

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

CASE NO.: ICTR-01-72-A  
APPEALS CHAMBER

SIMON BIKINDI  
v.  
THE PROSECUTOR  
OF THE TRIBUNAL

THURSDAY, 18 MARCH 2010  
0930H  
JUDGEMENT

Before the Judges:

Patrick Robinson, Presiding  
Mehmet Güney  
Fausto Pocar  
Lui Daqun  
Theodore Meron

For the Registry:

Mr. Constant Hometowu  
Ms. Zulphur Mhina

For the Prosecution:

Mr. Hassan Bubacar Jallow  
Mr. George Mugwanya  
Mr. François Nsanzuwera  
Ms. Florida Kabasinga  
Ms. Jane Mukangira

For the Appellant Simon Bikindi:

Mr. Andreas O'Shea

Court Reporter:

Ms. Sherri Knox

## PROCEEDINGS

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MR. PRESIDENT:

Mr. Registrar, will you call the case, please.

MR. HOMETOWU:

Thank you, Mr. President.

The Appeals Chamber of the International Criminal Tribunal for Rwanda, composed of Judge Patrick Robinson, presiding, Judge Mehmet Güney, Judge Fausto Pocar, Judge Liu Daqun and Judge Theodor Meron, is now sitting in open session today, Thursday, the 18th of March 2010, for the delivery of the appeal judgement in the matter of The Prosecutor versus Simon Bikindi, Case No. ICTR-2001-72-A.

Thank you.

MR. PRESIDENT:

Mr. Bikindi, I am to ask you whether you can follow the proceedings in a language that you understand.

Are you able to hear me, Mr. Bikindi?

THE APPELLANT:

Yes, I can hear you, Mr. President.

MR. PRESIDENT:

Thank you very much. And may I now ask the parties to identify themselves, beginning with

Mr. O'Shea.

MR. O'SHEA:

Yes. Good morning, Mr. President, Your Honours. I am Andreas O'Shea, and I represent

Mr. Simon Bikindi. Thank you.

MR. PRESIDENT:

And the appearances on behalf of the Office of the Prosecutor.

MR. JALLOW:

Good morning, Your Honours. With me, the Prosecutor, are George Mugwanya, senior appeals counsel; François Nsanzuwera and Florida Kabasinga, appeals counsel; and Jane Mukangira, associate appeals counsel.

MR. PRESIDENT:

Thank you, Mr. Prosecutor.

This hearing concerns the case of Simon Bikindi against the Prosecutor, and today the Appeals Chamber delivers its judgement.

What I will read is a summary. It is not a part of the written judgement. The written judgement is the

1 only authoritative account of the findings and reasoning of the Appeals Chamber. Copies of the written  
2 judgement will be made available to the parties at the conclusion of this hearing.

3  
4 The Appellant, Simon Bikindi, was born on the 28th of September 1954 in Rwerere *commune*,  
5 Gisenyi *préfecture* in Rwanda. In 1994, he was a composer and singer, and he worked at the ministry  
6 of youth and association movements of the government of Rwanda.

7  
8 Mr. Bikindi was tried on the basis of an amended indictment dated the 15th of June 2005. The  
9 Trial Chamber found him guilty under Articles 2(3)(C) and 6(1) of the Statute of the Tribunal for direct  
10 and public incitement to commit genocide based on public exhortations to kill Tutsis which he made on  
11 the Kivumu-Kayove road in Gisenyi *préfecture* towards the end of June 1994. The Trial Chamber  
12 acquitted Mr. Bikindi of all other charges and imposed a sentence of 15 years.

13  
14 Mr. Bikindi has presented six grounds of appeal challenging his conviction as well as his sentence. He  
15 requests the Appeals Chamber to overturn his conviction and order his release. In the alternative, he  
16 requests that, should his conviction be upheld, the Appeals Chamber order a reduction in his sentence.

17  
18 The Prosecution appeals against the sentence imposed by the Trial Chamber. It requests the  
19 Appeals Chamber to revise the sentence and impose one in the range of 30 years to life imprisonment.

20  
21 The Appeals Chamber heard oral arguments on the 30th of September 2009. And having considered  
22 the written and oral submissions, it now renders its judgement.

23  
24 I will address each of Mr. Bikindi's grounds of appeal in turn before turning to the Prosecution's appeal.  
25 But I will begin by addressing Mr. Bikindi's fifth ground of appeal against his conviction, which alleges  
26 ineffective assistance of co-counsel. Further, I will address a part of Mr. Bikindi's sixth ground of appeal  
27 under the section dealing with his conviction and the other part in the sentencing section of this  
28 summary and the judgement itself.

