UNITED NATIONS
NATIONS UNIES

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

JUDGEMENT

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CONTENTS

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal," respectively) is seised of appeals by Ephrem Setako ("Setako") and the Prosecution against the Judgement and Sentence rendered by Trial Chamber I of the Tribunal ("Trial Chamber") on 25 February 2010, and issued in writing on 1 March 2010, in the case of *The Prosecutor v. Ephrem Setako* ("Trial Judgement").[1]

I. INTRODUCTION

A. Background

2. Setako was born on 5 May 1949 in Nkuli commune, Ruhengeri prefecture, Rwanda.[2] In 1973, he graduated from the *École d'officiers de Kigali*,[3] with the rank of sub-lieutenant[4] and was appointed to the rank of lieutenant colonel in 1991.[5] He obtained a bachelor's degree in law in 1977 from the National University of Rwanda.[6] Throughout his career, Setako held several posts in the Ministry of Defence and the Ministry of the Interior.[7] From November 1993 and throughout the relevant events, Setako served as head of the legal affairs division of the Ministry of Defence.[8]

3. The Trial Chamber convicted Setako of genocide under Article 6(1) of the Statute of the Tribunal ("Statute") for ordering the killings of Tutsis at Mukamira military camp ("Mukamira camp") on 25 April 1994 and 11 May 1994 ("25 April Killings" and "11 May Killings", respectively; "25 April and 11 May Killings", jointly).[9] Moreover, in relation to the 25 April Killings, it convicted Setako under Article 6(1) of the Statute of extermination as a crime against humanity, and of violence to life, health, and physical or mental well-being of persons (murder) as a

[1] *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Judgement and Sentence, 25 February 2010. For ease of reference, two annexes are appended: Annex A – Procedural History and Annex B – Cited Materials and Defined Terms.
[2] Trial Judgement, para. 86.
[3] This school was later renamed *École supérieure militaire*. *See* Trial Judgement, fn. 140.
[4] Trial Judgement, para. 86.
[5] Trial Judgement, para. 88.
[6] Trial Judgement, para. 86.
[7] Trial Judgement, paras. 86-88.
[8] Trial Judgement, para. 89.
[9] Under Count 1. *See* Trial Judgement, paras. 368, 474, p. 131 (Verdict). *See also* Trial Judgement, para. 18. The Trial Chamber found that in light of Setako's conviction under Article 6(1) of the Statute there was no need to consider his responsibility under Article 6(3) of the Statute "since it would be impermissible to enter a conviction on both bases". *See* Trial Judgement, para. 474. While this finding was made in conclusion of the Trial Chamber's analysis relating to Count 1 (genocide), it appears to have been equally applied to Setako's other convictions under Counts 4 and 5, respectively.

serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[10] The Trial Chamber found Setako not guilty of complicity in genocide, murder as a crime against humanity, and pillage as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[11] The Trial Chamber sentenced Setako to a single term of 25 years of imprisonment.[12]

B. The Appeals

4. Setako challenges his convictions[13] and requests that the Appeals Chamber overturn them, quash his sentence, and release him, or, in the alternative, order a retrial and his release on bail pending the commencement of the retrial.[14] Setako has divided his grounds of appeal into two main categories: (i) errors of law; and (ii) errors of fact.[15] The Prosecution responds that Setako's grounds of appeal should be dismissed in their entirety.[16] The Appeals Chamber notes that several aspects of Setako's arguments framed as errors of law or errors of fact are inextricably intertwined. Therefore, for ease of analysis, related arguments have been grouped together.

5. The Prosecution presents three grounds of appeal. It alleges that the Trial Chamber erred: (i) in failing 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;[17] (ii) in failing to make any finding on Setako's responsibility under Article 6(3) of the Statute for the 25 April and 11 May Killings;[18] and (iii) in its determination of Setako's sentence.[19] It requests that the Appeals Chamber find Setako responsible as a superior pursuant to Article 6(3) of the Statute for the 25 April and 11 May Killings for the purpose of sentencing, and convict Setako for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for ordering the 11 May Killings.[20] It also requests that the Appeals Chamber

[10] Under Counts 4 and 5, respectively. *See* Trial Judgement, paras. 482, 491, p. 131 (Verdict). *See also* Trial Judgement, para. 18. The Trial Chamber considered that Setako's convictions for extermination as a crime against humanity and for violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II were cumulative to his conviction for genocide. *See* Trial Judgement, para. 508.
[11] Under Counts 2, 3, and 6, respectively. *See* Trial Judgement, paras. 474, 479, 492, p. 131 (Verdict).
[12] Trial Judgement, para. 509.
[13] Setako Notice of Appeal, paras. 7-68; Setako Appeal Brief, paras. 8-274.
[14] Setako Notice of Appeal, para. 69; Setako Appeal Brief, para. 275.
[15] Setako Notice of Appeal, Table of Contents.
[16] Prosecution Response Brief, paras. 1, 139.
[17] Prosecution Notice of Appeal, paras. 4-6; Prosecution Appeal Brief, paras. 22-30.
[18] Prosecution Notice of Appeal, paras. 7-12; Prosecution Appeal Brief, paras. 31-40.
[19] Prosecution Notice of Appeal, paras. 13-29; Prosecution Appeal Brief, paras. 41-76.
[20] Prosecution Notice of Appeal, paras. 6, 11, 12; Prosecution Appeal Brief, paras. 30, 40, 77.

impose a sentence of life imprisonment.[21] Setako responds that the Prosecution's appeal should be dismissed.[22]

6. The Appeals Chamber heard oral submissions regarding these appeals on 29 March 2011.

[21] Prosecution Notice of Appeal, paras. 28, 29; Prosecution Appeal Brief, paras. 76, 77.
[22] Setako Response Brief, paras. 3, 73, 74.

II. STANDARDS OF APPELLATE REVIEW

7. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.[23]

8. Regarding errors of law, the Appeals Chamber has stated:

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[24]

9. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[25] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[26]

10. Regarding errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by the trial chamber:

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[27]

11. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[28] Arguments which do not have the potential to cause the

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[23] *Muvunyi II* Appeal Judgement, para. 7; *Renzaho* Appeal Judgement, para. 7. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 9.
[24] *Muvunyi II* Appeal Judgement, para. 8; *Renzaho* Appeal Judgement, para. 8; *Ntakirutimana* Appeal Judgement, para. 11 (internal citation omitted). *See also Boškoski and Tarčulovski* Appeal Judgement, para.10.
[25] *Muvunyi II* Appeal Judgement, para. 9; *Renzaho* Appeal Judgement, para. 9. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 11.
[26] *Muvunyi II* Appeal Judgement, para. 9; *Renzaho* Appeal Judgement, para. 9. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 11.
[27] *Muvunyi II* Appeal Judgement, para. 10; *Renzaho* Appeal Judgement, para. 10; *Krstić* Appeal Judgement, para. 40 (internal citations omitted).
[28] *Muvunyi II* Appeal Judgement, para. 11; *Renzaho* Appeal Judgement, para. 11. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 16.

impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[29]

12. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[30] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[31] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[32]

[29] *Muvunyi II* Appeal Judgement, para. 11; *Renzaho* Appeal Judgement, para. 11. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 16.
[30] Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). *See Muvunyi II* Appeal Judgement, para. 12; *Renzaho* Appeal Judgement, para. 12. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 17.
[31] *Muvunyi II* Appeal Judgement, para. 12; *Renzaho* Appeal Judgement, para. 12. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 17.
[32] *Muvunyi II* Appeal Judgement, para. 12; *Renzaho* Appeal Judgement, para. 12. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 17.

III. APPEAL OF SETAKO

A. Alleged Violation of Fair Trial Rights

13. The Prosecution filed the original indictment in this case on 16 March 2004 ("Original Indictment")[33] and, on 22 March 2004, a modified version of this indictment was confirmed ("22 March 2004 Indictment").[34] On 15 June 2007, the Prosecution filed a motion seeking the amendment of the 22 March 2004 Indictment[35] which the Trial Chamber granted, in part, on 18 September 2007.[36] In compliance with the Decision of 18 September 2007, the Prosecution filed an amended indictment on 24 September 2007 ("24 September 2007 Indictment").[37] This indictment was subsequently amended on 10 March and 23 June 2008.[38] The Trial Judgement is based on the Amended Indictment of 23 June 2008.[39]

14. Setako submits that the Trial Chamber violated his right to be tried without undue delay by granting leave, in its Decision of 18 September 2007, to amend the 22 March 2004 Indictment more than three years after its confirmation.[40] Setako asserts that he was "gravely prejudiced" by this amendment because the 24 September 2007 Indictment significantly expanded the case against

[33] *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Indictment, 16 March 2004.
[34] *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Indictment, 22 March 2004; *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Decision on Confirmation of an Indictment against Ephrem Setako, 22 March 2004. At his initial appearance, Setako pleaded not guilty to all charges. T. 22 November 2004 pp. 4, 5.
[35] *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Prosecutor's Motion for Leave to Amend Indictment, 15 June 2007 (confidential) ("Motion for Leave to Amend the Indictment"). *See also The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Prosecutor's Reply to Defence Response to the Prosecutor's Motion for Leave to Amend Indictment, Dated 15 June 2007, 27 August 2007 (confidential).
[36] *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Decision on the Prosecution's Request to Amend the Indictment, 18 September 2007 ("Decision of 18 September 2007"). *See also* Trial Judgement, para. 515.
[37] *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Amended Indictment, 24 September 2007. The Appeals Chamber notes that while this amended indictment was apparently transmitted by the Prosecution to the Registry on 23 September 2007, it was stamped and filed on the next day. The Appeals Chamber further notes that in the Trial Judgement, the Trial Chamber referred to the date of 23 September 2007 (Trial Judgement, para. 515). The Appeals Chamber will refer to the actual filing date: 24 September 2007.
[38] *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Amended Indictment Filed Pursuant to the Decision of Trial Chamber Dated 3 March 2008, 10 March 2008 ("10 March 2008 Indictment"); *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Amended Indictment ŦPursuant to the Trial Chamber's Decision on Defence Motion concerning Defects in Indictment Delivered on 17 June 2008ğ, 23 June 2008 ("Amended Indictment"); *See also The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Decision on Defence Motion Concerning Defects in the Amended Indictment, 17 June 2008.
[39] Trial Judgement, para. 520. The Amended Indictment is annexed to the Trial Judgement (Trial Judgement, Annex C).
[40] Setako Notice of Appeal, para. 8; Setako Appeal Brief, paras. 9, 10; AT. 29 March 2011 pp. 3, 4. Setako suggests that the Trial Chamber implicitly recognized this infringement by stating, *inter alia*, that "the Prosecution Ŧdidğ not appear to have exercised diligence in bringing forth these amendments more than three years after confirmation was originally sought". Setako Appeal Brief, para. 10, *citing* Decision of 18 September 2007, para. 9. *See also* AT. 29 March 2011 pp. 37, 38.

