



**Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda**

**IN THE APPEALS CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Carmel Agius

**Registrar:** Mr. Adama Dieng

**Judgement of:** 28 September 2011

**Ephrem SETAKO**

**v.**

**THE PROSECUTOR**

*Case No. ICTR-04-81-A*

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**SUMMARY OF JUDGEMENT**

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**Counsel for the Appellant**

Prof. Lennox Hinds

**Office of the Prosecutor**

Mr. Hassan Bubacar Jallow  
Mr. James J. Arguin  
Ms. Deborah Wilkinson  
Mr. Ousman Jammeh  
Ms. Thembile Segoete  
Ms. Christina Fomenky  
Ms. Betty Mbabazi

The Appeals Chamber is sitting today in accordance with Rule 15*bis* of the Rules of Procedure and Evidence of the Tribunal in the absence of the Presiding Judge, Judge Robinson, who is unable to attend today's proceedings. The Presiding Judge has designated Judge Güney as the senior judge on the panel to pronounce the judgement.

Mr. Setako and the Prosecution both appealed the Trial Judgement rendered in this case on 25 February 2010 by Trial Chamber I. Today, the Appeals Chamber will deliver its judgement in this case. The text of the judgement will not be read out, except for the disposition. Instead, the main issues raised on appeal and the findings of the Appeals Chamber will be summarised.

The following summary is not a 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.

## **I. BACKGROUND OF THE CASE**

Briefly, the background of this case is as follows. Ephrem Setako was born on 5 May 1949 in Nkuli commune, Ruhengeri prefecture, Rwanda. In 1994, he held the rank of Lieutenant Colonel in the Rwandan Army and served as head of the legal affairs division of the Rwandan Ministry of Defence. The Trial Chamber convicted him of genocide under Article 6(1) of the Statute for ordering the killings of 30 to 40 Tutsis at Mukamira military camp on 25 April 1994 and the killings of nine or ten Tutsis at this camp on 11 May 1994. With regard to the killings on 25 April 1994, the Trial Chamber further entered a conviction for extermination as a crime against humanity and violence to life, health, and physical or mental well-being of persons (murder) as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Trial Chamber sentenced Mr. Setako to a single term of 25 years of imprisonment.

## **II. THE APPEALS**

Both parties appealed the Trial Judgement.

## **III. SETAKO'S APPEAL**

Mr. Setako divided his grounds of appeal into two main categories: (i) errors of law; and (ii) errors of fact. Within these categories, the Appeals Chamber identified five main issues.

### **1. Alleged Violation of Fair Trial Rights**

Mr. Setako submits that the Trial Chamber violated his right to be tried without undue delay because it allowed the Prosecution to amend the indictment in 2007, more than three years after its confirmation in 2004. In this context, Mr. Setako also contends that the amended indictment significantly expanded the case against him and that he was therefore unable to devote the necessary resources to investigate the charges relating to the 25 April and 11 May Killings.

The Appeals Chamber finds that Mr. Setako has failed to demonstrate that the Trial Chamber committed a discernible error in this respect. He has not shown that any delay in the pre-trial or trial proceedings resulted from the amendment of the indictment. Moreover, the crimes for which Mr. Setako was convicted were already included in the original indictment. He does not explain why he could not fully investigate these allegations before the indictment was amended. The Appeals Chamber further finds that Mr. Setako was afforded a reasonable period of time after the filing of the amended indictment to complete the preparation of his case.

Accordingly, the Appeals Chamber dismisses Mr. Setako's arguments.

## 2. Alleged Errors in the Assessment of Evidence

Mr. Setako submits that the Trial Chamber committed various errors of law and fact in its assessment of the Prosecution and Defence evidence relating to the 25 April and 11 May Killings. evidence.

### (a) Prosecution Evidence

Mr. Setako's conviction for the 25 April and 11 May Killings is based on the evidence of Prosecution Witnesses SLA and SAT. Mr. Setako submits that, for various reasons, the Trial Chamber erred in finding these witnesses credible.

He first argues that the Trial Chamber erred in its assessment of prior confessions and statements provided by the witnesses and their effect on the witnesses' credibility. The Appeals Chamber finds that Mr. Setako has not shown that the Trial Chamber ignored any material inconsistency between the confessions and statements of Witnesses SLA and SAT and their testimonies at trial. Neither has Mr. Setako demonstrated that the Trial Chamber erred in its assessment of inconsistencies.

Second, Mr. Setako contends that the Trial Chamber failed to properly consider inconsistencies between Witness SLA's testimony in the present case and his testimony in the *Ndindiliyimana et al.* case. The Appeals Chamber finds that the Trial Chamber took all inconsistencies alleged by Mr. Setako into account and reasonably found that they did not call into question Witness SLA's evidence.

Third, Mr. Setako contends that the Trial Chamber ignored significant contradictions between Witnesses SLA's and SAT's testimonies at trial. The Appeals Chamber finds that the Trial Chamber took into account any significant inconsistencies in this respect and reasonably found that they did not cast doubt on the Prosecution's case.