29  
30 In his fifth ground of appeal, Mr. Bikindi alleges that his case suffered as a result of the purported  
31 ineffective assistance of his co-counsel during the cross-examination of Witness AKJ. In particular,  
32 Mr. Bikindi submits that the cross-examination of Witness AKJ demonstrated that his counsel had an  
33 inadequate knowledge of the rules and method of cross-examination, that he had an inadequate  
34 knowledge of the case, particularly topics related to the examination-in-chief of this witness, and that he  
35 was poorly prepared and disorganised in his method of cross-examining this witness, and also that he  
36 failed to follow Mr. Bikindi's instructions.

1 For the reasons given in the judgement, the Appeals Chamber finds that Mr. Bikindi has not rebutted  
2 the presumption of competence of his co-counsel and has failed to demonstrate ineffective assistance  
3 of counsel in his case. Accordingly, this ground of appeal, which is the fifth ground, is dismissed.  
4

5 Mr. Bikindi submits that the Trial Chamber erred in finding, based on the evidence of Witnesses AKK  
6 and AKJ, that he incited the killing of Tutsis on the Kivumu-Kayove road. In essence, he submits that  
7 the Trial Chamber erred in assessing the testimonies of Witnesses AKK and AKJ, in finding that these  
8 two witnesses corroborated each other, in finding that the incident for which he was convicted occurred  
9 in late June 1994, and in concluding that it was established beyond reasonable doubt that Mr. Bikindi  
10 participated in this incident.

11  
12 For the reasons given in the judgement, the Appeals Chamber dismisses Mr. Bikindi's first and  
13 second grounds of appeal. In particular, the Chamber finds that Mr. Bikindi has failed to demonstrate  
14 that no reasonable trier of fact could have relied on Witnesses AKK's and AKJ's testimonies in relation  
15 to Mr. Bikindi's conduct on the Kivumu-Kayove road.  
16

17 Mr. Bikindi argues that the Trial Chamber's findings related to the Kivumu-Kayove road incident should  
18 be reversed, as the Trial Chamber erred in law by failing to take judicial notice of or consider the  
19 movements of *Opération Turquoise* troops in its assessment of the likelihood of Mr. Bikindi making  
20 statements over a loudspeaker in Gisenyi *préfecture* in June 1994. In the alternative, he argues that  
21 the Trial Chamber erred in rejecting his request to take judicial notice of this fact in its decision of the  
22 27th May 2008. Mr. Bikindi further submits that it is a fact of common knowledge that  
23 *Opération Turquoise* began its mission on the 22nd of June 1994, landing in Goma, and that a  
24 contingent of troops made their way to Kibuye in Rwanda. Mr. Bikindi argues that this fact is relevant to  
25 his conviction because these troops would have taken the Kivumu-Kayove road during the same period  
26 in which he allegedly incited genocide at this location.  
27

28 He argues that no reasonable trier of fact, having considered this fact together with the other evidence,  
29 calling into question the commission of this offence in June, as well as the evidence of his absence  
30 from Rwanda from 4th April until 12th June 1994, would have been satisfied beyond reasonable doubt  
31 that he could have committed direct and public incitement on the Kivumu-Kayove road in  
32 June 1994.  
33

34 The Appeals Chamber recalls that on the 27th of May 2008 the Trial Chamber rejected Mr. Bikindi's  
35 motion for judicial notice in relation to *Opération Turquoise*, mainly on the grounds that he should have  
36 raised this matter during trial rather than five months after the closure of the Defence case.  
37

1 The Appeals Chamber finds that the Trial Chamber erred in rejecting Bikindi's motion solely on the  
2 basis of its late filing. The Trial Chamber should have considered whether the facts at issue were facts  
3 of common knowledge, and, if so, whether they were relevant to Mr. Bikindi's case. However, while the  
4 Trial Chamber erred in dismissing the application on the ground that it was untimely, the  
5 Appeals Chamber is not satisfied that the facts submitted by Mr. Bikindi were capable of being judicially  
6 noticed by the Trial Chamber. The information contained in these documents regarding the movements  
7 of the troops of *Opération Turquoise* do not qualify as facts commonly accepted or universally known or  
8 beyond reasonable dispute. And as a consequence, the Appeals Chamber finds that the  
9 Trial Chamber's error did not invalidate the decision.

10  
11 For the reasons given in the judgement, this, the third ground of appeal, is dismissed.

12  
13 Under the fourth ground of appeal, Mr. Bikindi argues that the Trial Chamber committed a number of  
14 errors of fact and law in assessing the Defence evidence. Specifically, he argues that the  
15 Trial Chamber erred by failing to give weight or sufficient weight to the evidence of Defence witnesses  
16 regarding Mr. Bikindi's movements in June 1994, Defence evidence relating to Mr. Bikindi's participation  
17 in a meeting in Kivumu in 1993, and the evidence of Charles Zilimwabagabo that, in 1994, the witness  
18 and Wellars Banzi spoke out against the killings.