him.[41] Due to a lack of resources and time, he was unable to devote the necessary investigative resources to charges relating to the 25 April and 11 May Killings.[42]

15. In response, the Prosecution requests the summary dismissal of Setako's contention that he lacked time and resources to prepare his defence, averring that this argument goes beyond his Notice of Appeal[43] and that Setako failed to raise this issue during trial.[44] The Prosecution further argues that Setako's claim should fail even if considered on the merits.[45] It asserts that Setako had ample time to investigate the 25 April and 11 May Killings as they were pleaded in the 22 March 2004 Indictment and remained unchanged in the 24 September 2007 Indictment and the Amended Indictment.[46] The Prosecution finally contends that Setako does not indicate what additional resources were needed to conduct further investigations for his defence.[47]

1. Preliminary Issues

16. In his Notice of Appeal, Setako submits that the Trial Chamber violated his right to be tried without undue delay by granting the Motion for Leave to Amend the Indictment.[48] In his Appeal Brief, Setako reiterates this contention, albeit in general terms,[49] and focuses on the prejudice he allegedly suffered in the preparation of his defence as a result of the introduction of new material facts and charges in the 24 September 2007 Indictment.[50] The Appeals Chamber finds that, contrary to the Prosecution's contention, in so doing Setako has not impermissibly expanded the scope of his Notice of Appeal.

17. Furthermore, the Appeals Chamber finds that Setako did not waive his right to raise on appeal the issue of lack of resources and time to conduct investigations concerning the 25 April and

[41] Setako Appeal Brief, paras. 22, 23; AT. 29 March 2011 p. 4. Setako submits that, although the Trial Chamber denied the Prosecution's request to add two new counts of conspiracy and direct and public incitement to commit genocide and various vague or general factual allegations, it allowed the remaining proposed amendments involving the inclusion of several additional factual allegations. Setako Appeal Brief, para. 11. *See also* Setako Brief in Reply, para. 8. Setako further indicates that nine of the new factual allegations allowed by the Trial Chamber were dismissed in the Trial Judgement for lack of notice. Setako Appeal Brief, paras. 21, 22; Setako Brief in Reply, para. 9. *See also* AT. 29 March 2011 pp. 37, 38.
[42] Setako Appeal Brief, paras. 22, 23; Setako Brief in Reply, paras. 7, 9; AT. 29 March 2011 p. 4. *See also* Setako Appeal Brief, paras. 12-20; AT. 29 March 2011 pp. 37, 38.
[43] Prosecution Response Brief, para. 11; AT. 29 March 2011 pp. 19-22. The Prosecution also submits that Setako has abandoned his contention that his right to be tried without undue delay was violated. Prosecution Response Brief, fn. 12.
[44] Prosecution Response Brief, para. 10.
[45] Prosecution Response Brief, paras. 12, 14, 15; AT. 29 March 2011 pp. 21, 22.
[46] Prosecution Response Brief, paras. 9, 17; AT. 29 March 2011 pp. 20, 21. *See also* Prosecution Response Brief, para. 12.
[47] Prosecution Response Brief, paras. 9, 12, 13; AT. 29 March 2011 p. 21.
[48] Setako Notice of Appeal, para. 8.
[49] Setako Appeal Brief, paras. 9, 10, 22.
[50] Setako Appeal Brief, paras. 11-23.

11 May Killings. While it appears that Setako did not specifically alert the Trial Chamber to his purported difficulty in completing these investigations as a result of the amendments to the 22 March 2004 Indictment, he did raise the issue of prejudice in his response to the Motion for Leave to Amend the Indictment.[51]

2. Alleged Violation of the Right to Be Tried Without Undue Delay and to Have Time and Facilities to Prepare a Defence

18. Setako challenges the introduction of new material facts not related to the 25 April and 11 May Killings in the 24 September 2007 Indictment.[52] He claims that he could not properly investigate the charges concerning the 25 April and 11 May Killings due to the expanded scope of the case and limited resources.[53] Setako argues that, had the Trial Chamber not granted leave to amend the 22 March 2004 Indictment, he would have expanded his investigations with respect to the events at Mukamira camp[54] in order to establish that: (i) no killings occurred at the camp; (ii) General Bizimungu ("Bizimungu") was not there on 25 April 1994; (iii) no civil defence training took place at the camp during the relevant period; and (iv) Witnesses SLA and SAT fabricated evidence.[55] Setako argues that the filing of the 24 September 2007 Indictment forced him to stop those investigations and focus on the new charges.[56]

19. The Appeals Chamber recalls that trial chambers enjoy considerable discretion in the conduct of proceedings before them.[57] This discretion must be exercised consistently with Articles 19 and 20 of the Statute which require trial chambers to ensure that trials are fair and expeditious.[58] The Decision of 18 September 2007 granting leave to amend the 22 March 2004 Indictment relates to the general conduct of trial proceedings and thus falls within the discretion of the Trial Chamber. In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a discernible error resulting in prejudice to that

[51] *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-PT, Defence Response to the Prosecutor's Motion for Leave to Amend the Indictment, 20 August 2007 (confidential), paras. 15, 16, 81-84, 135, 136.
[52] The Appeals Chamber further notes that Setako does not challenge on appeal the incorporation of these material facts into the counts of genocide and complicity in genocide made for the first time in the 10 March 2008 Indictment and maintained in the Amended Indictment. Nor does Setako complain about the other amendments introduced in the 10 March 2008 Indictment and the Amended Indictment.
[53] Setako Appeal Brief, para. 23; AT. 29 March 2011 pp. 3, 4.
[54] Setako Brief in Reply, para. 7; AT. 29 March 2011 pp. 3, 4.
[55] Setako Brief in Reply, para. 7; AT. 29 March 2011 pp. 3, 4.
[56] Setako Brief in Reply para. 7; AT. 29 March 2011 pp. 3, 4.
[57] *Nchamihigo* Appeal Judgement, para. 18; *Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009 ("*Ngirabatware* Decision of 12 May 2009"), para. 22.
[58] *Nchamihigo* Appeal Judgement, para. 18; *Ngirabatware* Decision of 12 May 2009, para. 22.

party.[59] The Appeals Chamber will therefore limit its consideration to whether the Trial Chamber abused its discretion by committing a discernible error.[60]

20. In its Decision of 18 September 2007, the Trial Chamber acknowledged its overriding obligation to ensure the fairness of the proceedings.[61] In considering the ameliorating effects of some of the proposed amendments, it noted with concern that the majority of the amendments sought "to greatly expand the case against ŦSetakoğ, as opposed to simply providing greater precision and clarity to vague allegations."[62] The Trial Chamber considered that the "principal issue is whether allowing the proposed amendments would unduly delay the proceedings or otherwise prejudice the Defence."[63] It then found that "permitting the Prosecution's proposed amendments in their entirety at this stage of the proceedings would certainly lead to an unfair tactical advantage" in view of the upcoming start of the trial.[64] The Trial Chamber ultimately decided that it was appropriate "to allow the Prosecution to make some of its proposed changes to the Ŧ22 March 2004 Indictmentğ, which enhance trial fairness, such as better articulating its theories of criminal responsibility, removing any factual allegations it no longer wishes to pursue, and correcting or supplementing with additional detail any of the existing factual allegations."[65] It therefore only allowed some of the sought amendments.[66]

21. The Appeals Chamber finds no error in the Trial Chamber's approach. The Trial Chamber took into account the need to ensure the fairness of the proceedings in considering the amendments sought by the Prosecution and carried out a balanced evaluation. The fact that the Trial Chamber allowed amendments to the 22 March 2004 Indictment more than three years after its confirmation is not sufficient to demonstrate that the amendments were untimely or that they prejudiced Setako.

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[59] *Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor*, Case No. ICTR-98-44-AR73.19, Decision on Matthieu Ngirumpatse's Appeal Against a Sanction Imposed on Counsel by Trial Chamber's Decision of 1 September 2010, 21 March 2011, para. 12; *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 18 May 2010, para. 11; *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents, 19 February 2010, para. 9. *See also The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 9 (stating that "Ŧiğf the Trial Chamber has properly exercised its discretion, the Appeals Chamber may not intervene solely because it may have exercised the discretion differently.").
[60] *Nchamihigo* Appeal Judgement, para. 18; *Ngirabatware* Decision of 12 May 2009, para. 8.
[61] Decision of 18 September 2007, para. 6.
[62] Decision of 18 September 2007, para. 8.
[63] Decision of 18 September 2007, para. 10.
[64] Decision of 18 September 2007, para. 11. At the time of the Decision of 18 September 2007, the trial was due to start at the end of 2007 or beginning 2008 (*see* Decision of 18 September 2007, para. 11). Ultimately, it started on 25 August 2008 (*see* Trial Judgement, paras. 521, 522).
[65] Decision of 18 September 2007, para. 11.
[66] Decision of 18 September 2007, para. 13, p. 5 (Disposition).

22. Furthermore, while the Prosecution case started on 25 August 2008, approximately eight months after the commencement date envisaged by the Decision of 18 September 2007,[67] Setako has not demonstrated that this delay or any other delay in the pre-trial or trial proceedings resulted from the amendments authorized in that decision.

23. Moreover, the Appeals Chamber notes that the material facts relating to the 25 April and 11 May Killings were already pleaded in the Original Indictment and the 22 March 2004 Indictment.[68] Setako does not explain why he could not fully investigate these allegations before the filing of the 24 September 2007 Indictment. In addition, the Prosecution case started on 25 August 2008 and the Defence case began on 4 May 2009, respectively 11 and 19 months after the filing of the 24 September 2007 Indictment.[69] Consequently, the Appeals Chamber finds that Setako was afforded a reasonable period of time after the filing of the 24 September 2007 Indictment to complete the preparation of his case.

24. The Appeals Chamber also notes that the trial record, including evidence presented by the Defence, shows that Setako addressed at trial the issues which he now claims he was not able to investigate in full.[70]

3. Conclusion

25. The Appeals Chamber finds that Setako has failed to establish that the Trial Chamber committed a discernible error in its Decision of 18 September 2007 by allowing the amendments to the 22 March 2004 Indictment, and has not demonstrated how the amendments prejudiced him or how his case was otherwise unduly delayed as a result.

