's documentary evidence challenging the existence of a Civil Defense program prior to April 1994 did not raise doubt about Witnesses **SLA** and **SAT**'s testimony. (Para.359, pp.93-4)
29. The Trial Chamber erred in law and fact in its finding that killings took place in Mukamira camp, without any independent or objective evidence, and based solely on the testimony of Witnesses **SLA** and **SAT**.

(2) Specific Incorrect Factual Findings

(A) **Differences Between the Testimony of Witnesses SLA & SAT**

30. The Trial Chamber erred in its finding that the differences between the testimony of **SAT** and **SLA** are reasonably explained by their varying vantage point and passage of time. (para.341, p.89)

31. The Trial Chamber erred in its finding that the fundamental features of Witness SLA and Witness SAT's testimony were mostly first-hand account and largely consistent. (Paras.340,344, pp.88-9)
32. The Trial Chamber erred in failing to note the differences in both content and emphasis of the alleged statements attributed to **Appellant** on 25 April 1994, by Witness SLA and Witness SAT and concluding that the differences in their accounts were not surprising or material. (Para.342, p.89)
33. The learned Chamber erred in its finding of fact that Witness SAT's testimony that **Col. Marcel Bivugabagabo, Captain Hasengineza and Lt. Mburuburengero** were present among the attendants while Witness SLA did not list them as present, was not a significant difference. (Para.341, p.89)
34. The learned Chamber erred in its finding of fact that it was not surprising or material that Witness SLA indicated that only **Appellant** addressed the crowd whereas Witness SAT testified that **Bizimungu and Appellant** spoke during that incident. (Para.342, p.89)
35. The Trial Chamber erred in failing to assess the significance that although both Witnesses SLA and SAT claimed that **Appellant** addressed those in attendance, only Witness SLA mentioned **Appellant's** order to establish the roadblock and that he alone discussed the killings of 30-40 Tutsis that evening who were captured at the roadblock at **Appellant's** instruction. (Para.343, p.89)
36. The Trial Chamber erred in law and fact in failing to find that Witness SLA's testimony concerning the killings at the roadblock on 25 April, the contradictions between his prior statements and that of Witnesses SAT were sufficient to raise reasonable doubt. (Para.367, p.96)

37. The Trial Chamber erred in its finding that there was insufficient evidence that Witnesses SAT and SLA's testimony of September 2008 was subject to manipulation by the Rwandese authorities. (Para.339, p.88)
38. The Trial Chamber erred, as a matter of law and fact, in finding that there was not a sufficient basis to conclude that witnesses SLA and SAT colluded in their testimony without more concrete evidence. (Para.339, p.88, fn.409)
39. In its assessment of whether Witnesses SLA and SAT colluded, the Trial Chamber erred, in its factual findings, by ignoring the evidence that Witnesses SLA and SAT gave their first and second statements to the ICTR implicating Appellant on the same date, were both incarcerated in Ruhengeri prison and released to a solidarity camp during the same time period, were interviewed at that solidarity camp on the same date and gave their testimonies in Arusha during the same week. (Para.339, p.88)
40. The Trial Chamber mischaracterized the Defense's assertion of fabrication of evidence as limited primarily to Witness SAA and others implicated in attacks in Mukingo commune. (Para.339, p.88)

(B) **Credibility of Witnesses SLA & SAT**

41. In assessing their credibility, the Trial Chamber erred in rejecting the evidence that Witness SLA and Witness SAT failed to admit in their confessions in Rwanda to crimes they testified to before this Tribunal. (Para.347, p.90)
42. The Trial Chamber erred in law and fact in failing to consider that Witness SLA admitted lying before the Rwandan judicial authorities in assessing his credibility. (T. 16 September 2008 p.60, L.28; p.63, L.12-13; p.64, L.17)

43. The Trial Chamber erred in its failure to find that Witness **SLA**'s unsubstantiated claim of being tortured as an explanation for his lying before the Rwandan judicial authorities, did not affect his credibility. (Fn.417, p.90)
44. The Trial Chamber erred in its finding that it was not surprising that, because Witnesses **SLA** and **SAT** were not charged with the 25 April killings in Rwanda, neither witness would have voluntarily discussed his participation in his confessions to the Rwandan authorities. (Para.348, p.90)
45. The Trial Chamber erred in accepting Witness **SLA**'s explanation that his testimony concerned **Augustin Bizimungu** as a reasonable explanation for the omission in mentioning the alleged killings of 25 April at Mukamira camp in his October 2002 statement to the ICTR. (Para.350, p.90)
46. The Trial Chamber erred as a matter of fact and law in its findings that the inconsistencies and variations between Witness **SAT**'s first statement of September 2002 and his trial testimony are explained because he initially did not trust the ICTR investigators. (Para. 351, p.91)
47. The Trial Chamber erred in its legal and factual findings that Witness **SAT**'s trial testimony was credible and consistent with his 2002 statement, that during the 3 months that he spent at Mukamira camp, that each time, Tutsi soldiers went to the front, the other soldiers exterminated their relatives at the camp. (Para.352, fn.428, p.91)
48. The Trial Chamber erred in its legal and factual finding that Witness **SLA**'s failure to testify about the 25 April meeting and subsequent killings in the *Ndindiliyimana* case could be explained because that event was not part of that case. (Para.354, pp.91-2)