19  
20 For the reasons given in the judgement, the Appeals Chamber dismisses Mr. Bikindi's fourth ground of  
21 appeal. And, in particular, the Appeals Chamber finds that:

22  
23 One, contrary to his contention, the fact that the Prosecution did not prove or even allege that  
24 Defence witnesses were giving false testimony did not prevent the Trial Chamber from exercising its  
25 discretion in assessing the weight to be attached to their evidence. The Appeals Chamber recalls that  
26 a credibility determination may be based, but does not necessarily depend, on a judicial finding that a  
27 witness has given false testimony.

28  
29 Mr. Bikindi has not demonstrated that no reasonable trier of fact could have reached the conclusion that  
30 none of the evidence raised a reasonable doubt as to the possibility of making the return journey  
31 between Kivumu and Kayove on the same day.

32  
33 And, thirdly, Mr. Bikindi has not demonstrated that no reasonable trier of fact could have concluded that  
34 he spoke at a rally in Kivumu in June 1993. Further, contrary to Mr. Bikindi's submission, the  
35 Trial Chamber did consider Mr. Bikindi's evidence to the effect that he did not give speeches at other  
36 political rallies.

1 In his sixth ground of appeal, Mr. Bikindi submits that the Trial Chamber erred in fact in its evaluation of  
2 the evidence relating to his association with the MRND and the *Interahamwe*. He argues that these  
3 errors influenced the Trial Chamber's assessment of Witnesses AKJ's and AKK's testimonies relating to  
4 the Kivumu-Kayove road incident and the sentence imposed on him.

5  
6 The Appeals Chamber finds that it was properly within the Trial Chamber's discretion as the primary  
7 trier of fact to make findings as to the perceived influence or authority of Mr. Bikindi within the MRND  
8 and the *Interahamwe* based on the totality of the evidence before it.

9  
10 And for the reasons given in the judgement, the Chamber dismisses this part of Mr. Bikindi's  
11 sixth ground of appeal.

12  
13 I turn now to Mr. Bikindi's appeal on sentence.

14  
15 He contends that the Trial Chamber erred in law and in fact in sentencing him to 15 years'  
16 imprisonment. He requests that his sentence be revised and reduced.

17  
18 In particular, he submits that the Trial Chamber erred in imposing a sentence of 15 years' imprisonment  
19 that is disproportionate to the gravity of the offence and that is manifestly excessive, in failing to  
20 consider comparative national court practice in determining the effect of the gravity of the offence on  
21 sentence, and in its analysis of his individual circumstances and applicable mitigating factors.

22  
23 The Appeals Chamber considers that Mr. Bikindi has failed to demonstrate any discernible error in the  
24 Trial Chamber's assessment of the gravity of the offence, or that it erred in failing to consider  
25 comparative national court practice in determining the effect of the gravity of the offence on sentencing.  
26 The Appeals Chamber further finds that Mr. Bikindi has not demonstrated that the Trial Chamber  
27 committed a discernible error in its assessment of his individual mitigating circumstances and, having  
28 done so, in its decision to accord no weight to these circumstances.

29  
30 The Appeals Chamber has also considered Mr. Bikindi's submission originally raised in his sixth ground  
31 of appeal that the Trial Chamber erred in fact in its evaluation of the evidence relating to his association  
32 with the MRND and the *Interahamwe*. He argues that these errors led to a miscarriage of justice  
33 because, according to him, they would have influenced the Trial Chamber's findings with respect to  
34 sentencing.

35  
36 In particular, Mr. Bikindi challenges the Trial Chamber's reliance on Exhibit P. 30, which consists of a  
37 video allegedly depicting an MRND rally and the transcript of the video.

1 The Appeals Chamber finds that the Trial Chamber abused its discretion by relying on Exhibit P. 30 to  
2 support its finding that Mr. Bikindi spoke at an MRND rally in Nyamirambo stadium on the  
3 7th of November 1993, and in relying on this exhibit to find that Mr. Bikindi was perceived to be an  
4 influential member of the MRND. But the Chamber is satisfied that the Trial Chamber based its finding  
5 regarding the Appellant's influence on sufficient other evidence before it and not merely on the  
6 evidence of the Nyamirambo stadium rally. Accordingly, the Appeals Chamber does not consider that  
7 the Trial Chamber's error impacted on the validity of its overall finding that the Appellant was perceived  
8 as an important and influential member of the MRND. The Appeals Chamber, therefore, considers that  
9 the Trial Chamber's erroneous reliance on Exhibit P. 30 does not impact on the validity of the  
10 Trial Chamber's ultimate findings with respect to Mr. Bikindi's sentence.