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

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[67] Trial Judgement, paras. 521, 522. *See also* Decision of 18 September 2007, para. 11.
[68] For the 25 April Killings: *see* 22 March 2004 Indictment, paras. 21.3 (under Count 4: Extermination as a Crime against Humanity); 26.3 (under Count 5: Causing Violence to Life, Health and Physical or Mental Well-Being of Persons as a Serious Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II). For the 11 May Killings: *see* 22 March 2004 Indictment, para. 21.5 (under Count 4: Extermination as a Crime against Humanity).
[69] Trial Judgement, paras. 522, 525.
[70] Several Defence witnesses testified that no killings occurred at Mukamira camp: Witnesses NBO, NEC, NDI, and NCA. *See* Trial Judgement, paras. 333-337. Setako also presented *Gacaca* material and an expert witness in order to raise doubt in the Prosecution case. *See* Trial Judgement, paras. 73, 75-80. Setako also tried to impeach Witness SLA's testimony that Bizimungu was present at the 25 April Meeting. *See* Trial Judgement, para. 355. Setako also presented evidence to the effect that no civil defence training took place at Mukamira camp. *See* Trial Judgement, paras. 334 (Witness NEC); 359 (Defence Exhibits 56, 57, and 100). Finally, Setako presented evidence to the effect that the Prosecution evidence was fabricated. *See* Defence Exhibit 14.

B. Alleged Errors in the Assessment of the Evidence

27. In its factual findings underlying Setako's convictions, the Trial Chamber relied on the evidence of Prosecution Witnesses SLA and SAT.[71] On appeal, Setako claims that the Trial Chamber erred in law and in fact in convicting him based on their evidence[72] and in its assessment of the Defence evidence.[73]

1. Alleged Errors in Assessing Prosecution Evidence

28. Witnesses SLA and SAT testified that they attended a meeting at Mukamira camp on 25 April 1994 ("25 April Meeting") in which Setako urged the killing of Tutsis at the camp.[74] Witness SAT testified that, at around 9.00 p.m. that night, he and other assailants assembled and shot between 30 and 40 Tutsi civilians, who had sought refuge at Mukamira camp.[75] Witness SLA testified that, on the night of 25 April 1994, assailants killed between 30 and 50 refugees from Kigali.[76] Although Witness SLA did not participate in this attack he heard gunfire and saw bodies.[77] Witnesses SLA and SAT further testified that, on 11 May 1994, Setako brought approximately 10 individuals to Mukamira camp and arranged for their killing.[78]

29. The Trial Chamber noted that both witnesses were alleged accomplices of Setako "at least with respect to the killings of 25 April", and stated that it would view their evidence with "appropriate caution".[79] After addressing several issues which, according to Setako, affected the credibility of their testimonies,[80] the Trial Chamber concluded that the witnesses "provided convincing and largely corroborated accounts of Setako's presence at [Mukamira] camp on 25 April and 11 May 1994 as well as the ensuing killings."[81]

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[71] Trial Judgement, paras. 322-330, 338-359, 367.
[72] Setako Notice of Appeal, paras. 24, 25, 29, 30-52; AT. 29 March 2011 pp. 4-15.
[73] Setako Notice of Appeal, paras. 21-23, 26-28, 53-67; AT. 29 March 2011 p. 11.
[74] T. 16 September 2008 pp. 43-45; T. 18 September 2008 pp. 15-17, 21, 22, 55, 56, 77-82.
[75] T. 18 September 2008 pp. 82, 83; T. 19 September 2008 pp. 2-6, 30; T. 22 September 2008 pp. 7, 9. *See also* Trial Judgement, paras. 329, 340.
[76] T. 16 September 2008 pp. 49, 50, 67; T. 18 September 2008 pp. 17-24. *See also* Trial Judgment, paras. 325, 340.
[77] T. 18 September 2008 pp. 20-24. Witness SLA further testified that, at around 10.00 p.m. on the same night, he participated in the killing of 30 to 40 Tutsis who had been arrested at a roadblock upon Setako's orders. *See* T. 16 September 2008 pp. 45-49; T. 18 September 2008 pp. 17-20, 24-26; Trial Judgement, para. 324. The Trial Chamber did not convict Setako for these killings. *See* Trial Judgement, para. 367.
[78] T. 16 September 2008 pp. 49-54; T. 18 September 2008 pp. 39-41, 84, 85; T. 22 September 2008 pp. 1-3. *See also* Trial Judgement, paras. 326, 330, 340.
[79] Trial Judgement, para. 339. *See also* Trial Judgement, paras. 348, 367.
[80] *See* Trial Judgement, paras. 321, 339-358.
[81] Trial Judgement, para. 367. *See also* Trial Judgement para. 12.

30. Setako avers that the Trial Chamber erred in finding Witnesses SLA and SAT credible.[82] In particular, he submits that the Trial Chamber erred in its assessment of: (a) their prior confessions and statements;[83] (b) inconsistencies between Witness SLA's testimony in the present case and his testimony in the *Ndindiliyimana et al.* case;[84] (c) inconsistencies between the testimonies of Witnesses SLA and SAT in the present case;[85] (d) allegations of fabrication and manipulation of evidence;[86] (e) allegations of collusion;[87] and (f) Witnesses SLA's and SAT's evidence in light of the fact that they were accomplice witnesses.[88]

31. The Appeals Chamber will consider these challenges in turn. At the outset, it recalls that it is within the discretion of a trial chamber to evaluate inconsistencies in the evidence, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.[89] The Appeals Chamber will defer to a trial chamber's judgement on issues of credibility, including its resolution of disparities among different witnesses' accounts, and will only find an error of fact if it determines that no reasonable trier of fact could have made the impugned finding.[90] Furthermore, corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.[91]

(a) Prior Confessions and Statements

32. Witnesses SLA and SAT made several confessions to the Rwandan judicial authorities about their participation in crimes committed during the genocide. Witness SLA made a *pro justitia* statement in January 1997[92] and a confession and guilty plea in July[93] and August 1999.[94] Witness SAT confessed and entered a guilty plea in March 2001[95] and May 2005.[96] Both witnesses

[82] Setako Notice of Appeal, paras. 13, 25, 41-52; Setako Appeal Brief, paras. 98, 99, 154-185; AT. 29 March 2011 pp. 4-15, 37-40. *See also* Setako Brief in Reply, paras. 19, 20, 22-43.
[83] Setako Notice of Appeal, paras. 36, 41-47; Setako Appeal Brief, paras. 89-92, 94-96, 140, 154-175.
[84] Setako Notice of Appeal, paras. 48-50, 52; Setako Appeal Brief, paras. 93, 97, 169, 176-184.
[85] Setako Notice of Appeal, paras. 24, 31, 51; Setako Appeal Brief, paras. 79-82, 87, 128-139, 185.
[86] Setako Notice of Appeal, para. 37, 40; Setako Appeal Brief, paras. 142-145, 152, 153. *See also* Setako Brief in Reply, paras. 22-24.
[87] Setako Notice of Appeal, paras. 38, 39; Setako Appeal Brief, paras. 146-151.
[88] Setako Notice of Appeal, para. 25; Setako Appeal Brief, paras. 98, 99, 141, 166; AT. 29 March 2011 pp. 8, 39. *See also* Setako Brief in Reply, para. 29.
[89] *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.
[90] *See supra*, para. 10. *See also Renzaho* Appeal Judgement, para. 355; *Gacumbitsi* Appeal Judgement, para. 70.
[91] *Rukundo* Appeal Judgement, para. 201; *Karera* Appeal Judgement, para. 173; *Nahimana et al.* Appeal Judgement, para. 428.
[92] Defence Exhibit 47.
[93] Prosecution Exhibit 21.
[94] Defence Exhibit 48.
[95] Prosecution Exhibit 23.
[96] Prosecution Exhibit 24.

were also interviewed by the Tribunal's investigators and provided statements to them. Witness SLA provided statements in October 2002[97] and April 2003.[98] Witness SAT provided statements in September 2002[99] and April 2003.[100]

33. None of the confessions and statements made by Witnesses SLA and SAT prior to April 2003 mentioned the 25 April and 11 May Killings or Setako's role therein. At the core of Setako's submissions is the contention that the Trial Chamber failed to properly assess or sufficiently explain this omission.[101] In this context, Setako raises both general and specific challenges to the Trial Chamber's reasoning. Moreover, Setako points to additional issues which, he claims, affect the credibility of Witnesses SLA and SAT and were not adequately addressed by the Trial Chamber. The Appeals Chamber will consider these submissions in turn.

(i) General Challenges to the Trial Chamber's Reasoning

34. At trial, Setako confronted Witnesses SLA and SAT with their failure to mention the 25 April and 11 May Killings and Setako's role therein prior to the statements they made to Tribunal's investigators in April 2003.[102] The witnesses explained that they had not been charged with participating in these crimes in Rwanda.[103] The Trial Chamber accepted the witnesses' explanations, reasoning as follows:

> The Chamber observes that neither witness was directly involved in the 11 May killings. They only observed Setako order the killing of the Tutsis [*sic*] refugees and either saw or heard about the subsequent killings. Therefore, there is no reason why this would feature in their Rwandan judicial records. Furthermore, it is not surprising that, without being charged with the 25 April killings, neither witness would have voluntarily discussed their participation in them. This reflects the general need, mentioned above, to view their evidence with caution. It does not, however, invalidate their accounts of these events.[104]

35. Setako avers that the Trial Chamber erred in this respect. He argues that it is inconceivable that Witnesses SLA and SAT would remember details such as dates and locations of crimes and names of victims and co-perpetrators in their confessions, and yet not mention the 25 April and 11 May Killings.[105]

[97] Defence Exhibit 45. Witness SLA was interviewed by the Tribunal's investigators on 28 and 29 October 2002 but signed his statement on 29 October 2002.
[98] Defence Exhibit 46.
[99] Defence Exhibit 53.
[100] Defence Exhibit 54.
[101] Setako Notice of Appeal, paras. 41-47; Setako Appeal Brief, paras. 154-175.
[102] *See* Trial Judgement, para. 346.
[103] T. 16 September 2008 p. 67; T. 19 September 2008 p. 4.
[104] Trial Judgement, para. 348 (internal citations omitted).
[105] Setako Appeal Brief, para. 164. Setako does not specify to which confessions of Witnesses SLA and SAT he refers.

