

## COMMENTARY

### The Appeals Judgement in the Aloys Simba Case

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Aloys Simba is a former Rwandan career military officer who acquired national prominence as early as 1973, due to his involvement with the military group which organised and carried out the *coup* that brought Juvénal Habyarimana to power.<sup>1</sup> Immediately after this takeover, Aloys Simba was appointed Minister of Information. Yet he was subsequently accused of planning to overthrow the regime and was excluded from the government.<sup>2</sup> Nevertheless, he pursued a military career and returned to the national political scene in 1989, as a *Député* in the Rwandan parliament for the *Mouvement révolutionnaire national pour la démocratie et le développement* (MRND) on behalf of Gikongoro, his home prefecture. In 1993, at the height of tensions with the *Front patriotique rwandais*, Simba resigned from the MRND and ceded his parliamentary position.<sup>3</sup> In May 1994, in the midst of the genocide, he was appointed *Conseiller* of the civil defence for Gikongoro and Butare prefectures.<sup>4</sup>

This man – who was never far from the levers of power – was charged with participating in massacres which occurred in five different locations within the

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<sup>1</sup> *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Judgement and Sentence (Trial Chamber), 13 December 2005 (hereafter “Judgement *Simba*”), para. 54.

<sup>2</sup> Judgement *Simba*, para. 55.

<sup>3</sup> Judgement *Simba*, para. 56.

<sup>4</sup> *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement (Appeals Chamber), 27 November 2007 (hereafter “Appeals Judgement *Simba*”), para. 83 referring to page 1 of the indictment.

Gikongoro and Butare prefectures and with allowing his subordinates to commit those crimes.<sup>5</sup> The massacres took place at Kibeho Parish,<sup>6</sup> Murambi Technical School,<sup>7</sup> Cyanika Parish,<sup>8</sup> Kaduha Parish,<sup>9</sup> and in Ruhashya commune.<sup>10</sup>

Simba was charged with genocide as well as complicity in genocide, and with crimes against humanity (extermination and murder) under the two forms of responsibility: for his own acts (individual criminal responsibility),<sup>11</sup> and for acts committed by his subordinates (superior criminal responsibility).<sup>12</sup> At the end of the trial however, the Prosecutor withdrew the counts of complicity in genocide and of murder, and also set aside the superior criminal responsibility. The case was therefore stripped down to allegations of massacres categorised as genocide or extermination. Thus, in addition to the categorisation of the crimes, there was also a difficulty inherent in the Prosecution case in terms of cumulative charges. Furthermore, the Prosecutor asserted that with respect to his individual criminal responsibility, Simba had taken part in a joint criminal enterprise.

On 13 December 2005, the Trial Chamber acknowledged the validity of some of the charges by finding Aloys Simba guilty of genocide and extermination as a crime against humanity<sup>13</sup> and sentenced him to 25 years' imprisonment.<sup>14</sup> But this sentence only concerned two of the five massacres, namely those at Kaduha Parish and Murambi Technical School. Regarding the other three massacres,

<sup>5</sup> Judgement *Simba*, para. 10.

<sup>6</sup> Judgement *Simba*, para. 62. The massacre occurred on or about 9 April 1994. Aloys Simba allegedly told the *interahamwe* that some Tutsi were still alive in Kibeho and that they had to go there to help with the killings. Simba allegedly went there himself to participate in the massacre in addition to providing weapons to the *interahamwe* who then took part in the massacres in Kibeho.

<sup>7</sup> Judgement *Simba*, para. 87. The massacre occurred on or about 21 April 1994. Following an order of the prefect, 40,000 refugees had been gathered at the Murambi Technical School. Aloys Simba allegedly worked with local authorities, gendarmes and militias to organise and carry out the attack against these refugees. He more specifically distributed the machetes used during the attack. Furthermore, Aloys Simba allegedly came to the massacre site before the attack, dressed in military uniform, and then after the attack, to express his satisfaction.

<sup>8</sup> Judgement *Simba*, para. 122. The massacre occurred on or about 21 April 1994. Following the attack on the Murambi Technical School, Aloys Simba allegedly organised and ordered governmental forces and militiamen to attack predominantly Tutsi refugees at the Cyanika Parish. He allegedly supervised the attack and in particular ordered the *interahamwe* to cut off all escape routes around the parish.

<sup>9</sup> Judgement *Simba*, para. 139. The massacre occurred on or about 21 April 1994. Aloys Simba allegedly organised and carried out the attack against Tutsi refugees in the Kaduha Parish, after having provided the weapons for the attack. Previously, he had allegedly expressed his intent during a meeting at the Kaduha trading centre, where he incited others to take part in the massacre.

<sup>10</sup> Judgement *Simba*, para. 179. The two massacres occurred on or about 29 April 1994. According to the indictment, Aloys Simba stock-piled weapons in the Kinyamakara communal office and then distributed them in preparation of the two attacks at Ruhashya: the first at the Rugogwe trading centre and the second at Gashoba Hill. Aloys Simba, armed and dressed in military uniform, personally took part in the attack and shot at fleeing refugees.

<sup>11</sup> See Article 6(1) of the Statute.

<sup>12</sup> See Article 6(3) of the Statute.

<sup>13</sup> Judgement *Simba*, para. 427.

<sup>14</sup> Judgement *Simba*, para. 445.

the Trial Chamber found that either the accused had not participated in a joint criminal enterprise, or that these massacres did not constitute part of the initial joint criminal enterprise carried out at Kabuha and Murambi.<sup>15</sup>

The Trial Chamber's verdict included concessions to both the Prosecution and the Defence, with the latter perhaps getting the better end of the stick. Both parties subsequently appealed the judgement. In its Appeal Brief, the Defence systematically contested the judgement, introducing a plethora of arguments that mixed questions of law and questions of fact.<sup>16</sup> For its part, the Prosecution confined its appeal to the acquittal with respect to Cyanika Parish, and the final sentence which it considered unduly lenient.<sup>17</sup> On 27 November 2007, the Appeals Chamber rendered its judgement rejecting all grounds of appeals raised by both parties. In reviewing this Appeals Judgement, we will first focus on the Defence's grounds of appeal and then on those of the Prosecution.

## 1. GROUNDS OF APPEAL: THE DEFENCE

Of the numerous grounds of appeal raised by the Defence, we will only address those which appear to raise new judicial questions with respect to jurisdiction or which resulted in original findings by the Appeals Chamber.

First, the Defence raised a certain number of arguments characterised by the Appeals Chamber as relating to the *form of the indictment*. According to the Defence, these defects in the form relating to the joint criminal enterprise tend to show the imprecision of the allegations, which may have affected the fairness of the trial. The Appeals Chamber, after briefly recalling the applicable law in this matter,<sup>18</sup> successively dismissed the Defence's assertions that post-indictment communications may not cure defects in the indictment<sup>19</sup> and that the specific type of joint criminal enterprise had not been pleaded in the indictment even though the *mens rea* for the basic form was explicitly stated.<sup>20</sup>

The Defence subsequently asserted that the Trial Chamber could not legally *give more weight to oral evidence than to documentary evidence*, arguing that this was a basic principle of law recognised in legal systems all over the world. The Appeals Chamber first recalled the discretion given to 'triers of fact' under article 89(C) of the Rules.<sup>21</sup> The Appeals Chamber determined that it falls within the jurisdiction of the triers of fact (i.e. the Trial Chamber) to assess and weigh the evidence before it and to determine which evidence is most relevant and credible.<sup>22</sup> Without responding directly to the Defence's argument regarding the validity of

<sup>15</sup> Concerning the joint criminal enterprise, see the reasoning of the Trial Chamber. Judgement *Simba*, paras. 386-410.

<sup>16</sup> Appeals Judgement *Simba*, para. 4.

<sup>17</sup> Appeals Judgement *Simba*, para. 7.

<sup>18</sup> Appeals Judgement *Simba*, paras. 63-64.

<sup>19</sup> Appeals Judgement *Simba*, para. 65.

<sup>20</sup> Appeals Judgement *Simba*, paras. 77-79.

<sup>21</sup> This rule reads as follow: "A Chamber may admit any relevant evidence with it deems to have probative value".

<sup>22</sup> Appeals Judgement *Simba*, para. 103.

the general principle, the Trial Chamber reassigned the problem, claiming that it was the responsibility of the Defence to prove errors in the exercise of the Trial Chamber's discretion on a case-by-case basis. This represents an implicit rejection, not of the existence of the general formulated principle, but of its validity in the law used in international criminal tribunals.<sup>23</sup>

The Defence went on to raise several *alleged contradictions between the testimonies of two witnesses*. In one instance, the Appeals Chamber acknowledged that the Trial Chamber had erred concerning Aloys Simba's alleged arrival time at Kaduha Parish. The Appeals Chamber found that the Trial Chamber was compelled to justify its preference for one of the two (differing) accounts reported by the two witnesses.<sup>24</sup> This is particularly pertinent considering the Trial Chamber's preference for the uncorroborated evidence of an accomplice to the crime, while the very same Trial Chamber previously stated that it approached that particular witness's testimony with caution because of his participation in the alleged crimes and stated that it would only accept it if it was "adequately corroborated".<sup>25</sup> One of the two witnesses had claimed that Aloys Simba arrived at approximately 8.20 a.m., while the other had maintained that he arrived at 9.00 a.m.; both reporting that the accused came from Murambi Technical School. According to the Defence, it is impossible to cover this distance in less than three hours during the rainy season, as was the case in April 1994. After having analysed the varying witness testimonies<sup>26</sup> and recalling that each witness only gave approximate times,<sup>27</sup> the Appeals Chamber concluded that the Defence failed to demonstrate that the fact-finding of the Trial Chamber was erroneous and consequently dismissed that ground of appeal, even though the Trial Chamber failed in its obligation to provide a reasoned opinion.<sup>28</sup> In addition, in reply to another ground of appeal, the Appeals Chamber stated that a lack of justification does not, in the present case, demonstrate any bias on the part of the Trial Chamber.<sup>29</sup>

Finally, the Defence raised the question of *cumulative convictions* for the same facts. The Appeals Chamber satisfied itself with recalling the applicable law,<sup>30</sup> underlying that cumulative convictions of genocide and extermination were possible insofar as each offence had a "materially distinct constitutive element not contained in the other".<sup>31</sup> Even if such an approach is perfectly sound in theory, one must wonder if it does not imply, in practice, a certain injustice in cases where different sentences individually related to each crime are cumulative. It would appear that an accumulation of sentences is less justifiable, as judges

<sup>23</sup> This interpretation is confirmed by an earlier assertion of the Appeals Chamber, in Appeals Judgement *Simba*, para. 132: "The Appeals Chamber recalls that it has already dismissed the argument that as a matter of law documentary evidence should be preferred to oral testimony."

<sup>24</sup> Appeals Judgement *Simba*, para. 143.

<sup>25</sup> Judgement *Simba*, paras. 164 and 169.

<sup>26</sup> Appeals Judgement *Simba*, paras. 151-157.

<sup>27</sup> Appeals Judgement *Simba*, paras. 158-159.

<sup>28</sup> Appeals Judgement *Simba*, para. 159.

<sup>29</sup> Appeals Judgement *Simba*, para. 233.

<sup>30</sup> Appeals Judgement *Simba*, paras. 276-277.

<sup>31</sup> Appeals Judgement *Simba*, para. 277.

should give precedence to the heaviest sentence, even if it results in increasing that sentence by taking the other crimes into account as aggravating factors. However, this is an approach that the case law has thus far not adopted.

## 2. GROUNDS OF APPEAL: THE PROSECUTION

The Prosecution's grounds of appeal were limited to (i) Aloys Simba's responsibility *vis-à-vis* Cyanika Parish, and (ii) the length of his sentence.

Regarding the events at Cyanika Parish, the Prosecution argued that the Trial Chamber had erred in two respects: by requiring both proof of the accused's presence at the site of the massacre and proof of the accused's substantial participation (as if these elements were necessary in order to demonstrate Simba's responsibility in the joint criminal enterprise).

Regarding the presence of the accused, the Appeals Chamber determined that the physical presence of Simba at the site of massacre was not required for liability to be incurred in a joint criminal enterprise.<sup>32</sup> However, the Appeals Chamber did not consider that this was the finding of the Trial Chamber which had expressed doubts as to whether the accused had shared any "common purpose" in relation to the massacre at this particular site.<sup>33</sup>

Regarding Simba's participation in the events at Cyanika Parish, the Appeals Chamber considered that the Prosecution had likewise misinterpreted the findings of the Trial Chamber. The Trial Chamber had considered that the participation of Aloys Simba in Murambi and Kaduha *was* substantial but it did not make 'substantial contribution' a required element for the determination of such responsibility, meaning that the Prosecution's argument was ultimately fruitless.

However, even accepting the Prosecution's assertion that the accused's participation in the joint criminal enterprise was not required to be 'substantial' in order for the accused to be found responsible, the Appeals Chamber indicated that the contribution of the accused to the perpetration of the crime must at least be 'significant'.<sup>34</sup> Where then is the difference? The Appeals Chamber will probably enlighten us on this point the next time a party seeks to take advantage of this ambiguity.

Regarding the second ground of appeal, the length of the sentence, we should highlight the Prosecution's argument contesting the Trial Chamber's finding that the lack of 'zeal or sadism' in the perpetration of crimes was a mitigating circumstance. Once more, the Appeals Chamber considered that the Prosecution had misinterpreted the findings of the Trial Chamber which had not actually included it as a mitigating circumstance.<sup>35</sup> However, and *proprio motu*, the Appeals Chamber held that the Trial Chamber erred when it assessed 'zeal or sadism' to be relative to the *gravity* of the crime. In the opinion of the Appeals Chamber, these

<sup>32</sup> Appeals Judgement *Simba*, para. 296.

<sup>33</sup> *Ibid.*

<sup>34</sup> Appeals Judgement *Simba*, para. 303.

<sup>35</sup> Appeals Judgement *Simba*, paras. 317-318.

elements could only be discussed as aggravating factors.<sup>36</sup> Once again, it is all in the nuance and the Appeals Chamber seems to relish such details... Judge Liu even expressed his dissenting opinion towards the Appeals Chamber's finding on this point. In his opinion, although zeal and sadism are not constitutive elements of the crimes of genocide and extermination, they *can* be taken into account in order to assess the gravity of these crimes, as they go to establishing the particular circumstances of the case. According to Judge Liu, these two elements can thus be taken into account both to assess the gravity of the crime and to determine the aggravating circumstances.<sup>37</sup>

Finally, and still concerning the second ground of appeal, the Prosecution challenged the Trial Chamber's discretion in sentencing, arguing that given the Trial Chamber's conclusion that the accused *was* a principal perpetrator of the genocide, 25 years' imprisonment was a disproportionately lenient sentence. However, the Appeals Chamber (with Judge Schomburg dissenting) was not satisfied with such a curtailment of the Trial Chamber's discretion.<sup>38</sup> Intricately connected to this first point, the Prosecution also claimed that the sentence was disproportionate considering the Tribunal's prior practice. Unfortunately, the Appeals Chamber did not discuss this point as it was not included in the Prosecution's Notice of Appeal. Because the judges' discretion is not restricted (contrary to what the Prosecution alleged) and the principle of individualising sentences requires a 'casuistic appraisal', this supplementary ground of appeal ought to have been simply dismissed outright. One can certainly question the Appeals Chamber's refusal to come to such a logical finding.

To conclude, the Appeals Chamber affirmed all the elements of the Trial Chamber's judgement, ultimately giving neither party the spoils. Aloys Simba, born in 1938, only has to serve 19 remaining years in prison, with the further possibility of a reduction in his sentence meaning that he could be freed well before 2026.

*This commentary was translated from French by the Hague Justice Portal.*

<sup>36</sup> Appeals Judgement *Simba*, para. 320.

<sup>37</sup> Partially dissenting opinion of Judge Liu (Appeals Judgement *Simba*), paras. 2-6.

<sup>38</sup> Appeals Judgement *Simba*, para. 336.