11  
12 For the reasons given in the judgement, Mr. Bikindi's appeal on sentencing, including the remainder of  
13 the sixth ground of his appeal, is accordingly dismissed.

14  
15 May I turn now to the Prosecution's appeal.

16  
17 The Prosecution contends that the Trial Chamber failed to consider or give sufficient weight to several  
18 aggravating factors in determining the sentence, namely, the manner by and the context within which  
19 Mr. Bikindi committed the crime and Mr. Bikindi's stature and authority in Rwanda. The Prosecution  
20 further argues that the Trial Chamber abused its discretion by imposing a sentence of 15 years of  
21 imprisonment without any explanation justifying its leniency and by failing to give sufficient account to  
22 the absence of any mitigating factors. The Prosecution also submits that the Trial Chamber committed  
23 a discernible error by not taking into account the general sentencing practice in Rwanda or the relevant  
24 jurisprudence of this Tribunal, which, it avers, would have supported the imposition of a higher  
25 sentence. And, finally, it contends that the sentence of 15 years is inappropriate for the crime of direct  
26 and public incitement to commit genocide.

27  
28 Having addressed the Prosecution's arguments, the Appeals Chamber find as follows:

29  
30 One, the Prosecution has not established that the Trial Chamber gave insufficient weight to  
31 Mr. Bikindi's stature in Rwandan society as an aggravating factor.

32  
33 Two, the Prosecution has failed to demonstrate that the Trial Chamber abused its discretion by failing to  
34 accord sufficient weight to the absence of any mitigating factors in this case. Contrary to the  
35 Prosecution's assertion, the Trial Chamber was not obliged to accord sufficient weight to the absence of  
36 mitigating factors in this case.

1 Three, contrary to the Prosecution's submissions, the Trial Chamber took into account the maximum  
2 sentence available under Rwandan law in the context of all other relevant factors, general as well as  
3 individualised, in determining the appropriate sentence in this case.

4  
5 And four, the Trial Chamber did not err in failing to take into account the Tribunal's sentencing practice.  
6 In this regard, the Appeals Chamber recalls that Trial Chambers have brought discretion to tailor the  
7 penalties to fit the individual circumstances of the accused and the gravity of the crime and that  
8 comparison between cases is thus generally of limited assistance.

9  
10 Accordingly, for the reasons given in the judgement, the Appeals Chamber dismisses the Prosecution's  
11 appeal on sentence in its entirety.

12  
13 Finally, the Appeals Chamber notes that the Trial Chamber erroneously considered that Mr. Bikindi was  
14 arrested on the 12th of June 2001 and granted him credit for time served as of that date, whereas  
15 Mr. Bikindi was arrested on 12th July 2001.

16  
17 Although the Appeals Chamber has an inherent power to correct *proprio motu* a material error  
18 committed by the Trial Chamber, it considers that, in the circumstances of this case, it will not disturb  
19 the Trial Chamber's ruling.

20  
21 I will now read out the operative paragraph of the Appeals Chamber's disposition.

22  
23 Mr. Bikindi, will you kindly stand.

24  
25 For the foregoing reasons, the Appeals Chamber, pursuant to Article 24 of the Statute and Rule 118 of  
26 the Rules, noting the written submissions of the parties and their oral arguments presented at the  
27 hearing on the 30th of September 2009, sitting in open session, dismisses Simon Bikindi's appeal in its  
28 entirety; dismisses the Prosecution's appeal in its entirety; affirms the Appellant's conviction for direct  
29 and public incitement to commit genocide under Count 4 of the indictment; affirms the Appellant's  
30 sentence of 15 years' imprisonment entered for this conviction, subject to credit being given under  
31 Rule 101(D) and Rule 107 of the Rules since 12 June 2001; rules that this judgement shall be enforced  
32 immediately pursuant to Rule 119 of the Rules; and orders, in accordance with Rules 103(B) and 107 of  
33 the Rules, that Simon Bikindi is to remain in the custody of the Tribunal pending his transfer to the state  
34 in which his sentence will be served.

35  
36 Mr. Bikindi, you may now sit.



1 And I will now ask the registrar to hand copies of the judgement to the parties in this case.

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3 The hearing stands adjourned.

4 *(Court adjourned at 1000H)*

5 *(Pages 1 to 8 by Sherri Knox)*

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## CERTIFICATE

I, Sherri Knox, Official Court Reporter for the International Criminal Tribunal for Rwanda, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand (*stenotype*) and thereafter transcribed by computer; that the foregoing pages contain a true and correct transcription of said proceedings to the best of my ability and understanding.

I further certify that I am not of counsel nor related to any of the parties to this cause and that I am in nowise interested in the result of said cause.

\_\_\_\_\_  
Sherri Knox