Fourth, Mr. Setako submits that the Trial Chamber erroneously failed to find that Witnesses SLA and SAT had colluded and that their evidence about the 25 April and 11 May Killings had been manipulated and fabricated. The Appeals Chamber finds that the Trial Chamber did not commit any error in concluding that there was insufficient evidence to establish such allegations.

Finally, Mr. Setako asserts that the Trial Chamber did not treat Witnesses SLA's and SAT's evidence with appropriate caution even though they were his alleged accomplices. In particular, Mr. Setako suggests that the Trial Chamber erred in concluding that the witnesses were credible because they exposed themselves to criminal liability by acknowledging that they had participated in crimes at Mukamira camp on 25 April 1994. The Appeals Chamber finds that the Trial Chamber was well aware of the criminal records of Witnesses SLA and SAT and that Mr. Setako has not demonstrated that it failed to exercise appropriate caution in assessing their evidence.

For these reasons, as fully explained in the judgement, the Appeals Chamber dismisses Mr. Setako's allegations that the Trial Chamber erred in assessing the Prosecution evidence.

(b) Defence Evidence

With regard to Defence evidence, Mr. Setako first points to the four Defence witnesses who lived at Mukamira camp in April and May 1994 and testified that no Tutsis were killed there. Mr. Setako submits that the Trial Chamber rejected their evidence for improper reasons.

While the Appeals Chamber dismisses several submissions made in this regard, it agrees with Mr. Setako that the Trial Chamber committed an error of law when it doubted the impartiality of the Defence witnesses. Contrary to the Trial Chamber's finding, the mere fact that the Defence witnesses may have survived the genocide in 1994 because they found refuge at Mukamira camp due to their relationships with soldiers does not indicate that they gave favourable testimony in order to protect Mr. Setako. Likewise, the Trial Chamber erred in doubting the impartiality of one of the witnesses simply because her husband was related to an accused person before the Tribunal.

However, the Appeals Chamber finds that these errors do not invalidate the Trial Judgement as the Trial Chamber reasonably concluded for other reasons that the Defence witnesses' evidence did not raise reasonable doubt about the Prosecution case.

Second, Mr. Setako alleges that the Trial Chamber erred in its findings about the existence of a civil defence program at Mukamira camp in April and May 1994. The Appeals Chamber agrees with Mr. Setako that the Trial Chamber committed an error of law as it relied on a discussion of facts in the *Bagosora et al.* Trial Judgement in order to find that informal and regional civil defence measures existed before such a program was established on a national scale. By proceeding in this way, the Trial Chamber took judicial notice of facts from another case without hearing the parties and without the facts in question having been upheld on appeal. This constitutes a violation of Rule 94(B) of the Rules of Procedure and Evidence.

Nonetheless, the Appeals Chamber finds that this error has no impact on the verdict. Witnesses SLA and SAT provided detailed and largely consistent accounts of their recruitment into a local civil defence force and their military training at Mukamira camp in April 1994. Contrary to Mr. Setako's assertion, documentary evidence provided by the Defence did not raise reasonable doubt about these accounts. As the Trial Chamber correctly noted, the documentary evidence merely concerned the formal establishment of a civil defence program on a national scale and thus did not refute Witnesses SLA's and SAT's evidence that a local civil defence structure existed earlier at Mukamira camp.

Third, Mr. Setako submits that the Trial Chamber erroneously disregarded his testimony that he was not at Mukamira camp in April and May 1994 and improperly diminished the weight of an Expert Witness's evidence as well as *Gacaca* documents tendered by the Defence. For the reasons set out in Appeal Judgement, the Appeals Chamber finds that Mr. Setako has failed to demonstrate any error in the Trial Chamber's assessment of these matters.

Accordingly, the Appeals Chamber dismisses Mr. Setako's allegations that the Trial Chamber erred in assessing the Defence evidence.

In conclusion, the Appeals Chamber finds that Mr. Setako has failed to show that no reasonable trier of fact could have concluded on the basis of all the evidence that he ordered the 25 April and 11 May Killings.

3. Alleged Violation of the Standard and Burden of Proof

Mr. Setako further submits that the Trial Chamber failed to correctly apply the standard of proof beyond reasonable doubt and shifted the burden of proof to the Defence. The Appeals Chamber finds that Mr. Setako has not demonstrated such an error on the part of the Trial Chamber. It therefore dismisses Mr. Setako's argument.

4. Alleged Error in Finding Mr. Setako Responsible for Ordering

Mr. Setako also submits that the Trial Chamber erred in convicting him for "ordering". In his view, there was not sufficient evidence that he possessed the required authority to order. The Appeals Chamber recalls that in order to establish liability for ordering pursuant to Article 6(1) of the Statute it is sufficient that there is proof of a position on the part of the accused that would compel another person to commit a crime. The Appeals Chamber finds that the Trial Chamber correctly applied this test and reasonably found that Mr. Setako exercised such an authority over the perpetrators of the 25 April and 11 May Killings. The Appeals Chamber therefore dismisses Mr. Setako's argument.

