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

APPEALS CHAMBER

Case No. ICTR-66-2001-T

ENGLISH
Original: FRENCH

Before: Judge Fausto Pocar, presiding

Registrar: Adama Dieng

Date filed: 19 January 2007

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THE PROSECUTOR

v.

ATHANASE SEROMBA

ATHANASE SEROMBA'S NOTICE OF APPEAL

Office of the Prosecutor:
Hassan Bubacar Jallow
James Stewart
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17-12-1A

FATHER ATHANASE SEROMBA HEREBY APPEALS THE JUDGEMENT RENDERED AND THE SENTENCE IMPOSED BY TRIAL CHAMBER III ON 13 DECEMBER 2006

Introduction

1. The trial of Father Seromba started on 20 September 2004 and ended on 28 June 2006.

2. By unanimous decision rendered on 13 December 2006, the Appellant was found guilty by Trial Chamber III of the following counts:

Count 1: **Genocide**

Count 4: **Crime Against Humanity (extermination)**

3. The Trial Chamber dismissed Count 2 and returned a not guilty verdict against the Appellant on Count 3.

4. The Trial Chamber sentenced the Appellant to 15 years' imprisonment on the counts of genocide and crime against humanity.

5. The Appellant lodges the present appeal pursuant to Article 24 of the Statute of the Tribunal, and Rule 108 of the Rules of Procedure and Evidence.

6. In the following grounds of appeal, and unless otherwise indicated, the expression "**error on a question of law**" or "**error of law**" means an error on a question of law invalidating the decision within the meaning of Article 24(1)(a) of the Statute, which provides:

"1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) An error on a question of law invalidating the decision; or

(b) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers."

The expression "**error of fact**" means an error of fact which has occasioned a miscarriage of justice, within the meaning of Article 24(1)(b) of the Statute.

7. Furthermore, each ground of appeal is numbered, titled, and indicates the verdict impugned, the nature of the error or errors committed, and the relief sought on appeal.

THE APPELLANT HEREBY SUBMITS THE FOLLOWING GROUNDS OF APPEAL TO THE APPEALS CHAMBER:

GROUNDS OF APPEAL

A. GROUND OF APPEAL BASED ON THE VIOLATION OF THE ACCUSED'S RIGHT TO HAVE ADEQUATE TIME AND FACILITIES FOR THE PREPARATION OF HIS DEFENCE, VIOLATION OF THE EQUALITY-OF-ARMS PRINCIPLE, THE ACCUSED'S RIGHT TO EXAMINE, OR HAVE EXAMINED, THE WITNESSES AGAINST HIM AND TO OBTAIN THE ATTENDANCE AND EXAMINATION OF WITNESSES ON HIS BEHALF UNDER THE SAME CONDITIONS AS WITNESSES AGAINST HIM

8. 1. In an oral decision on 21 April 2006, the Trial Chamber ordered the Defence to have the Accused testify before the last witness, PS2, even though Witness PS2 was scheduled – with the Trial Chamber's approval – to testify before the Accused.

On 24 April 2006, the Defence requested the Trial Chamber not to order the Accused to testify before Witness PS2; the Chamber denied the request, holding that its Decision of 21 April 2006 did not breach Article 20 of the Statute, or Rule 85 of the Rules of Procedure and Evidence, and that it did not require the Appellant to testify against his will, but simply reversed the order of appearance of Witness PS2 and the Accused, in order to keep to the schedule for the closure of the Defence case.

But, in fact, this was done in order to keep to the Trial Chamber's own schedule, as, in an attempt to make up for this patent inequity later on, the Trial Chamber allowed the Accused's oral request to make a final statement, after both the Prosecution and the Defence had rested. This is unique in the Tribunal's judicial history, because such a procedure is not provided for in the Statute or in the Rules.

Lastly, in a civil law system, the one to which the Accused belongs, the accused's right to testify last is considered to be a cardinal principle in a criminal case, as he is in a better position to defend against all the charges against him. In denying Father Athanase Seromba this inalienable right, the Chamber seriously violated his rights and caused him immense prejudice.

The Defence is still of the view that the Accused's testimony, just like that of Witness PS2, is indispensable to the discovery of the truth.