36. He further submits that the Trial Chamber erred in failing to consider that Witnesses SLA's and SAT's confessions to Rwandan authorities in 1999 and 2001 were made closest in time to the crimes.[106] He contends that, at the time of these confessions, the witnesses were "less vulnerable to any subsequent influence" and that, as a consequence, their failure to mention the 25 April Killings was significant and should have been taken into account in assessing their credibility.[107]

37. Setako also submits that the Trial Chamber failed to consider "one reasonable explanation" for the witnesses' failure to mention the 25 April Killings before their respective statements of April 2003, namely, that "no massacres occurred [at Mukamira camp] in April 1994."[108]

38. Finally, Setako argues that the Trial Chamber should have considered that, under the Rwandan Organic Law No. 8/96, the witnesses were obliged to list in their confessions to Rwandan judicial authorities all their prior offences and co-perpetrators.[109]

39. The Prosecution does not specifically respond to these challenges.

40. The Appeals Chamber finds speculative and unconvincing Setako's assertion that the witnesses were "less vulnerable to any subsequent influence" at the time of their confessions in Rwanda. In assessing the credibility of a witness, various factors should be considered, including the timing and circumstances of any confessions as well as the possible vulnerability of a witness to undue influence. However, these factors must be considered in the context of all of the evidence on the record.[110] In the present case, the Trial Chamber reasonably considered other relevant circumstances. In particular, it took into account that the witnesses were not charged in Rwanda with the killings on 25 April 1994 and thus would not have voluntarily discussed their participation in them.[111] Furthermore, the Trial Chamber reasoned that since the witnesses were not directly involved in the 11 May Killings, this event would not feature in their Rwandan judicial records.[112] Setako has not demonstrated that the Trial Chamber failed to address a significant factor in assessing Witnesses SLA's and SAT's explanations for not having mentioned the 25 April and 11 May Killings in their confessions in Rwanda.

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[106] Setako Appeal Brief, para. 155, *referring to Niyitegeka* Appeal Judgement, para. 33. *See also* Setako Appeal Brief, para. 92.
[107] Setako Appeal Brief, para. 155.
[108] Setako Appeal Brief, para. 165. *See also* Setako Brief in Reply, para. 31.
[109] Setako Appeal Brief, para. 163, *referring to* Defence Exhibit 48, p. 1; Rwandan Organic Law No. 8/96, Chapter 21, Article 6. In reply, Setako claims that Witnesses SLA and SAT were both required under the Rwandan Organic Law No. 8/96 to list all of their offences and co-perpetrators. *See* Setako Brief in Reply, para. 31.
[110] *See Nchamihigo* Appeal Judgement, para. 47.
[111] Trial Judgement, paras. 347, 348.
[112] Trial Judgement, para. 348.

41. The Appeals Chamber notes that Setako raises for the first time on appeal the argument that Witness SLA was obliged under the Rwandan Organic Law No. 8/96 to mention all of his crimes and co-perpetrators in his confessions. At trial, Witness SLA testified during cross-examination that he was not under any obligation to raise the issue of the 25 April Killings before the courts in Rwanda, and the Defence did not confront him with the Rwandan Organic Law No. 8/96.[113] In these circumstances, the Trial Chamber was under no obligation to address the Rwandan Organic Law No. 8/96 in its assessment of Witness SLA's credibility.

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

(ii) Challenges Concerning Witness SLA

43. Setako contends that the Trial Chamber erred in relation to: (a) Witness SLA's disavowal of his January 1997 *pro justitia* statement;[114] (b) Witness SLA's admission of lying in his confessions in Rwanda;[115] and (c) the October 2002 statement of Witness SLA.[116] The Appeals Chamber will address these arguments in turn.

a. Disavowal of the January 1997 *Pro Justitia* Statement

44. In his January 1997 *pro justitia* statement, Witness SLA stated, *inter alia*, that he enrolled in the army in 1992 at Mukamira camp and was a soldier until he went into exile.[117] He also stated that he had been falsely accused of having killed three children.[118] In cross-examination, Witness SLA claimed that he made this statement as a result of torture,[119] and that he had been "coerced" to falsely state that he was soldier.[120]

45. The Trial Chamber noted Witness SLA's disavowal of his January 1997 *pro justitia* statement and his explanation that he had made it under torture.[121] The Trial Chamber concluded that, "[i]rrespective of whether the witness's allegation of torture is correct, the Chamber does not consider that this affects his testimony about the events at Mukamira camp."[122]

[113] T. 16 September 2008 p. 67.
[114] Setako Notice of Appeal, para. 43; Setako Appeal Brief, paras. 160-162.
[115] Setako Notice of Appeal, para. 42; Setako Appeal Brief, paras. 158, 159.
[116] Setako Notice of Appeal, para. 45; Setako Appeal Brief, paras. 167-170; AT. 29 March 2011 p. 12.
[117] Defence Exhibit 47.
[118] Defence Exhibit 47.
[119] T. 16 September 2008 pp. 61, 62. Witness SLA testified that "all the allegations that fall in this document [were] lies." T. 16 September 2008 p. 63.
[120] T. 16 September 2008 p. 61. *See also* T. 16 September 2008 p. 62.
[121] Trial Judgement, fn. 417.
[122] Trial Judgement, fn. 417.

46. Setako submits that the Trial Chamber erred in so finding.[123]

47. The Prosecution responds that Setako does not demonstrate an error in the Trial Chamber's conclusion that Witness SLA's claim of torture was irrelevant to its assessment of his evidence.[124]

48. The Appeals Chamber recalls that a trial chamber may rely on part of a witness's testimony and reject other parts.[125] Furthermore, the Appeals Chamber notes that the Trial Chamber only relied on Witness SLA's testimony where corroborated.[126] The Trial Chamber was therefore entitled to disregard Witness SLA's claim of torture and still rely on his evidence with respect to the 25 April and 11 May Killings.

49. Accordingly, the Appeals Chamber dismisses Setako's argument.

b. Admission of Lying in Confessions

50. Setako submits that the Trial Chamber erred by failing to consider that Witness SLA admitted to having lied in his confessions and that this admission affected the "veracity and truthfulness in his testimony".[127] Specifically, Setako challenges the Trial Chamber's failure to properly assess the witness's explanation that, if he had told the truth, he would have risked being killed by his co-perpetrators with whom he was incarcerated.[128] Setako argues that "[t]he problem with this explanation is that it does not explain his failure to mention the massacres at Mukamira".[129]

51. The Prosecution responds that Setako ignores Witness SLA's explanations.[130]

52. The Appeals Chamber notes that Setako does not indicate in which confessions Witness SLA is alleged to have lied. However, Setako refers to portions of Witness SLA's testimony in which the Defence confronted the witness with his January 1997 *pro justitia* statement and his confession from July 1999.[131] A review of the trial record shows that Witness SLA's explanation

[123] Setako Notice of Appeal, para. 43; Setako Appeal Brief, para. 160. *See also* Setako Brief in Reply, para. 33.
[124] Prosecution Response Brief, paras. 78-80.
[125] *Haradinaj et al.* Appeal Judgement, para. 201.
[126] *See* Trial Judgement, para. 367.
[127] Setako Appeal Brief, para. 159. *See also* Setako Notice of Appeal, para. 42; Setako Appeal Brief, para. 158.
[128] Setako Appeal Brief, para. 158.
[129] Setako Appeal Brief, para. 158.
[130] Prosecution Response Brief, para. 75.
[131] Setako Notice of Appeal, para. 42, *referring to* T. 16 September 2008 pp. 60, 63, 64.

regarding his fear of being killed by co-perpetrators concerned only the latter.[132] Thus, Setako's present contention is only relevant with regard to the July 1999 confession.

53. Witness SLA testified that, in July 1999, he did not admit to having participated in the killing of four members of a certain family in April 1994 because he feared being killed by his co-perpetrators in prison had he done so.[133] The Appeals Chamber notes that this explanation was meant to clarify why the witness did not fully confess to this particular crime, and not why he failed to mention the events at Mukamira camp on 25 April 1994. As regards the 25 April Killings, the Appeals Chamber recalls that Witness SLA explained that he did not mention these killings in prior confessions because they were not part of the charges against him, which was reasonably considered by the Trial Chamber.[134]

54. In light of the above, the Appeals Chamber dismisses Setako's arguments.

c. October 2002 Statement

55. At trial, Witness SLA explained that he did not refer to the 25 April and 11 May Killings or to Setako in his October 2002 statement because this statement focused mainly on investigations against Bizimungu.[135] The Trial Chamber accepted this explanation as reasonable.[136]

56. Setako asserts that the Trial Chamber erred in so doing.[137] He contends that Witness SLA's October 2002 statement was not limited to facts concerning Bizimungu, but also referred to other persons and events, such as persons attending a meeting on 11 April 1994[138] and Witness SLA's enrolment in the civil defence training at Mukamira camp on 20 April 1994.[139] Setako further points out that the October 2002 statement alluded to crimes which Witness SLA had committed on 11 April and 18 May 1994,[140] but failed to mention the 25 April Killings.[141]

[132] See T. 16 September 2008 pp. 34, 64.
[133] T. 16 September 2008, pp. 34, 63, 64.
[134] *See supra*, para. 40.
[135] Trial Judgement, para. 349, *referring to* T. 16 September 2008 p. 32; T. 18 September 2008 pp. 14, 15.
[136] Trial Judgement, para. 350. The Trial Chamber noted further that Bizimungu "does not feature" in the 11 May 1994 Killings. *See* Trial Judgement, para. 350.
[137] Setako Notice of Appeal, para. 45; Setako Appeal Brief, para. 167. *See also* Setako Appeal Brief, para. 91.
[138] Setako Appeal Brief, para. 167.
[139] Setako Appeal Brief, para. 168; Setako Brief in Reply, para. 34.
[140] *See* Setako Appeal Brief, para. 168; Setako Brief in Reply, para. 34.
[141] Setako Appeal Brief, para. 168. *See also* Setako Brief in Reply, para. 34.

57. The Prosecution responds that Setako fails to show that the Trial Chamber was unreasonable in accepting Witness SLA's explanation.[142]

58. The Appeals Chamber does not find any error in the Trial Chamber's assessment of Witness SLA's explanation. In this context, the Appeals Chamber notes that Witness SLA's October 2002 statement is not limited to events concerning Bizimungu. Indeed, it briefly recounts other incidents, including: the aftermath of the death of President Habyarimana; Witness SLA's encounter with an *Interahamwe* on 11 April 1994; and Witness SLA's civil defence training at Mukamira camp.[143] The Appeals Chamber considers that this does not render unreasonable the Trial Chamber's acceptance of Witness SLA's explanation for not mentioning Setako or the 25 April and 11 May Killings in this statement. The other persons and events mentioned therein were peripheral and only provided context for the main topic, namely Bizimungu's acts in Gitarama. Thus, Setako fails to demonstrate that the Trial Chamber's decision to accept Witness SLA's explanation was unreasonable.

59. Accordingly, the Appeals Chamber dismisses Setako's argument.

(iii) Challenges Concerning Witness SAT

a. September 2002 Statement

60. The Trial Chamber noted that Witness SAT failed to mention the 25 April and 11 May Killings in his September 2002 statement. Specifically, it considered Witness SAT's testimony that he had provided this statement in connection with investigations into Captain Hasengineza ("Hasengineza"), Bizimungu, and Juvénal Kajelijeli ("Kajelijeli").[144] In light of this explanation, the Trial Chamber found it "notable" that the statement made no reference to the 25 April Meeting since, according to Witness SAT, these individuals attended the meeting.[145] The Trial Chamber further observed that the statement did not mention the 11 May Killings even though Witness SAT testified that Hasengineza played a central role in this incident.[146] Notwithstanding these concerns, the Trial Chamber found that in the overall context these omissions did not reflect material inconsistencies with the witness's testimony at trial.[147]

[142] Prosecution Response Brief, para. 81.
[143] *See* Defence Exhibit 45, pp. 3-5.
[144] Trial Judgement, para. 351.
[145] Trial Judgement, para. 351.
[146] Trial Judgement, para. 351.
[147] Trial Judgement, para. 352.

61. Setako contends that the Trial Chamber erred in its assessment of the discrepancies between the September 2002 statement and Witness SAT's testimony at trial.[148] He argues that the Trial Chamber failed to consider that the omissions in the September 2002 statement were material inconsistencies that affected the witness's credibility.[149] Specifically, Setako submits that the Trial Chamber erred in accepting that these inconsistencies were reasonably explained by the witness's lack of trust in the Tribunal's investigators.[150] He further avers that Witness SAT's failure to mention the 25 April and 11 May Killings could not be reasonably explained on the basis that his September 2002 statement was given in connection with investigations into Bizimungu, Kajelijeli, and Hasengineza, since Hasengineza allegedly was present and participated in those killings.[151]

62. The Prosecution responds that the Trial Chamber reasonably concluded that Witness SAT's attitude towards the Tribunal's investigators in 2002 explained the discrepancy in his accounts.[152] The Prosecution further maintains that a trial chamber may accept evidence that deviates from prior statements if it takes into account any explanations offered in respect of inconsistencies when weighing the probative value of the evidence.[153] It submits that Setako does not demonstrate any error in the Trial Chamber's assessment of Witness SAT's evidence.[154]

63. The Trial Chamber was fully aware of the significance of the omission of any reference to the 25 April and 11 May Killings in Witness SAT's September 2002 statement and the apparent inconsistency between the witness's explanation – that this statement focused on the acts of Hasengineza, Bizimungu, and Kajelijeli –[155] and his testimony that these officials were present at the 25 April Meeting and that Hasengineza played a central role in the 11 May Killings.[156] In resolving this inconsistency, the Trial Chamber considered that the September 2002 statement was rather brief, spanned from early 1992 to July 1994, included Witness SAT's own acts in April 1994, and only covered "the events at Mukamira" in a cursory manner.[157] It also accepted Witness SAT's explanation that he lied to the Tribunal's investigators in 2002 and only gave a full statement in

[148] Setako Notice of Appeal, para. 46; Setako Appeal Brief, para. 171.
[149] Setako Appeal Brief, para. 172.
[150] Setako Notice of Appeal, para. 46; Setako Appeal Brief, para. 171. *See also* Setako Brief in Reply, paras. 40, 42.
[151] Setako Appeal Brief, para. 90. *See also* Setako Appeal Brief, para. 171; Setako Brief in Reply, para. 39.
[152] Prosecution Response Brief, para. 93.
[153] Prosecution Response Brief, para. 96, *referring to Muhimana* Appeal Judgement, para. 135; *Niyitegeka* Appeal Judgement, para. 96.
[154] Prosecution Response Brief, paras. 93, 96.
[155] Defence Exhibit 54, p. 3.
[156] *See* Trial Judgement, para. 351.
[157] *See* Trial Judgement, para. 351.

2003, "once he was assured of their identity."[158] The Appeals Chamber finds no error in the Trial Chamber's approach.

64. Setako further submits that the Trial Chamber erred in finding that Witness SAT's testimony at trial was "credible and consistent" with his September 2002 statement regarding the description of the killings at Mukamira camp in April 1994.[159] Setako points out that in his September 2002 statement, Witness SAT indicated that during the three months he spent at the camp, relatives of Tutsi soldiers who had gone to the front were killed on various occasions by soldiers who remained at the camp.[160] According to Setako, this suggests a series of killings, which were committed not upon orders of any particular person, but on the initiative of individual soldiers.[161] By contrast, Witness SAT did not mention killings of relatives of Tutsi soldiers in his April 2003 statement.[162] Moreover, during his testimony at trial, he described the killings as a single event on 25 April 1994 ordered by Setako.[163] Setako further submits that Witness SAT claimed in his September 2002 statement that Tutsi soldiers complained about the killing of their relatives. In Setako's view, "[i]f this was indeed true, then more witnesses other than SAT and SLA would have been aware of these massacres such as families of victims and former Tutsi soldiers."[164]

65. In response, the Prosecution submits that the possibility that the relatives of Tutsi soldiers may have been killed on more than one occasion does not exclude the fact that Tutsis were killed on 25 April 1994.[165]

66. The Trial Chamber noted that, in his September 2002 statement, Witness SAT mentioned that Tutsis who had sought refuge with relatives based at Mukamira camp were killed during the three months he spent there.[166] The Appeals Chamber notes that Witness SAT also testified at trial that various groups of persons were killed at the camp.[167] Thus, while no details were provided, Witness SAT did testify at trial that other persons were also killed at Mukamira camp in circumstances other than the 25 April Killings. Accordingly, there was no contradiction between the witness's testimony and his September 2002 statement with regard to various killings taking

[158] *See* Trial Judgement, para. 351.
[159] Setako Notice of Appeal, para. 47; Setako Appeal Brief, para. 173, *referring to* Trial Judgement, para. 352. *See also* Setako Appeal Brief, para. 89.
[160] Setako Notice of Appeal, para. 47; Setako Appeal Brief, paras. 89, 173.
[161] Setako Appeal Brief, paras. 89, 173.
[162] Setako Appeal Brief, paras. 89, 173.
[163] Setako Appeal Brief, paras. 89, 173.
[164] Setako Appeal Brief, para. 173.
[165] Prosecution Response Brief, para. 95.
[166] Trial Judgement, para. 352, *referring to* Defence Exhibit 53, pp. 6, 7.

place at the camp. Contrary to Setako's assertion, there was also no such discrepancy between Witness SAT's September 2002 and April 2003 statements. In the latter, the witness expressly stated that he would concentrate on Setako's role.[168] It is therefore not surprising that this statement does not mention crimes committed by other people at Mukamira camp.

67. Setako's claim that if the massacres of relatives of Tutsi soldiers had indeed taken place "more witnesses would have been aware" and would have complained, is dismissed as speculative.

68. Finally, Setako avers that the Trial Chamber erred in finding that Witness SAT "included his own acts in April 1994" in his September 2002 statement, when in fact the witness did not mention his participation in the 25 April Killings therein.[169]

69. The Prosecution does not specifically respond to this challenge.

70. The Appeals Chamber considers that Setako misconstrues the Trial Chamber's finding. The Trial Chamber observed that Witness SAT's September 2002 statement was brief and "span[ned] from early 1992 to July 1994".[170] It then noted that this statement included Witness SAT's "own acts in April 1994, and that the events at Mukamira [were] only covered in a cursory manner in the statement."[171] This was a reasonable conclusion, since the September 2002 statement indeed provides, *inter alia*, a description of Witness SAT's acts on 8 April and 17 April 1994.[172] Moreover, this statement did not focus on the events at Mukamira camp. The Appeals Chamber therefore discerns no error in the Trial Chamber's assessment.

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

b. Witness SAT's Evidence Concerning the Victims of the 11 May Killings

72. Setako submits that the Trial Chamber "failed to fully assess the inconsistencies between [Witnesses] SAT and SLA in describing the Tutsis whom [the] Appellant allegedly brought with him on 11 May 1994."[173] He points out that Witness SLA claimed in his April 2003 statement that

[167] T. 19 September 2008 p. 30: "[t]hose who were killed were refugees. They were murdered on the 25th of April 1994. Other persons were brought to the camp who had been abducted and accused of being either *Inkotanyi* or *Inkotanyi* accomplices, and they were also killed at the camp."
[168] Defence Exhibit 54, p. 3.
[169] Setako Appeal Brief, para. 89, fn. 96, *referring to* Trial Judgement, para. 351.
[170] Trial Judgement, para. 351.
[171] Trial Judgement, para. 351.
[172] Witness SAT spoke about crimes he committed on 8 April 1994 and briefly mentioned his return to Mukamira camp on 17 April 1994. *See* Defence Exhibit 53, pp. 4-6.
[173] Setako Appeal Brief, para. 96.

the group was composed of ten Tutsis, including three women, one of whom was carrying a baby on her back,[174] while Witness SAT's statement of April 2003 indicated that there were nine Tutsi men.[175]

73. The Prosecution does not specifically respond to this issue.

74. To the extent that Setako suggests an inconsistency between the testimonies of Witnesses SLA and SAT,[176] the Appeals Chamber observes that both witnesses stated at trial that there were nine or ten victims of the 11 May Killings, including a woman with a child on her back.[177] Witness SLA's testimony was consistent with his April 2003 statement.[178] By contrast, the April 2003 statement of Witness SAT recounts that Setako brought nine Tutsi men to Mukamira camp who were then killed on his instructions.[179] Therefore, the question before the Appeals Chamber is whether it was reasonable for the Trial Chamber to rely on Witness SAT's evidence despite this inconsistency with his testimony at trial.

75. The Trial Chamber did not address this issue in the Trial Judgement. A review of the trial record shows that the Defence questioned Witness SAT on the difference between his April 2003 statement and testimony at trial. Witness SAT insisted that he told the Tribunal's investigators in 2003 that the victims of the 11 May Killings were nine Tutsis including a woman with a child on her back.[180] Except for the identity of the victims, Witness SAT's account of the 11 May Killings in his April 2003 statement was consistent with his testimony at trial and, in many respects, corroborated by Witness SLA.[181]

76. For these reasons, the Appeals Chamber finds that the difference concerning the identity of the victims does not call into question the Trial Chamber's reliance on Witness SAT's testimony. Accordingly, Setako's argument is dismissed.