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49. The Trial Chamber erred in its legal and factual findings that Witness SLA's contradictory statement that **Augustin Bizimungu** was not at Mukamira camp on 25 April, was not significant. (Para.355, p.92)
50. The Trial Chamber erred, in law and fact, in accepting the contradictory and conflicting testimony of Witness SLA in the *Ndindiliyimana* trial concerning his presence at Mukamira camp on May 11, as not affecting his overall credibility. (Paras.357-8, fn 443, p.93)
51. The Trial Chamber erred in its findings of fact and law that despite Witness SLA and SAT's conflicting and contradictory statements concerning the events of May 11, their testimony was credible. (Para.344, p.89)
52. The Trial Chamber erred in its failure to find that SAT's testimony in the *Ndindiliyimana et al* trial in which he claimed that the 25 April meeting actually occurred on 25 May was a serious contradiction and therefore raised questions about his credibility. (Para.356, p.92)

(C) **Defense Expert's testimony**

53. The Trial Chamber erred in law and fact in attaching limited weight to Defense Expert **Bert Ingelaere's** report and testimony in assessing **Appellant's** responsibility for crimes at Mukamira camp. (Para.82, p.22)
54. The Trial Chamber erred in law and fact in its finding that Defense Expert **Bert Ingelaere's** report and findings concerning the allegations at Mukamira camp were insufficient to raise reasonable doubt. (Para.365, pp.95-6)

- 55. The Trial Chamber erred in law in shifting the burden of proof to the Defense to prove that the Defense Expert's predictions regarding the probability of the **Appellant** being mentioned in Gacaca proceedings were correct. (Para.81, p.22)

- 56. The Trial Chamber erred in fact in finding that the Defense Expert did not consider the specific context of Gacaca proceedings in Kigali and Ruhengeri, where the **Appellant's** name would appear, in making his conclusions since two of the five geographic areas in which he conducted the fieldwork upon which his report is based, were Kigali and Ruhengeri. (Para.83, p.22; T.23 June 2009, p.7; T.24 June 2009, p.5)

- 57. The Trial Chamber erred in law and fact in using the above false premise to diminish the weight of the Expert's conclusions. (Para 83, p.22)

- 58. The Trial Chamber erred as a matter of law and fact in failing to attach sufficient weight to the Defense Expert's opinion that given the sheer number and geographic range of allegations against the **Appellant**, certain predictions can be made, notwithstanding the limitations of the Gacaca proceedings to uncover truth. (Para 83, p. 22)

(D) **Defense Witnesses' testimony**

- 59. The Trial Chamber abused its discretion in discrediting the Defense witnesses' testimony that no massacres of Tutsis took place at Mukamira camp in April and May 1994, as due to their varying vantage points at the time of the killings and limited knowledge of camp activities. (Para.361, p.94)

- 60. The Trial Chamber's finding that the killings at Mukamira camp could have occurred on 25 April and 11 May 1994, without Defense witnesses hearing about them defies logic and commonsense. (Para.361, p.94)