See (in this respect: *Requête en extrême urgence de la Défense aux fins de reconsidération de la décision du 21 avril 2006 concernant la comparution de l'accusé en qualité de témoin, sur le fondement des dispositions des articles 85.c du Règlement de procédure et de preuve et 20 du Statut, dated 24 April 2006*)

The Defence subsequently filed with the Bureau of the Tribunal a Motion for disqualification of the Chamber, which Motion was dismissed on 25 April 2006.

9. This ground of appeal is based, *inter alia*, on Article 20(4) of Statute and Rule 85 of the Rules of Procedure and Evidence.

Section I - GROUND OF APPEAL BASED ON THE TRIAL CHAMBER'S FINDINGS ON THE OBJECTIONS AS TO DEFECTS IN THE FORM OF THE INDICTMENT RAISED IN THE DEFENCE PRELIMINARY MOTION, WHICH DEFECTS PREVENTED THE ACCUSED FROM MAKING FULL ANSWER AND DEFENCE

10. 1. In endorsing in its Judgement an Indictment that did not clearly specify the material facts of the offences charged, the Trial Chamber denied the Accused the right to make full answer and defence.

Even though Rule 72 of the Rules of Procedure and Evidence provides for the filing of a preliminary motion alleging hidden defects in the Indictment within a specific time limit during the pre-trial phase, the Appeals Chamber acknowledges, however, that the Trial Chamber has a discretion to deal with the matter at a later stage in the trial, by re-opening proceedings if necessary, if such defects are so serious as to affect the fairness of the trial.

It seems, indeed, that the Trial Chamber accepted the Prosecution's submissions in its Judgement without analyzing them or thoroughly considering the actual nature of the plan devised and executed by Father Seromba to exterminate the Tutsi, the date and place of its conception, those who devised it, the means used to execute it and the exact role of the Accused in its conception, planning, and execution.

See in this respect, the Appeals Chamber's reasoning in:

Ntagerura, Bagambiki & Imanishimwe v. The Prosecutor, Appeals Chamber Judgement, 7 July 2006, paragraph 55.

11. This ground of appeal is based, *inter alia*, on sub-Articles 20(2), 20(4)(a) and 20(4)(b) of the Statute.

Section II. ERRORS OF LAW AND OF FACT IN THE JUDGEMENT ON THE MERITS

12. Father Athanase Seromba prays the Appeals Chamber to reverse the Judgement of Trial Chamber III rendered on 13 December 2006 in that it convicted him of the crime genocide, crime against humanity (extermination), and sentenced him on those counts.

His conviction is based on errors of law invalidating the decision and on errors of fact that have occasioned a miscarriage of justice, as will be demonstrated *infra*.

In support of his appeal, the Appellant hereby reiterates all the submissions contained in his Final Trial Brief.

13. GENERAL AND BASIC OBSERVATIONS

The Trial Chamber erred in law:

- In relying on erroneous definitions of the crimes charged;

- In omitting to identify the material facts of each crime and the Accused's specific role in the commission thereof.
- In omitting to identify and thoroughly assess the evidence adduced.

In particular, the Appellant intends to raise the following grounds of appeal:

I. GROUND OF APPEAL BASED ON THE TRIAL CHAMBER'S FINDINGS ON COUNT 1: GENOCIDE

14. In light of its factual findings, the Trial Chamber misapplied the law in finding Father Athanase Seromba guilty of aiding and abetting genocide, which resulted in the killing of members of a group and also caused them serious bodily and mental harm, and of crime against humanity (extermination) for participating in the events in Nyange, Kivumu Commune, between 6 and 20 April 1994, which culminated in the destruction of the church.

15. This ground of appeal is based on the Trial Chamber's incorrect characterization of its own assessment of the facts, notably its factual findings, in finding Father Athanase Seromba guilty of the counts of genocide and crime against humanity (extermination) in relation to the events at Nyange Parish.

16. The Trial Chamber states, notably at paragraph 32 of the Judgement, that the allegations in paragraphs 5, 33, 34, 35 and 45 of the Indictment briefly describe a plan of extermination involving the Accused, even though he is not charged with any specific act; it concludes that these allegations are general in nature, in other words, unsubstantiated.

How could it then return a verdict of guilty against the Accused for the crime of genocide and crime against humanity, without contradicting itself, since there was no plan for the extermination of the Tutsi in Nyange? The contradiction is all the more flagrant, as the Chamber acknowledges at paragraph 54 of the Judgement that the Tutsi voluntarily sought refuge at Nyange Church.