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[174] Setako Appeal Brief, para. 96, *referring to* Defence Exhibit 46, p. 4.
[175] Setako Appeal Brief, para. 96, *referring to* Defence Exhibit 54, p. 3.
[176] Setako Notice of Appeal, para. 24; Setako Appeal Brief, para. 96.
[177] T. 16 September 2008 p. 53; T. 18 September 2008 pp. 39, 84, 85; T. 22 September 2008 pp. 1-3. It is not clear from Witnesses SLA's and SAT's testimonies whether there were a total of nine victims or whether the child was the tenth person. However, in the Appeals Chamber's view, this issue did not affect the consistency and credibility of the accounts. *See also* Trial Judgement, fn. 401. The Appeals Chamber notes that, for the purposes of sentencing, the Trial Chamber considered the number of victims to be nine. *See* Trial Judgement, fn. 592.
[178] *See* Defence Exhibit 46, p. 4, according to which Witness SLA "noticed approximately ten Tutsi[;] there were about three women, one of whom was carrying a baby on her back. The rest were men."
[179] *See* Defence Exhibit 54, p. 4.
[180] T. 22 September 2008 pp. 2, 3.
[181] *See* Trial Judgement, paras. 326, 330. As to Setako's argument that the Trial Chamber ignored substantial inconsistencies between Witnesses SLA's and SAT's testimonies about the 11 May Killings, *see infra,* Section III. B.1.(c)(ii).

(b) Witness SLA's Testimony in the *Ndindiliyimana et al.* Case

77. At trial, the Defence confronted Witness SLA with inconsistencies between his testimonies in the present case and in the *Ndindiliyimana et al.* case.[182] The Trial Chamber noted that, in the latter case, Witness SLA: (i) initially failed to mention the 25 April Meeting and 25 April Killings; (ii) stated that Bizimungu was not present at Mukamira camp during his military training there; and (iii) provided a different explanation for his presence at Mukamira camp on 11 May 1994.[183] The Trial Chamber did not consider these inconsistencies with his testimony in the present case to be significant.[184]

78. Setako submits that the Trial Chamber erred in assessing the above-mentioned inconsistencies.[185] The Appeals Chamber will consider his specific challenges in turn.

(i) Failure to Mention the 25 April Meeting and 25 April Killings

79. The Trial Chamber noted Witness SLA's testimony in the *Ndindiliyimana et al.* case that, during the two weeks he received military training at Mukamira camp in April and May 1994, no "particular" event occurred and he never personally met an officer.[186] It concluded that Witness SLA's failure to testify about the 25 April Meeting and 25 April Killings in the *Ndindiliyimana et al.* case could be explained by the fact that these events were not part of that case.[187]

80. Setako submits that this conclusion was erroneous since Witness SLA was "reasonably expected to recall [the events of 25 April 1994 in the *Ndindiliyimana et al.* case] if they indeed occurred."[188] In his view, the witness's testimony in that case calls into question the veracity of his claim in the present case that Setako participated in the 25 April Meeting and ordered the 25 April Killings.[189]

81. The Appeals Chamber recalls that Witness SLA referred to the 25 April Meeting and 25 April Killings in his April 2003 statement, more than two years before he testified in the

[182] T. 18 September 2008 pp. 25-31, 33-37.
[183] Trial Judgement, paras. 353-358. The Trial Chamber also noted that, in the *Ndindiliyimana et al.* case, Witness SLA had testified that the 25 April Meeting took place on 25 May 1994. Setako has withdrawn his contention that the Trial Chamber failed to properly assess this inconsistency. *See* Setako Notice of Appeal, para. 52; Setako Appeal Brief, para. 186.
[184] *See* Trial Judgement, paras. 353-358.
[185] Setako Notice of Appeal, paras. 48-50.
[186] *See* Defence Exhibit 50, pp. 17, 18.
[187] *See* Trial Judgement, para. 354.
[188] Setako Appeal Brief, para. 176. *See also* Setako Notice of Appeal, paras. 24, 48; Setako Appeal Brief, paras. 93, 169, 177; Setako Brief in Reply, paras. 35, 36; AT. 29 March 2011 pp. 12, 13.
[189] Setako Appeal Brief, para. 176.

Ndindiliyimana et al. case.[190] While he did not mention these events during examination-in-chief in that case, he acknowledged the content of his April 2003 statement and the allegations against Setako on cross-examination.[191]

82. Moreover, the Trial Chamber correctly noted that: (i) the 25 April Meeting and the 25 April Killings were not pleaded in the indictment in the *Ndindiliyimana et al.* case;[192] (ii) the Prosecution did not question Witness SLA specifically about Setako or the events on 25 April 1994 in that case;[193] and (iii) Witness SLA was apparently uncertain of the extent to which he could testify in the *Ndindiliyimana et al.* case about allegations against Setako.[194] Finally, in the present case, Witness SLA explained that he did not mention the 25 April Killings in the *Ndindiliyimana et al.* case because he was only asked questions about Bizimungu, who did not commit any crime on 25 April 1994.[195]

83. In light of these factors, the Appeals Chamber finds that the Trial Chamber reasonably concluded that Witness SLA's failure to testify about the 25 April Meeting and 25 April Killings in the *Ndindiliyimana et al.* case could be explained by the fact that these events were not part of that case.

84. Accordingly, the Appeals Chamber dismisses Setako's argument.

(ii) Bizimungu's Presence at the 25 April Meeting

85. The Trial Chamber found it insignificant that Witness SLA stated in the *Ndindiliyimana et al.* case that Bizimungu was not at Mukamira camp when he (Witness SLA) underwent military training there.[196] It explained that the 25 April Meeting "was not directly related to the [civil defence] group's training in weapons handling or combat techniques" and that Witness SLA did not recall in the present case that Bizimungu made any statements during the meeting.[197]

86. Setako submits that the Trial Chamber erred in determining that the inconsistencies in Witness SLA's evidence concerning Bizimungu's presence at Mukamira camp on 25 April 1994

[190] Witness SLA gave evidence in the *Ndindiliyimana et al.* case on 10 May 2005 and 19 May 2005. The transcripts of his testimony were admitted as Defence Exhibit 51 (containing the transcript of 10 May 2005) and Defence Exhibit 50 (containing the transcript of 19 May 2005). *See also* T. 18 September 2008 pp. 25-31, 33-37.
[191] *See* Defence Exhibit 51, p. 51; Defence Exhibit 50, pp. 26-29. *See also* Trial Judgement, para. 354, fns. 433, 434.
[192] Trial Judgement, fn. 431.
[193] Trial Judgement, para. 354, fn. 432, *referring to* Defence Exhibit 50, p. 17.
[194] Trial Judgement, para. 354, fn. 433, *referring to* Defence Exhibit 51, p. 51; fn. 434, *referring to* Defence Exhibit 50, pp. 26-29.
[195] Trial Judgement, para. 353, *referring to* T. 18 September 2008 pp. 26, 27.
[196] Trial Judgement, para. 355.
[197] Trial Judgement, para. 355.

were insignificant.[198] He contends that Witness SLA's assertion that Bizimungu participated in the 25 April Meeting is contradicted by his testimony in the *Ndindiliyimana et al.* case, as well as his statements of October 2002 and April 2003.[199]

87. The Prosecution responds that the Trial Chamber's finding was not unreasonable.[200]

88. The Appeals Chamber observes that Witness SLA did not mention the 25 April Meeting in his October 2002 statement. In his April 2003 statement, he mentioned the meeting, explaining that it was convened by Setako in the presence of *Bourgmestre* Gatsimbanyi ("Gatsimbanyi") and Kajelijeli; however, he did not name Bizimungu.[201] When testifying two years later in the *Ndindiliyimana et al.* case,[202] Witness SLA stated that he did not see Bizimungu at Mukamira camp while he underwent military training there in April and May 1994.[203] Thus, the first time Witness SLA asserted that Bizimungu participated in the 25 April Meeting was during his in-court testimony in the present case.[204]

89. The Trial Chamber considered this inconsistency in Witness SLA's evidence and found that it was not significant. In this context, the Trial Chamber noted that Witness SLA did not recall whether Bizimungu made any statement during the 25 April Meeting.[205] The Appeals Chamber discerns no error in the Trial Chamber's assessment in this regard, particularly since Witness SLA provided various details about this meeting, which were corroborated by Witness SAT.[206] Finally, the Appeals Chamber notes that the Trial Chamber made no finding as to whether Bizimungu was in fact present at Mukamira camp on 25 April 1994.

90. For the same reasons, the Appeals Chamber finds it insignificant that Witness SLA did not mention Bizimungu's participation in the 25 April Meeting in his statements of October 2002 and April 2003.

91. Accordingly, Setako's argument is dismissed.

(iii) Witness SLA's Presence at Mukamira Camp on 11 May 1994

[198] Setako Notice of Appeal, para. 49; Setako Appeal Brief, para. 178; Setako Brief in Reply, para. 37.
[199] Setako Appeal Brief, para. 180; Setako Brief in Reply, para. 37.
[200] AT. 29 March 2011 pp. 30, 31.
[201] *See* Defence Exhibit 46, p. 3.
[202] *See supra,* fn. 190.
[203] *See* Defence Exhibit 51, p. 65.
[204] T. 16 September 2008 pp. 43, 44; T. 18 September 2008 pp. 15, 16.
[205] *See* Trial Judgement, paras. 350, 355. As to Setako's argument that Witnesses SLA and SAT provided contradictory testimonies on Bizimungu's role in the 25 April Meeting, *see infra*, paras. 100, 103, 104.
[206] *See* Trial Judgement, paras. 323, 328. As to Setako's argument that Witnesses SLA and SAT provided contradictory testimonies on the 25 April Meeting, *see infra*, Section III. B.1.(c)(i).