61. The Trial Chamber erred in law and fact in failing to provide a reasoned and balanced evaluation of Defense Witness **NDI**'s testimony that she passed the site of the alleged massacres and decomposing corpses, twice a week to attend church services, in assessing reasonable doubt that any killings occurred at the camp. (Para 361, p.94)
62. The Trial Chamber erred in law and fact in its assessment of reasonable doubt by rejecting the totality of the Defense witnesses' testimony concerning whether any killings took place at Mukamira camp. (Para.361, p.94-5, see also trial transcripts of NBO at T.6 May 2009, p.36, L.31-35; NDI at T.11 May 2009, p.36, L.31-37; p.37, L.1-9; NEC at T. 19 May 2009, p.35, L.23-31; NCA at 27 May 2009, p.2, L.23-30)
63. The Trial Chamber erred in law and fact by failing to find that Defense Witnesses **NCA** and **NEC**'s specifically contradicted Witness **SAT**'s testimony concerning the death of the family members of a Tutsi soldier named **Mironko** in 25 April at Mukamira camp, thereby raising reasonable doubt whether the killings took place. (Para.362, p.95, fn.450)
64. The Trial Chamber erred in law and fact by failing to find that Witness **NEC** and **NDI**'s contradiction of Witness **SLA** and **SAT**'s testimony on the presence of **Captain Hasengineza** at Mukamira camp during April and May 1994 raised reasonable doubt. (Para.363, p.95)
65. The Trial Chamber abused its discretion in requiring Witness **NEC** and **NDI** to have a basis of knowledge in matters of military deployment as a pre-requisite for accepting their eye-witness testimony on the presence of **Captain Hasengineza** at Mukamira camp during April and May 1994. (Para 363, p. 95)
66. The Trial Chamber erred in law and fact in failing to find reasonable doubt, given **SLA**'s assertion that all Tutsis in the camp were killed which contrasted with the testimony of Defense witnesses including 2 Tutsis (Witnesses **NEC** and **NCA**) who testified that the Tutsis they knew at the camp survived. (Para.364, p.95)

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67. The Trial Chamber erred in law and fact in failing to give sufficient weight to the evidence that **Appellant** during the period between April 24 and May 18, 1994 was involved in judicial investigations which raised reasonable doubt as to his presence at Mukamira camp on 25 April and 11 May (Paras.331-2, p.86, fn 402, 403)

III. RELIEF REQUESTED

68. For all of the reasons outlined above, the **Appellant** submits that the findings of guilt on Counts 1, 4 and 5 of the Amended Indictment are:

- a) Wrong in law;
- b) Wrong in fact;

69. And requests that the Appeals Chamber:

- a) OVERTURN the verdicts of the Trial Chamber on Counts 1, 4 and 5 of the Amended Indictment; and
- b) SUBSTITUTE verdicts of Not Guilty on each Count; and
- c) RELEASE the **Appellant** from detention without delay.
- d) Or, in the alternative, the **Appellant** requests that the Appeals Chamber:
- e) ORDER a Retrial and Immediately Release the **Appellant** on Bail Pending Commencement of the Retrial; or, again, in the alternative;
- f) QUASH the sentence of imprisonment for 25 years; and
- g) The Defense reserves the right to apply for leave to amend or otherwise vary the Grounds of Appeal, as circumstances may dictate but in particular, after the **Appellant** has been served with and considered the Judgment in a language, which he understands;
- h) The **Appellant** reserves the right to amend and add to these Grounds of Appeal in the **Appellant's** Brief;
- i) The **Appellant** specifically reserves the right to add new grounds of appeal on the basis of new evidence not available to it at trial, and to call any such evidence (Rule 115);
- j) The **Appellant** considers that the record on appeal should consist of the whole trial record (Rule 109);

70. The **Appellant** notifies the Appeals Chamber that it will be requesting an oral hearing of the Appeal in open court (Rule 114).

14/A

Dated: New York, N.Y.

30th day of March 2010

Respectfully Submitted,


/s/ Lennox S. Hinds

PROFESSOR LENNOX S. HINDS

Lead Counsel on behalf of Appellant



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input checked="" type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS M. Diop	<input type="checkbox"/> Appeals Chamber / The Hague R. Muzigo-Morrison K. K. A. Afande
From:	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence Prof. Lennox S. Hinde (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. Setako		Case Number: ICTR-1-04-81-A	
Dates:	Transmitted: 2010-03-30		Document's date: 2010-03-30	
No. of Pages:	16	Original Language:	<input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
Title of Document:	APPELLANT'S NOTICE OF APPEAL			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Ex-Parte		<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Decision <input type="checkbox"/> Affidavit <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Submission from parties		
<input type="checkbox"/> Confidential		<input type="checkbox"/> Disclosure <input type="checkbox"/> Order <input type="checkbox"/> Appeal Book <input type="checkbox"/> Accused particulars		
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Judgement <input type="checkbox"/> Motion <input type="checkbox"/> Book of Authorities		

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

English French Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	<input type="checkbox"/> English <input type="checkbox"/> French <input checked="" type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English <input type="checkbox"/> French <input checked="" type="checkbox"/> Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

English French Kinyarwanda

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<input type="checkbox"/> The OTP is overseeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	<input type="checkbox"/> DEFENCE is overseeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:
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III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	COMMENTS	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: