

## COMMENTARY

### Committing Genocide by Integral-Part Participation:

#### The ICTR Appeals Chamber Judgement in *Prosecutor v. Seromba*

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#### 1. INTRODUCTION

On 12 March 2008 the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) handed down its judgement in the case of *Prosecutor v. Seromba*.<sup>1</sup> By a four-to-one majority, the Appeals Chamber found that Athanase Seromba, a Roman-Catholic priest from Rwanda, was guilty both of *committing* genocide and of extermination as a crime against humanity for his participation in the bulldozing of Nyange church on 16 April 1994. The actions that day resulted in the killing of some 1,500 displaced ethnic Tutsi inside the church. Accordingly, the Appeals Chamber increased his sentence from fifteen years' imprisonment to prison "for the remainder of Athanase Seromba's life."<sup>2</sup> The Appeals Chamber's judgement expanded the legal definition of 'committing' (as a mode of participation), and set another precedent by also applying this definition to extermination as a crime against humanity. This expansion of the definition of 'committing' under international criminal law and the imposition of the maximum sentence by the Appeals Chamber's majority drew a dissenting opinion from Judge Liu.<sup>3</sup>

The judgement reversed the Trial Chamber's finding that Seromba had merely *aided and abetted* (as a mode of participation) genocide in the bulldozing of

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<sup>1</sup> See *Prosecutor v. Seromba*, ICTR-2001-66-A, Judgement, 12 March 2008 (Appeals Chamber) (hereinafter "Seromba Appeals Judgement").

<sup>2</sup> See *id.*, para. 240.

<sup>3</sup> See *Prosecutor v. Seromba*, ICTR-2001-66-A, Judgement, 12 March 2008, at 86-93 (Dissenting Opinion of Judge Liu) (hereinafter "Dissenting Opinion of Judge Liu").

Nyange church.<sup>4</sup> The Appeals judgement, however, affirmed the Trial Chamber's finding that Seromba, in a separate incident on a previous day, had aided and abetted genocide by expelling several of the parish's Tutsi employees, which resulted in their being killed by Hutu extremist attackers gathered outside the presbytery walls.<sup>5</sup> The Appeals Chamber also affirmed the acquittal of Seromba on the charge of conspiracy to commit genocide.<sup>6</sup>

Several of the Appeals Chamber's other rulings in *Seromba* are noteworthy, including the finding, on trial procedure, that an accused person does not have an unfettered right to testify last at his trial;<sup>7</sup> on evidence, that the testimony of one witness can be sufficient to make a finding of fact beyond a reasonable doubt (in other words, that *unus testis, nullus testis* is not a valid rule of evidence);<sup>8</sup> on sentencing, that "betrayal of trust" is an aggravating circumstance,<sup>9</sup> and; that an accused person's relatively youthful age (Seromba was 31 years old at the time of the crimes) does not constitute a mitigating circumstance.<sup>10</sup>

## 2. THE FACTS AS FOUND BY THE TRIAL CHAMBER

The ICTR Trial Chamber in its judgement of 13 December 2006 had found that from 12 April 1994 Tutsi were herded toward Nyange church, located in (the former) Kibuye prefecture in the west of Rwanda. The displaced Tutsi civilians (men, women and children) sought shelter in Nyange church and thousands of armed, extremist Hutu attackers surrounded the church to prevent the Tutsi from escaping.<sup>11</sup> On 13 April 1994, Seromba expelled the parish's Tutsi staff from his presbytery compound.<sup>12</sup> Seromba prohibited the hungry, displaced Tutsi from picking bananas from the parish's nearby grove and he ordered gendarmes to shoot any Tutsi that did so.<sup>13</sup> Additionally, the priest Seromba denied requests from the Tutsi seeking shelter in Nyange church to celebrate mass for them.<sup>14</sup>

In the days preceding 16 April 1994, Hutu assailants, including *Interahamwe*, attacked the displaced Tutsi and the church sheltering them using machetes, guns, grenades, dynamite, and petrol sprayers.<sup>15</sup> As the attacks escalated, the Tutsi barricaded themselves inside Nyange church. On 15 April 1994, the attackers

<sup>4</sup> See generally Gabriella Venturini, Rwanda's Unanswered Screams: Still Seeking Justice after the Seromba Trial, *Hague Justice Journal* Vol. 2, Issue 3 (2007) (commenting on the Seromba Trial Chamber Judgement).

<sup>5</sup> Seromba Appeals Judgement, para. 240.

<sup>6</sup> *Id.*, paras. 225, 240.

<sup>7</sup> *Id.*, para. 19.

<sup>8</sup> *Id.*, paras. 79, 92,

<sup>9</sup> *Id.*, para. 230.

<sup>10</sup> *Id.*, para. 237.

<sup>11</sup> See *Prosecutor v. Seromba*, ICTR-2001-66-I, Judgement, 13 December 2006, para. 85 (Trial Chamber) (hereinafter "Seromba Trial Judgement").

<sup>12</sup> Seromba Trial Judgement, para. 114.

<sup>13</sup> *Id.*, para. 95.

<sup>14</sup> *Id.*, para. 107.

<sup>15</sup> *Id.*, paras. 154-159.

attempted but failed to burn down the church.<sup>16</sup> Witnesses testified that attackers sang songs with anti-Tutsi lyrics and blew whistles during attacks coordinated by local leaders.

On 16 April 1994, over a period of several hours Nyange church was bulldozed and the Tutsi seeking shelter inside the church were attacked resulting in the killing of at least 1,500 Tutsi.<sup>17</sup> There appears to have been only one survivor from the bulldozing and attacks that took place on 16 April 1994 against Nyange church. The Trial Chamber found that Seromba discussed and “accepted” the local authorities’ decision to bulldoze the church with the Tutsi inside it.<sup>18</sup> Before he began bulldozing, the bulldozer driver “asked Seromba three times whether he should destroy the church.”<sup>19</sup> Seromba responded in the affirmative and “said such words to [the] bulldozer driver ... as would encourage him to destroy the church.”<sup>20</sup> The Trial Chamber found that Seromba advised the bulldozer driver where to hit his own church, pointing to “the fragile side of the church.”<sup>21</sup> Based on these factual findings, the Trial Chamber held that Seromba merely aided and abetted genocide and gave him what was – under the circumstances – a paltry prison sentence of fifteen years. Both the Prosecutor and the Defence appealed the Trial Chamber judgement.

### 3. THE APPEALS CHAMBER’S JUDGEMENT OF 12 MARCH 2008

The main issue on appeal was the accused’s mode of participation,<sup>22</sup> namely: did Seromba *aid and abet, commit, or order* genocide and extermination as a crime against humanity? Seromba, for his part, maintained he was innocent. The Defence claimed that he “did not commit any crime,”<sup>23</sup> and it sought to overturn the Trial Chamber’s factual and legal findings. The Prosecutor’s appeal generally did not seek to overturn the facts, but rather sought different legal conclusions on the same facts. The legal categorisation of Seromba’s acts became the hallmark of the Appeals Chamber’s judgement.

The Prosecutor argued that Seromba’s acts and utterances amounted to “ordering” genocide and extermination as a crime against humanity. Alternatively, Seromba’s acts constituted “committing”, which does not require direct and physical perpetration of the killing or killing “with one’s own hands.” This

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<sup>16</sup> *Id.*, para. 162.

<sup>17</sup> *Id.*, para. 285.

<sup>18</sup> *Id.*, para. 268.

<sup>19</sup> *Id.*, para. 236.

<sup>20</sup> *Id.*, paras. 236, 269.

<sup>21</sup> *Id.*, para. 269.

<sup>22</sup> Article 6(1) of the ICTR statute lists five modes of participation (planning, instigating, ordering, committing, and aiding and abetting). The *Seromba* indictment charged all five modes, but the appeal revolved around the last three.

<sup>23</sup> *Seromba Appeals Judgement*, para. 159.

alternative argument relied on the Appeals Chamber's holding in *Prosecutor v. Gacumbitsi*<sup>24</sup> which was handed down five months before the trial judgement in *Seromba*.

In *Seromba*, a majority of the Appeals Chamber found that "committing" does not require direct and physical perpetration ("with his own hands"). The four-judge majority took its own *Gacumbitsi* precedent and expanded upon it to create a wider legal definition of 'committing'. The four-judge majority created a new legal standard, and held that 'committing' may occur where the actions of an accused are "as much an *integral part* of the genocide as were the killings which [they] enabled."<sup>25</sup> The majority held that Seromba was a "principal perpetrator of the crime itself by approving and embracing as his own the decision to commit the crime and thus should be convicted for committing genocide."<sup>26</sup> Therefore, Seromba "committed" genocide because his actions (i.e. his presence, utterances, approving and embracing the decision to bulldoze, and his giving of directions) amounted to an integral part of the genocidal bulldozing of Nyange church. Under this expanded definition of 'committing', "[i]t is irrelevant that Athanase Seromba did not personally drive the bulldozer that destroyed the church."<sup>27</sup>

Also as a precedent, the Appeals Chamber applied this expanded definition of committing (previously limited in *Gacumbitsi* to just the crime of genocide) to extermination as a crime against humanity. Thus, the Appeals Chamber in *Seromba* held:

Notwithstanding the confinement of the *Gacumbitsi* dictum regarding committing to genocide, the Appeals Chamber, Judge Liu dissenting, can find no reason why its reasoning should not be *equally applicable to the crime of extermination*. The key question raised by the *Gacumbitsi* dictum is what other acts can constitute direct participation in the *actus reus* of the crime. As noted above, the Appeals Chamber is satisfied that the acts of Athanase Seromba set out in the Judgement were sufficient to constitute direct participation in the *actus reus* of the crime of genocide, and is equally satisfied that the same acts are sufficient to constitute direct participation in the crime of extermination....<sup>28</sup>

#### 4. DISSENTING OPINION OF JUDGE LIU

In his dissenting opinion, Judge Liu found that the four-judge majority confused the definition of 'committing' because to commit, in the judge's opinion, without "physical perpetration" is only allowed under a joint criminal enterprise (JCE) theory and when JCE is pleaded expressly in the indictment.<sup>29</sup> Judge Liu seems

<sup>24</sup> See *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, 7 July 2006, para. 60 (Appeals Chamber).

<sup>25</sup> Seromba Appeals Judgement, para. 161 (italics added).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, para. 171.

<sup>28</sup> *Id.*, para. 190 (emphasis added).

<sup>29</sup> Dissenting Opinion of Judge Liu, para. 6.

concerned that the new “integral part” test fashioned by the majority blurs the line between ‘aiding and abetting’ and ‘committing’, and serves as a “catch-all” mode of participation for less significant acts of an accused, thereby opening up the flood gates for ‘committing’.<sup>30</sup> In other words, the Prosecutor can plead ‘committing’ without direct participation and without JCE, in more cases and in cases of acts more accurately described as aiding and abetting.

Judge Liu dissented on the majority’s increasing Seromba’s sentence to the maximum sentence. This appears to indicate not necessarily a presence of many mitigating circumstances in favour of Seromba, but rather a preference to show a *gradation* between weighty sentences and to use sentencing as a way of reflecting various degrees of individual criminal responsibility.<sup>31</sup>

## 5. READING BETWEEN THE LINES AND THE CASE FOR ‘ORDERING’

The Appeals Chamber appears to have used *Seromba* as a vehicle to expand the definition of ‘committing’ as a mode of participation instead of issuing a short, unremarkable judgement relying on ‘ordering’. This expansion provides an innovative, co-perpetrator type of mode of participation for ‘committing’ and grants courts wider discretion in determining the mode of participation in which a crime is carried out. This expansion, however, may needlessly blur the line between ‘committing’ and ‘aiding and abetting’.

The Appeals Chamber’s inclination to expand the definition of committing is also evident in its abrupt dismissal of the Prosecutor’s first argument that the utterances and acts by Seromba constituted *ordering* as a mode of liability.<sup>32</sup> At first blush, this case has a colourable claim that Seromba ‘ordered’ as opposed to ‘committed’ genocide by his utterances that ‘directed’ the bulldozer driver and that the bulldozer followed. Had the Appeals Chamber found that Seromba *ordered* instead of *committed*, it might have avoided debate. The Appeals Chamber started its analysis of ‘ordering’ by agreeing with the Prosecutor’s contention that the Trial Chamber had applied the wrong test for ordering, namely finding that the Trial Chamber had erred in law when it considered ‘effective control’ (an element of Article 6(3) of the Statute) as an element necessary to prove ‘ordering’, under Article 6(1) of the Statute.<sup>33</sup> The Appeals Chamber, however, failed to go any further, and declined to analyse the facts of the case within the framework of ordering.

By finding that Seromba was not liable for ‘ordering’ the bulldozing on 16 April 1994, the Appeals Chamber was forced to re-interpret the Trial Chamber’s finding that Seromba had ‘ordered’ the gendarmes to shoot the Tutsi taking bananas around 13 April 1994. The Appeals Chamber decided to reverse this well-supported finding of fact and re-categorised Seromba’s utterance to the gendarmes from an ‘order’ to “a mere reinforcement of his prohibition against refugees getting

<sup>30</sup> *Id.*, para. 14.

<sup>31</sup> *Id.*, para. 17.

<sup>32</sup> Seromba Appeals Judgement, paras. 197-205.

<sup>33</sup> *Id.*, para. 202.

food from the plantation.”<sup>34</sup> This semantic re-interpretation seems unwarranted. It is also inconsistent because the Appeals Chamber elsewhere cites this same utterance by Seromba as an “order”.<sup>35</sup> In addition, the Appeals Chamber refers to another finding of the Trial Chamber that Seromba issued an “order”,<sup>36</sup> but fails to distinguish that finding. The judgement seems to downgrade Seromba’s mode of participation. Moreover, the words uttered one day to gendarmes do not necessarily determine the legal significance of words uttered to a bulldozer driver three days later. The reasoning of the Appeals Chamber on this point and on ordering in general is scant.

In its terse analysis of ordering, the Appeals Chamber failed to rule whether Seromba had an informal superior-subordinate relationship with the bulldozer driver. Perhaps this is because the Appeals Chamber’s findings on ‘committing’ already tend to show the existence of an informal superior-subordinate relationship between Seromba and the bulldozer driver. These findings also include facts that tend to show *ordering*. The Appeals Chamber found:

On the basis of these underlying factual findings, the Appeals Chamber finds that Athanase Seromba approved and embraced as his own the decision of Kayishema, Ndahimana, Kanyarukiga, Habarugira, and other persons to destroy the church in order to kill the Tutsi refugees.... What is important is that Athanase Seromba fully *exercised his influence over the bulldozer driver* who, as the Trial Chamber’s findings demonstrate, *accepted Athanase Seromba as the only authority*, and whose *directions* he followed.<sup>37</sup>

Thus, the Appeals Chamber affirmed that Seromba had influence over the bulldozer driver, that the bulldozer driver accepted Seromba as the only authority, and that Seromba gave “directions” and the bulldozer driver followed these directions. The Appeals Chamber appears to split hairs between ‘direction’ and ‘order’ without providing any reasoning.

The Appeals Chamber did not apply any of the case law defining *ordering* and *informal superior-subordinate relationship*. The *actus reus* of ordering is an affirmative ‘instructing’ by a superior to a subordinate with at least an informal superior-subordinate relationship. In other words, ordering is when a person in a position of authority uses that authority to instruct another to commit an offence, and that authority can be reasonably implied.<sup>38</sup> A formal superior-subordinate relationship between the accused and the perpetrator is not required.<sup>39</sup> The ICTR Appeals Chamber in *Semanza* held that the (informal) superior-subordinate

<sup>34</sup> *Id.*, para. 203.

<sup>35</sup> *Id.*, para. 45 (referring to Seromba’s “order prohibiting refugees from getting food at the banana plantation.”) (emphasis added); para. 47.

<sup>36</sup> *Id.*, para. 70 (referring to Seromba’s “order” to a certain Patrice, a Tutsi employee of Nyange parish, to leave the protected, walled compound of the presbytery during an attack).

<sup>37</sup> *Id.*, para. 171 (emphasis added).

<sup>38</sup> See *Prosecutor v. Brdanin*, IT-99-36, Judgement, para. 270, 1 September 2004 (ICTY Trial Chamber).

<sup>39</sup> See *Prosecutor v. Kordić & Cerkez*, IT-95-14/2-A, 17 December 2004, para. 28 (ICTY Appeals Chamber); *Prosecutor v. Kordić & Cerkez*, IT-95-14/2, 26 February 2001, para. 388 (ICTY Trial Chamber).

relationship may be *implied* and that the accused need hold *some* position of authority.<sup>40</sup> An informal superior-subordinate relationship can be proved with circumstantial evidence.<sup>41</sup>

Under this case law, the facts relied upon to find committing, and that the bulldozer driver drove on the parish's property and that he, before committing the offence, specifically asked leave of the priest Seromba because it was his church that was targeted, tend to show an implied superior-subordinate relationship. The Appeals Chamber found that Seromba held a "position of trust", and that he abused that position, but it did not take this finding any further.<sup>42</sup> Seromba was the priest in charge of the parish and the church's representative, who occupied "some position of authority." The Appeals Chamber did not analyse this authority or acknowledge that the Roman-Catholic Church was a powerful institution in Rwanda<sup>43</sup> and that Seromba was its representative at Nyange during the events. None of the local authorities which were found to have 'ordered' the bulldozing had a *formal* superior-subordinate relationship with the bulldozer driver. To categorise their utterances as a 'decision' or 'order' and not that of Seromba (which was the operative one) is dubious.

Also noteworthy in the judgement is the affirming of the acquittal on the charge of conspiracy to commit genocide,<sup>44</sup> despite the finding that Seromba "approved and joined" the decision to bulldoze Nyange church.<sup>45</sup> It appears that the Prosecutor's appeal misguidedly focused on the insufficient evidence of meetings held in Nyange in the days before the bulldozing where Seromba and others allegedly hatched a plot, which would have required the Appeals Chamber to overturn the Trial Chamber's findings of fact. In hindsight, the Prosecutor would have been better served by having focused on the key conversation between the

<sup>40</sup> *Prosecutor v. Semanza*, ICTR\_97-20-A, Appeal Judgement, 20 May 2005, para. 361 (holding: "All that it required was the implied existence of a superior-subordinate relationship.... As recently clarified by the ICTY Appeals Chamber in *Kordić and Čerkez*, the *actus reus* of 'ordering' is that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.") (Citing *Kordić & Čerkez*, IT-95-14/2-A, Appeals Judgement, 17 December 2004, para. 28) (emphasis added).

<sup>41</sup> See *Prosecutor v. Galić*, IT-98-29-A, Judgement, para. 178, 30 November 2006 (Appeals Chamber) (finding that "the mode of liability of ordering can be proven, like any other mode of liability, by circumstantial or direct evidence, taking into account evidence of acts or omissions of the accused").

<sup>42</sup> *Id.*, para. 230.

<sup>43</sup> See generally, Catholic Church Wants Arrested Army Officers Tried By Foreigners, *Rwanda News Agency*, 12 June 2008, available at: [www.allafrica.com/stories/200806120954.html](http://www.allafrica.com/stories/200806120954.html) (reporting that "[w]ith the possible exception of the government, the Roman Catholic Church was the most powerful institution in Rwanda. It always had been intertwined with the political establishment, historians say. The church ran 60 percent of Rwandan schools, even enforcing strict quotas that limited Tutsi enrollment to their proportion of the overall population. It operated clinics and relief services. In the rural areas, which accounted for over 70 percent of the population, often the church functioned effectively like the social services department of the government.").

<sup>44</sup> Seromba Appeals Judgement, para. 218.

<sup>45</sup> *Id.*, para. 177.

local authorities, Seromba, and the bulldozer driver that immediately preceded the bulldozing. The Prosecutor's appeal might have persuaded the Appeals Chamber to characterise that conversation as a criminal agreement and conspiracy, had it focused on the facts as found at trial.

## 6. SEROMBA, THE *GÉNOCIDAIRE*, IS STILL A PRIEST TODAY

Gabriella Venturini noted that in 1999, when the London-based non-governmental organisation African Rights publicised the allegations that Seromba committed genocide in Nyange, Rwanda in April 1994 and identified that he was living under a false name in Florence, Italy, the Roman-Catholic Church "immediately ... reassigned [Seromba] to a different parish."<sup>46</sup> The Church secured residence permits for Seromba under his false name.

The ICTR Prosecutor charged Seromba in an indictment of 8 June 2001, but not until 6 February 2002 did Seromba surrender from Italy to the ICTR in Tanzania. Seromba surrendered only when Italian national legislation that would permit his extradition was pending approval. Italy adopted such legislation on 2 August 2002.<sup>47</sup> The Trial Chamber considered Seromba's surrender as a mitigating circumstance in sentencing him,<sup>48</sup> and the Appeals Chamber did not disturb this holding.<sup>49</sup>

To date, despite Seromba's convictions for the gravest crimes – genocide and extermination as a crime against humanity – and his life sentence being final, the Church has not held any proceedings under canon law to defrock Seromba. Seromba, a convict, is still an ordained priest and wears his clerical collar, though branded a *génocidaire* by an international tribunal. The ICTR has not yet transferred Seromba from its detention facility in Arusha, Tanzania to the state in which he will serve his remainder-of-life prison sentence. Italy is one of the seven states that have concluded an agreement with the ICTR to enforce prison sentences.<sup>50</sup>

<sup>46</sup> See Venturini, *supra* note 5, at 50.

<sup>47</sup> See *id.*, at 51.

<sup>48</sup> Seromba Trial Judgement, para. 398.

<sup>49</sup> Seromba Appeals Judgement, para. 236.

<sup>50</sup> The ICTR has concluded agreements for the enforcement of its prison sentences with Mali (1999), Benin (1999), Swaziland (2000), France (2003), Italy (2004), Sweden (2004), and Rwanda (2008), see [www.ictor.org](http://www.ictor.org).