I.A. GROUND OF APPEAL BASED ON THE ALLEGATION THAT FATHER ATHANASE SEROMBA PREVENTED THE REFUGEES FROM TAKING FOOD FROM THE PARISH BANANA PLANTATION AND ORDERED GENDARMES TO SHOOT ANY "INYENZI" ATTEMPTING TO TAKE BANANAS FROM THERE

1. Allegation that Father Seromba prevented the refugees from taking food from the banana plantation

17. The Trial Chamber convicted Father Athanase SEROMBA for genocide on the grounds that he prevented the refugees from taking food from the banana plantation and instructed gendarmes to shoot any *Inyenzi* attempting to get bananas from there (see paras. 86 to 95 of the Judgement).

a/- The Trial Chamber's reasoning does not stand up to factual scrutiny, as it is contrary to the truth

18. It emerges from the impugned Judgement, (paras. 83-85), and notably from the testimony of Witnesses CBS, CBK, PA1 and FE56, that the church was surrounded and, as the record reveals, the refugees could not leave the church and go to the banana plantation without risking certain death. Therefore, Father Athanase Seromba had no compelling reason to give such an incomprehensible and pointless order, given that the refugees came to the church of their own free will and Father Seromba allowed them in.

I.B. GROUND OF APPEAL BASED ON FATHER ATHANASE SEROMBA'S ALLEGED REFUSAL TO CELEBRATE MASS FOR THE "INYENZI"

19. It emerges from paragraphs 97 to 102 of the impugned Judgement that Father Seromba deliberately refused to celebrate mass for the "Inyenzi", meaning the Tutsi refugees.

20. The Trial Chamber's finding is based on fantasy and takes no account whatsoever of the context in which the events occurred.

21. The fact is that, owing to the sheer number of refugees who were staying in the church, it was practically impossible if not inconceivable to celebrate mass there out of respect for the Blessed Sacrament, as the refugees had brought their personal effects, food, and even domestic animals with them into the church; in fact, this is why the priests who were at the parish removed the Blessed Sacrament from the church.

22. Accordingly, it was not because of Father Seromba's refusal that mass was not celebrated during the alleged period, but rather because there was an unavoidable circumstance, owing to the fact that the refugees were staying in the church; nowhere else in the world has mass ever been celebrated in an occupied church.

23. Lastly, the Trial Chamber's finding that Father Seromba's alleged refusal was a constituent element of genocide is not based on rigorous, logical, and coherent legal reasoning that a reasonable trier of fact would reach.

24. Indeed, paragraph 106 of the impugned Judgement reads: "*The Trial Chamber considers that the fact that Witness PA1 testified that the refugees offered no resistance to the removal by Seromba of the sacred objects does not preclude the fact that the refugees may have requested a mass to be celebrated for them (...)*"

" ... The Chamber therefore deems it highly likely that the most fervent among them may have requested Seromba to celebrate mass. For the same reason, the Chamber is of the opinion that the fact that Seromba removed the sacred objects may be interpreted as a refusal of the refugees' request, especially as he continued to celebrate mass from the small chapel as from 11 April 1994".

25. In this instance, the Tribunal does not rely on any probative evidence, but merely puts forward facile philosophical propositions in entering its factual and legal findings; such a course of action is known as speculation and is inadmissible in law, particularly before an international tribunal.

I.C. GROUND OF APPEAL BASED ON THE ALLEGATION THAT FATHER SEROMBA EXPELLED FOUR TUTSI EMPLOYEES (ALEX, FELICIEN, GASORE AND PATRICE) FROM THE PARISH, AND ON THE DEATH OF PATRICE, TO WHOM SEROMBA REFUSED ENTRY TO THE PRESBYTERY

26. The Trial Chamber further asserts at paragraph 108 of the Judgement that following the death of the Rwandan President, Father Athanase Seroma [sic] expelled the Tutsi parish employees named Alex, Félicien, Gasore and Patrice.

27. At paragraph 109 of the Judgement, the Tribunal states: “Witness CBK explained that these employees allegedly returned to the parish on 13 April 1994, but were allegedly expelled by Athanase Seromba who allegedly told them that there was no refuge for them at the parish. The witness further testified that the security situation had become so bad that any Tutsi who ventured outside risked being killed. He further testified that he saw Patrice behind the presbytery, with injuries on his arms and legs. The witness allegedly asked Seromba to come and assist Patrice. Seromba allegedly refused, and instead told Patrice to go away. Seeing that Patrice was still hanging around, Seromba allegedly instructed the gendarmes to make him leave by force. Lastly, the witness testified that he later saw Patrice’s corpse in the presbytery’s inner compound.”