92. At trial, Witness SLA explained his presence at Mukamira camp on 11 May 1994 by stating that, even though he was posted elsewhere at the time, he returned to the camp daily in order to collect food.[207] The Trial Chamber observed that this explanation varied from the one he gave in the *Ndindiliyimana et al.* case, where he stated that he had asked for leave to go to Mukamira camp on 11 May 1994.[208] However, the Trial Chamber found that the latter statement did not raise questions since it was reasonable that Witness SLA "returned to the camp for provisions, which was likely also viewed as leave."[209] The Trial Chamber further held that even if the explanations in both cases were inconsistent, the difference was minor and did not call into question the overall credibility of Witness SLA's account of the 11 May Killings.[210]

93. Setako contends that, in the present case, Witness SLA provided explanations for his presence at Mukamira camp on 11 May 1994 which contradicted his testimony in the *Ndindiliyimana et al.* case and his April 2003 statement.[211] He submits that the Trial Chamber failed to properly evaluate the significance of these contradictions when assessing Witness SLA's credibility.[212]

94. In the *Ndindiliyimana et al.* case, Witness SLA explained his presence at Mukamira camp on 11 May 1994 as follows:

> The fact that I was in Nkumba or Mukingo could not prevent me from going to Mukamira because there were vehicles that could take us there for free. That morning I had asked for leave to go to Mukamira camp. That is how I went to Mukamira camp on that date.
>
> […]
>
> The fact is that one could ask for leave for a few hours or a day, a single day, and it could be accorded to him. That 11th of May, on that day, I had obtained leave to leave the company. And during this period, I passed through the camp and witnessed -- became a witness to the events that I have related to the Court.[213]

In the present case, Witness SLA testified:

> A. When we were deployed to the various positions, our mission was to track down the three categories of persons I have mentioned already. However, we were replaced by other persons after some time. However, anyone who found himself in a given position could ask for permission to go back to the camp to change or to take a bath. That is how we lived when we were at the various positions.
>
> Q. Witness, when you were at Nyamagumba, did you ask permission to go to take a bath?

[207] Trial Judgement, para. 357.
[208] Trial Judgement, para. 358.
[209] Trial Judgement, para. 358.
[210] Trial Judgement, fn. 443.
[211] Setako Appeal Brief, paras. 97, 183, 184; AT. 29 March 2011 pp. 13, 14.
[212] Setako Appeal Brief, para. 184; Setako Brief in Reply, para. 38.
[213] Defence Exhibit 50, p. 37.

> A. Mr. President, Your Honour, wherever I was, in Nyamagumba or elsewhere, my duty was to supply provisions to my friends; that is, I brought foodstuff. And in order to bring foodstuff in the morning, I left the position at about 10 o'clock in the morning. And to provide the evening meal, I left the position at about 3 p.m. or 4 p.m., and I came back at 6 p.m. to spend the night at the position. And the next morning I would go to the camp at about 6 a.m. to take care of the morning meal.
>
> Q. So is it your testimony here, Witness, that as you went to all of the various camps, that you left on a daily basis to go back to Mukamira in order to get supplies? Is that your testimony, Witness?
>
> A. Yes, Mr. President.[214]

95. The Appeals Chamber finds that it was reasonable for the Trial Chamber to accept Witness SLA's explanation for his presence at Mukamira camp on 11 May 1994 in the present case and conclude that it was compatible with the witness's testimony in *Ndindiliyimana et al.* case. Furthermore, Witness SLA's testimony in respect of various details of the 11 May Killings was corroborated by Witness SAT.[215] Consequently, even if Witness SLA's explanations about his presence at Mukamira camp were inconsistent, any difference was minor and did not call into question the overall credibility of his account. For the same reason, it is irrelevant that Witness SLA made no mention of his daily returns to Mukamira camp in his April 2003 statement.[216]

96. Setako's arguments are therefore dismissed.

(c) Inconsistencies Between the Testimonies of Witnesses SLA and SAT at Trial

97. The Trial Chamber found that the fundamental features of Witnesses SAT's and SLA's accounts of the events at Mukamira camp were largely consistent.[217] It further found that, although there were differences in their testimonies, many of those differences were reasonably explained by the witnesses' varying vantage points and the passage of time.[218]

98. Setako submits that the Trial Chamber ignored significant contradictions between Witnesses SLA's and SAT's testimonies at trial.[219] The Appeals Chamber will consider Setako's specific challenges relating to the 25 April and 11 May Killings in turn.

(i) The 25 April Meeting and 25 April Killings

[214] T. 18 September 2008 pp. 36, 37.
[215] *See infra*, Section III.B.1.(c)(ii).
[216] The Trial Chamber considered this fact in its assessment of Witness SLA's testimony. *See* Trial Judgement, para. 358.
[217] Trial Judgement, paras. 340, 345. *See also* Trial Judgement, para. 367.
[218] *See* Trial Judgement, para. 341.
[219] Setako Notice of Appeal, paras. 24, 30-35; Setako Appeal Brief, paras. 79-82, 95, 118-140. *See also* Setako Appeal Brief, paras. 29, 41.

99. The Trial Chamber found the accounts of Witnesses SAT and SLA concerning the events at Mukamira camp on 25 April 1994 "largely consistent" because: (i) both witnesses testified that they were recruited into the civil defence forces in Nkuli commune in mid-April 1994 and gave a similar description of the period and purpose of the military training they received at Mukamira camp; (ii) both testified that, on the morning of 25 April 1994, they attended the 25 April Meeting, where Setako, in the presence of other prominent persons, addressed the crowd and called for the killing of Tutsis at Mukamira camp; (iii) Witness SAT acknowledged that he participated in the 25 April Killings and testified that they occurred that night; (iv) Witness SLA heard gunfire that evening; and (v) both witnesses observed the remains of the dead being eaten by dogs.[220]

100. Setako claims that the Trial Chamber failed to consider substantial discrepancies between the testimonies of Witnesses SLA and SAT regarding the 25 April Meeting.[221] In his opinion, these discrepancies call into question whether Witnesses SLA and SAT spoke of the same event and raised doubt about the veracity of their testimonies.[222] Specifically, Setako points out that: (i) only Witness SAT listed Colonel Bivugabagabo ("Bivugabagabo"), Hasengineza, and Lieutenant Mburuburengero ("Mburuburengero") as participants of the meeting;[223] (ii) according to Witness SLA, Setako was the only one addressing the gathering, while Witness SAT indicated that Bizimungu also spoke;[224] (iii) the witnesses differed in their accounts of what Setako said at the meeting,[225] and, in particular, only Witness SLA recalled Setako's order to set up more roadblocks in the area;[226] and (iv) Witness SLA claimed that Setako addressed only a gathering of soldiers and civil defence force trainees, whereas Witness SAT claimed that Setako additionally offered Gatsimbanyi and Kajelijeli assistance with the killing of Tutsis.[227] Setako submits that these inconsistencies cannot be explained by the witnesses' different vantage points or the passage of time because both testified that they stood approximately five to 10 metres away from him at the meeting and could see and hear him without interference.[228]

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[220] Trial Judgement, para. 340.
[221] Setako Notice of Appeal, paras. 24, 30-36; Setako Appeal Brief, paras. 118-140; Setako Brief in Reply, paras. 25, 26.
[222] Setako Appeal Brief, para. 120; Setako Brief in Reply, para. 26.
[223] Setako Notice of Appeal, para. 33; Setako Appeal Brief, para. 30. Setako argues that the discrepancy concerning Hasengineza's presence at the 25 April Meeting is relevant because of Defence evidence that Hasengineza was not stationed at Mukamira camp during April and May 1994. *See* Setako Appeal Brief, para. 134. This evidence is discussed below; *see infra*, Section III.B.2.(a)(ii).
[224] Setako Notice of Appeal, para. 34; Setako Appeal Brief, paras. 80, 121, 135; AT. 29 March 2011 p. 5.
[225] Setako Appeal Brief, paras. 120-122; Setako Brief in Reply, para. 26.
[226] Setako Notice of Appeal, para. 35; Setako Appeal Brief, paras. 43, 82, 125, 129, 136; AT. 29 March 2011 pp. 5, 10.
[227] Setako Appeal Brief, paras. 81, 121; AT. 29 March 2011 p. 10.
[228] Setako Appeal Brief, paras. 118, 119, 133; Setako Brief in Reply, para. 26.

101. In addition, Setako contends that there were substantial discrepancies between the testimonies of Witnesses SLA and SAT with respect to the 25 April Killings. He points out that, according to Witness SAT, the victims of the 25 April Killings were taken from their residences at Mukamira camp. They were then assembled and shot behind the armoury at around 9.00 p.m., with their corpses left unburied.[229] Setako submits that it is inconceivable that Witness SLA, who testified that he was at the camp at 10.00 p.m. in order to kill Tutsis arrested at a roadblock,[230] would not have seen the victims of the 25 April Killings being taken from their homes.[231] He further contends that it is likewise implausible that Witness SLA never saw the victims' bodies.[232] Finally, Setako submits that it is inconceivable that Witness SAT was unaware of the killing of the Tutsis who had been arrested at the roadblock.[233]

102. The Prosecution responds that the Trial Chamber noted and carefully assessed the differences in the witnesses' testimonies[234] and that Setako simply disagrees with the Trial Chamber's findings without showing why they were unreasonable.[235]

103. With respect to the 25 April Meeting, the Trial Chamber noted that Witnesses SLA and SAT corroborated each other as to the presence of Bizimungu, Kajelijeli, Gatsimbanyi, and Major Bizabarimana ("Bizabarimana"), and found that it was not significant that Witness SAT named three additional individuals.[236] The Appeals Chamber considers that Setako has failed to demonstrate that this conclusion was unreasonable.

104. As to Setako's argument with respect to who addressed the 25 April Meeting, the Trial Chamber observed the discrepancy and noted that, according to Witness SLA, only Setako addressed the crowd, whereas Witness SAT recalled that Bizimungu spoke as well.[237] The Trial Chamber found that the difference in the witnesses' accounts on this point was not material since "the intervention of Bizimungu, as described by Witness SAT, amounts only to a brief comment."[238] The Appeals Chamber perceives no error in this reasoning.

[229] Setako Appeal Brief, para. 82; AT. 29 March 2011 p. 10.
[230] Setako Appeal Brief, para. 82; AT. 29 March 2011 p. 10.
[231] Setako Appeal Brief, para. 82.
[232] Setako Appeal Brief, para. 82; Setako Brief in Reply, para. 28; AT. 29 March 2011 p. 10.
[233] Setako Notice of Appeal, para. 35; Setako Appeal Brief, paras. 82, 124, 125, 129, 136; AT. 29 March 2011 p. 10.
[234] Prosecution Response Brief, paras. 62, 63; AT. 29 March 2011 pp. 26, 27.
[235] Prosecution Response Brief, paras. 64, 65.
[236] Trial Judgement, para. 341. The three additional persons he named were: Bivugabagabo, Hasengineza, and Mburuburengero.
[237] Trial Judgement, para. 342.
[238] Trial Judgement, para. 342.