5. Alleged Error in Relation to the Nexus between the 25 April Killing and an Armed Conflict

Mr. Setako finally argues that the Trial Chamber erred in convicting him for a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II under Article 4 of the Statute in relation to the 25 April Killings. In his view, the Trial Chamber erroneously concluded that these killings had the required nexus with an armed conflict. The Appeals Chamber however does not

discern any error in the Trial Chamber's assessment of this issue and its conclusion that the 25 April Killings were committed in furtherance of the armed conflict or under its guise. The Appeals Chamber therefore dismisses Mr. Setako's argument.

#### **IV. PROSECUTION'S APPEAL**

The Prosecution presents three grounds of appeal.

1. Failure to Enter a Conviction for the 11 May Killings as a War Crime

Under its first ground of appeal, the Prosecution submits that the Trial Chamber erroneously failed to enter a conviction under Count 5 for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the 11 May Killings. The Appeals Chamber notes that the Trial Chamber did not make a finding as to whether Mr. Setako incurred responsibility under Count 5 of the indictment. This failure constitutes an error of law. Furthermore, the Appeals Chamber finds that based on its factual findings in relation to the 11 May Killings, the Trial Chamber ought to have convicted Mr. Setako under Count 5. Its failure to do so thus constitutes an error of law.

The Appeals Chamber therefore grants the Prosecution's first ground of appeal and convicts, Judge Pocar dissenting, Mr. Setako of violation to life, health, and physical or mental well-being (murder) as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for ordering the 11 May Killings.

2. Failure to Make a Legal Finding on Article 6(3) Liability

Under its second ground of appeal, the Prosecution submits that the Trial Chamber erred in failing to make a finding on Mr. Setako's responsibility as a superior pursuant to Article 6(3) of the Statute. The Appeals Chamber recalls that it is inappropriate to convict an accused for a specific count under both Article 6(1) and 6(3) of the Statute. As Mr. Setako's convictions for the 25 April



and 11 May Killings under Article 6(1) of the Statute are upheld on appeal, the Appeals Chamber has only considered the Prosecution's contention for the purpose of sentencing. It finds that, since the indictment charged Mr. Setako cumulatively under Articles 6(1) and 6(3) of the Statute, the Trial Chamber was required to make a finding as to whether he incurred superior responsibility for the purpose of sentencing.

However, the Appeals Chamber finds that this error has no impact on the Trial Judgement because the Prosecution failed to establish that Mr. Setako was responsible as a superior pursuant to Article 6(3) of the Statute for the 25 April and 11 May Killings. Accordingly, the Appeals Chamber dismisses the Prosecution's second ground of appeal.

### 3. Sentencing

Under its third ground of appeal, the Prosecution submits that the Trial Chamber for various reasons erred in its determination of Mr. Setako's sentence. It requests the Appeals Chamber to correct the errors and to increase the sentence to life imprisonment.

The Appeals Chamber dismisses all of the Prosecution's arguments under this ground except for its assertion, that the Trial Chamber erred in taking into consideration, as an individual and mitigating factor that the Prosecution had presented evidence during trial in relation to allegations which were withdrawn or not allowed to be added to the indictment. The Appeals Chamber notes that the Trial Chamber did not conclude that Mr. Setako's right to a fair trial had been violated by the presentation of this evidence. Given the lack of such a finding, the Appeals Chamber finds that the Trial Chamber abused its discretion in considering this issue as a factor in the determination of Mr. Setako's sentence. It therefore allows the Prosecution's third ground of appeal in part.

## **V. IMPACT OF THE APPEALS CHAMBER'S FINDINGS ON THE SENTENCE**

Although the Appeals Chamber has partially granted the Prosecution's appeal, for the reasons given in the Appeal Judgement, the Appeals Chamber finds that this does not warrant an increase in Mr. Setako's sentence.

## **VI. DISPOSITION**

For the foregoing reasons, **THE APPEALS CHAMBER,**

**PURSUANT** to Article 24 of the Statute and Rule 118 of the Rules;

**NOTING** the respective written submissions of the parties and their oral arguments presented at the Appeal hearing on 29 March 2011;

**SITTING** in open session;

**DISMISSES** Setako's appeal in its entirety;

**AFFIRMS** Setako's conviction for genocide for ordering the 25 April and 11 May Killings;

**AFFIRMS** Setako's convictions for extermination as a crime against humanity, and for violence to life, health, and physical or mental well-being of persons (murder) as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the 25 April Killings;

**ALLOWS** the Prosecution's first ground of appeal, **FINDS** Setako guilty of violence to life, health, and physical or mental well-being of persons (murder) as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the 11 May Killings pursuant to Article 4 of the Statute, and **ENTERS**, Judge Pocar dissenting, a conviction under Count 5 of the Amended Indictment;

**ALLOWS** the Prosecution's third ground of appeal in part;

**DISMISSES** the remainder of the Prosecution's appeal;

**AFFIRMS** the sentence of 25 years of imprisonment imposed on Setako by the Trial Chamber to run as of this day, subject to credit being given under Rules 101(C) and 107 of the Rules for the period Setako has already spent in detention since his arrest on 25 February 2004;

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

**ORDERS** that, in accordance with Rules 103(B) and 107 of the Rules, Setako is to remain in the custody of the Tribunal pending his transfer to the State in which his sentence will be served.