28. In its findings on this specific question of fact, at paragraph 112 of the Judgement, the Chamber states the following:

“The Chamber finds Witness CBK to be credible. There is no contradiction between his testimony at trial and his prior statements. It further finds Witness CBK’s testimony as to the expulsion of the Tutsi employees by Athanase Seromba to be coherent and credible, having regard, notably, to the conditions prevailing at Nyange parish in April 1994.”

29. The Trial Chamber’s finding on this specific point of fact is specious and again speculative. Thus, it raises the legitimate question as to what would have been Athanase Seromba’s interest in expelling employees from a parish he was due to leave very soon, considering that he had already been transferred to another parish called Congo Nil and was due to report there immediately, and that the only reason he was still in Nyange on 6 April were the events following the death of the president. Moreover, he had already received his letter of transfer.

30. Lastly, the Trial Chamber merely asserts that it found Witness CBK to be credible, without taking the trouble to demonstrate the exactitude of such assertion beyond a reasonable doubt.

I.D. GROUND OF APPEAL BASED ON THE KILLING OF NUMEROUS TUTSI REFUGEES, INCLUDING THE TEACHER NAMED GATARE, AND TWO TUTSI WOMEN REFUGEES, ALEXIA AND MERIAM

31. Paragraphs 192 to 199, 201 and 202 state that Tutsi refugees were allegedly prevented from entering the presbytery, and were later killed.

32. The Trial Chamber found beyond a reasonable doubt that Meriam was prevented from entering the presbytery by Athanase Seromba, only to be killed thereafter.

33. The Trial Chamber's finding is entirely false. It is indisputable that Father Seromba spontaneously allowed Meriam to enter the presbytery; there is therefore no objective reason why he would have subsequently chased her and the other refugees away, given that the purpose of the alleged meetings testified to by the Prosecution witnesses was not to organize the extermination of the Tutsi, as acknowledged by the Trial Chamber in its Judgement.

Therefore, the argument that Seromba chased Meriam away so that she could be killed does not stand up to factual scrutiny, and is yet another example of speculation on the part of the Trial Chamber.

I.E. GROUND OF APPEAL BASED ON FATHER ATHANASE SEROMBA'S ALLEGED ROLE IN THE DESTRUCTION OF THE CHURCH

34. This is the focal point of the trial, the Gordian knot: who actually ordered the destruction of Nyange Church? Was it Father Athanase Seromba who ordered it or was it someone else?

35. This fundamental question is addressed in paragraphs 210 to 269 of the Judgement, which deal with the testimony of many witnesses. It is also important to note that the Trial Chamber found Father Seromba guilty of crime against humanity (extermination) on the basis of the factual findings on this question.

36. As to the order to destroy the church, the Trial Chamber does not clearly state, in a manner as to determine precisely the person who gave the order. Instead, it merely finds that "*Athanase Seromba did not personally order the destruction of the church, but that the authorities so ordered and he accepted*".

37. Now, the Prosecutor did not plead this allegation in the Indictment, the Pre-Trial Brief, or the Closing Arguments. It must therefore be the Trial Chamber's fabrication in respect of which the Parties were not afforded the opportunity to make submissions.

Not only did the Trial Chamber act *ultra petita* in reaching such a finding, but it also violated the Accused's right to make full answer and defence.

Moreover, the Trial Chamber did not sufficiently consider the evidence of Defence Witness Anastase Nkinamubanzi, the bulldozer operator, initially cajoled by the Prosecutor who used all sorts of tricks, but in vain, to convince him to testify against Father Athanase Seromba. The witness testified in great detail that Athanase Seromba

did not give him the order to destroy the church, adding that the order came instead from Kayishema.

Lastly, the Trial Chamber chose to disregard the many contradictions between the testimonies of Prosecution Witnesses CBN, CBJ, CDL, notably regarding the key question as to who ordered the destruction of the church.

II. GROUND OF APPEAL BASED ON ERRORS OF LAW REGARDING THE PRINCIPLES OF INDIVIDUAL CRIMINAL RESPONSIBILITY

38. 1. Principles of individual criminal responsibility

1.1 Responsibility under Article 6(1)

- The Trial Chamber erred in law by manifestly confusing the forms of responsibility set forth under Article 6(1) with those under Article 6(3) of the Statute;
- The Trial Chamber erred in law in omitting to specify the Accused’s mode of participation in the crime of genocide and the crime against humanity (Extermination).

39. The Trial Chamber further erred in law in basing the Accused’s responsibility under Article 6(1) purely on *mens rea*, thereby ignoring the requirement to prove an *actus reus*.

As to the sentence imposed on Father Athanase Seromba, the impugned Judgement sets forth no legal basis for establishing his criminal responsibility, namely, the demonstration of a personal and positive act, substantially related to the crime and committed intentionally.

III. GROUND OF APPEAL BASED ON THE DETERMINATION OF THE SENTENCE

40. The Trial Chamber imposed a sentence of 15 years on Father Athanase Seromba for the counts of aiding and abetting the crime genocide and of crime against humanity (extermination).

41. This question is dealt with in paragraphs 373 to 405 of the Judgement; there is no legal basis for Father Athanase Seromba’s individual responsibility under Article 6(1) of the Statute.

42. Here again, the Trial Chamber’s arguments are incoherent, and some would even characterize them as legal absurdity; the same can be said of the Trial Chamber’s very unseemly arguments on the breach of trust, arguments that are entirely extraneous to the offence.

In light of the unsubstantiated charges brought against the Accused and the case-law of the international tribunals on the matter, the Trial Chamber committed errors of law and of fact in handing down a manifestly unfounded sentence against the Accused.

For these reasons,

Father Athanase Seromba submits that the Judgement rendered against him on 13 December 2006 is fraught with errors of law and of fact.

He respectfully prays the Appeals Chamber:

TO REVERSE all the provisions of the Judgement of 13 December 2006 on Father Athanase Seromba's conviction for the crime of genocide and for crime against humanity (extermination)

TO FIND, RULING DE NOVO, the Appellant not guilty of the crime of genocide and crime against humanity (extermination)

TO ACQUIT him and **Order** his immediate release.

TO REVERSE, ACCORDINGLY, the provisions of the Judgement of 13 December 2006 on the 15-year prison sentence handed down against the Appellant,

TO REMIT, alternatively, the case before a differently composed Trial Chamber.

AND JUSTICE SHALL BE DONE.

Done at Arusha on 18 January 2007

Patrice Monthe
Lead Counsel

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Date:	05 February 2007	Case Name / affaire:	Mika MUHIMANA v. The Prosecutor
		Case No / no. de l'affaire:	ICTR-95-1B-A
	Appeal Chamber Unit, The Hague. <input type="checkbox"/> Koffi Afande <input type="checkbox"/> Patrick Tschidimbo <input type="checkbox"/> Ramadhani T. Juma	<input checked="" type="checkbox"/> Judge / Juge Fausto Pocar, Presiding <input checked="" type="checkbox"/> Judge / Juge Fausto Mohamed Shahabuddeen <input checked="" type="checkbox"/> Judge / Juge Fausto Mehmet Guney <input checked="" type="checkbox"/> Judge / Juge Fausto Liu Daqun <input checked="" type="checkbox"/> Judge / Juge Fausto Wolfgang Schomburg	
To:	ACCUSED / DEFENSE <input checked="" type="checkbox"/> Accused / Accusé Muhimana <input type="checkbox"/> see / voir "CMS4a" <input checked="" type="checkbox"/> Lead Counsel / Conseil Principal N. mwene Songa <input type="checkbox"/> Arusha _____ (signature) <input type="checkbox"/> FAX (see / voir CMS3F) <input type="checkbox"/> Co-counsel / Conseil Adjoint: K. Kabimba <input type="checkbox"/> Arusha _____ (signature) <input type="checkbox"/> FAX (see / voir "CMS4") <input type="checkbox"/> OTF / BUREAU DU PROCUREUR <input type="checkbox"/> J. B. Jallow, Chief, Prosecutions <input type="checkbox"/> Arusha _____ (signature) <input type="checkbox"/> FAX (see / voir "CMS3F") <input type="checkbox"/> J. Majola, Deputy Prosecutor <input type="checkbox"/> Arusha _____ (signature) <input type="checkbox"/> FAX (see / voir "CMS3F") <input checked="" type="checkbox"/> Attorney in charge of case <input checked="" type="checkbox"/> Stewart SAC		
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