105. With respect to the purported discrepancies regarding what Setako said at the 25 April Meeting, the Trial Chamber noted that Witness SLA was tasked with erecting the roadblock, where 30 to 40 Tutsis were captured on 25 April 1994 and killed that evening at Mukamira camp, and found that this accounted for his "more precise recollection" of Setako's instruction.[239] The Appeals Chamber observes that Witness SLA also testified to having participated in the killing of the Tutsis captured at the roadblock.[240] In light of these facts, it is understandable that Witness SAT, who did not take part in these killings, did not recall Setako's order to erect roadblocks.

106. Finally, the Trial Chamber noted, but did not discuss, the fact that Witness SLA claimed that Setako addressed only those soldiers and trainees present at the 25 April Meeting, while Witness SAT testified that Setako additionally offered Gatsimbanyi and Kajelijeli assistance with the killing of Tutsis.[241] However, the Appeals Chamber observes that Witness SAT merely recalled a brief comment by Setako[242] and considers that this discrepancy is insufficient to call into question the reasonableness of the Trial Chamber's finding that the fundamental features of the two witnesses' accounts were largely consistent.

107. Setako also implies that Witnesses SLA and SAT provided generally inconsistent accounts about the content of his speech to the crowd at the 25 April Meeting.[243] However, the Trial Chamber noted the witnesses' evidence in this respect,[244] and the Appeals Chamber finds that the alleged inconsistencies were minor and did not call into question the credibility of their testimonies.

108. The Appeals Chamber now turns to Setako's arguments with respect to the 25 April Killings. It considers Setako's contention that it was inconceivable that Witness SLA did not see the victims of this incident being removed from their homes or killed to be speculative. At trial, Witness SLA's testimony was limited on this point and mainly focused on the incident at the roadblock in which he participated. In this regard, he indicated that the Tutsis who had been stopped at the roadblock were taken to Mukamira camp and were killed there at around 10.00 p.m. and that their bodies were then thrown into pits.[245] However, he was not asked to specify where in

[239] Trial Judgement, para. 343.
[240] T. 16 September 2008 pp. 45-49; T. 18 September 2008 pp. 17-20, 24-26. *See also* Trial Judgement, para. 324.
[241] Trial Judgement, para. 328.
[242] T. 18 September 2008 pp. 80, 81 ("[H]e was talking to Gatsimbanyi and Kajelijeli, and this is what he told them: 'I would provide you with assistance -- I would assist the civil defence that would soon start.'").
[243] *See* Setako Appeal Brief, paras. 120-122, where Setako submits that, according to Witness SAT, he (Setako) said he was surprised to realize that Tutsis had found refuge at Mukamira camp, while in other communities they were killed, whereas Witness SLA stated that Setako explained how Tutsis were wicked and that "another body or another force was being set up in Nkuli commune and that even among the soldiers at the camp were some Tutsis within the military camp and that these Tutsis and their accomplices ought to be killed."
[244] *See* Trial Judgement, paras. 323, 328.
[245] T. 16 September 2008 pp. 45-49; T. 18 September 2008 pp. 17-20, 24-26. *See also* Trial Judgement, para. 324.

relation to the site of the 25 April Killings this other incident took place. Moreover, he was not asked to indicate where he was at the time the 25 April Killings occurred. Thus it was not inconceivable that Witness SLA did not see the victims of the 25 April Killings being taken from their homes or killed. Accordingly, the Appeals Chamber dismisses Setako's argument in this regard.

109. Setako further implies that Witness SLA did not see the bodies of the victims of the 25 April Killings. This assertion stands in contrast to the Trial Chamber's finding that Witnesses SLA and SAT both "observed the remains of the dead being eaten by dogs".[246] The Appeals Chamber notes that Witness SLA did not testify that he specifically saw the bodies of the victims of the 25 April Killings being eaten by dogs. Rather, he testified about generally witnessing such events while stationed at Mukamira camp.[247] However, the Trial Chamber also took into account his testimony that he heard gunshots on the night of 25 April 1994.[248] It was therefore reasonable for the Trial Chamber to conclude that Witness SLA's testimony corroborated Witness SAT's evidence about the 25 April Killings.

110. Regarding Setako's assertion that the Trial Chamber ignored the fact that Witness SAT was unaware of the killing of the Tutsis captured at the roadblock on 25 April 1994, the Appeals Chamber recalls that Setako was not convicted for these killings.[249] It will therefore address Setako's argument only from the perspective of whether Witness SAT's lack of knowledge of these killings was irreconcilable with the testimony of Witness SLA and thus raised reasonable doubt about the 25 April Killings. The Trial Chamber addressed this issue and found that:

> […] Witness SAT's general lack of knowledge concerning the killing of the refugees captured at the roadblock follows from Witness SLA's evidence that the Tutsis stopped at the roadblock were killed in a relatively inconspicuous manner. The attackers used knives, instead of loud-sounding firearms, and their bodies were disposed of in a pit and not left out in the open.[250]

In the Appeals Chamber's view, this finding was reasonable.

111. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber did not fail to take into account contradictions or inconsistencies between the testimonies of Witnesses SAT and SLA with regard to the 25 April Killings. Accordingly, Setako's arguments are dismissed.

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[246] Trial Judgement, para. 340. *See also* Trial Judgement, para. 325.
[247] *See* T. 18 September 2008 p. 23 (Q: Now, Witness, you did not see any -- during the time that you were at Mukamira camp, from the 20th to the time that you left, you didn't see bodies of Tutsis scattered around in the bushes of the camp, did you? A: Thank you, Mr. President, Your Honour. There were many bodies in that camp, and those bodies were eaten up by dogs. I saw a lot of bodies.). *See also* T. 18 September 2008 p. 20.
[248] Trial Judgement, paras. 325, 340. *See also* T. 18 September 2008 pp. 22, 23.
[249] *See* Trial Judgement, para. 367.
[250] Trial Judgement, para. 343 (internal citation omitted).

(ii) 11 May Killings

112. The Trial Chamber did not make a finding on specific differences between the testimonies of Witnesses SAT and SLA with regard to the 11 May Killings, but merely noted:

> In connection with the 11 May incident, Witness SLA stated that Setako addressed supervisory staff, including Colonel Marcel Bivugabagabo and Lieutenant Mburuburengero, other junior soldiers as well as civil defence forces that had gathered. Three soldiers and two civilians took the detainees away. According to Witness SAT, Setako addressed Captain Hasengineza, who then removed the prisoners. During cross-examination, Witness SLA indicated that he was uncertain whether Hasengineza was there, but later said that he was.[251]

113. Setako submits that Witnesses SLA and SAT provided contradictory testimonies with regard to the 11 May Killings because they: (i) did not hear the same speech allegedly given by Setako; (ii) did not see the same persons; and (iii) differed in their description of Hasengineza's role in the killings.[252] In Setako's view, these discrepancies could not be explained by varying vantage points or the passage of time.[253] In particular, he argues that Witness SAT testified that Hasengineza played a pivotal role in these killings, while, according to Witness SLA, Hasengineza did not play any role at all.[254]

114. The Prosecution responds that the Trial Chamber considered the differences between the testimonies of Witnesses SLA and SAT.[255] It contends that Setako fails to show why the passage of time and different vantage points would not account for the variances.[256]

115. The Appeals Chamber recalls that Witnesses SAT and SLA both testified that they saw Setako return to Mukamira camp around 2.00 or 3.00 p.m. on 11 May 1994 in a military-style Land Rover, which carried nine or 10 Tutsis, including at least one woman and a baby.[257] The driver of the car stopped near the camp headquarters.[258] Setako then arranged for the killing of these Tutsis.[259] Witness SAT watched the killing, which took place near the armoury after 8.00 p.m.[260] Witness SLA was told by one of the assailants that the Tutsis were killed that night.[261] Witnesses

[251] Trial Judgement, para. 344 (internal citation omitted).
[252] Setako Appeal Brief, para. 130. *See also* Setako Notice of Appeal, para. 51; Setako Appeal Brief, paras. 95, 127; Setako Brief in Reply, para. 28.
[253] Setako Appeal Brief, para. 127.
[254] Setako Appeal Brief, para. 95; Setako Brief in Reply, para. 28; AT. 29 March 2011 pp. 5, 12.
[255] Prosecution Response Brief, para. 67. *See also* AT. 29 March 2011 pp. 33, 34.
[256] Prosecution Response Brief, para. 67.
[257] T. 16 September 2008 pp. 50, 53; T. 18 September 2008 pp. 39, 84. As to the inconsistencies between Witness SAT's April 2003 statement and his testimony at trial concerning the victims of the 11 May Killings, *see supra,* Section III.B.1.(a)(iii)b.
[258] T. 16 September 2008 p. 51; T. 18 September 2008 p. 84.
[259] T. 16 September 2008 pp. 51, 52; T. 18 September 2008 p. 84.
[260] T. 18 September 2008 p. 85.
[261] T. 16 September 2008 pp. 52, 54.

SLA and SAT thus provided corroborating evidence concerning various details of the 11 May Killings, which the Trial Chamber accepted.[262]

116. The Appeals Chamber rejects Setako's assertion that the Trial Chamber should have doubted the evidence of Witnesses SLA and SAT because they differed in their accounts of what Setako said during the incident. Only Witness SLA testified that Setako stated that there should be no Tutsis at Mukamira camp or in the region and asked what the civil defence forces had been doing given that he had found some Tutsis.[263] This variance from Witness SAT's testimony, who did not recall such a speech, can be reasonably explained by varying vantage points or the passage of time.[264]

117. The Appeals Chamber is also not convinced by Setako's argument that there were significant contradictions between Witnesses SLA's and SAT's testimonies with regard to the persons present during the 11 May Killings. As noted by the Trial Chamber, Witness SLA testified that Bivugabagabo, Mburuburengero, junior soldiers, and members of the civil defence force were present when Setako arrived with the victims at Mukamira camp and arranged for their killing.[265] Witness SAT only stated that Setako handed the victims over to Hasengineza.[266] Since Witness SAT was not asked to identify other individuals who witnessed the event or participated therein, he did not contradict Witness SLA's testimony.

118. Although Witness SLA stated during cross-examination that Hasengineza was present, the Appeals Chamber notes that his testimony is confusing and raises doubts as to whether Witness SLA was actually referring to the 11 May Killings when making this statement.[267] However, given

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[262] *See* Trial Judgement, paras. 326, 330.
[263] T. 16 September 2008 pp. 51, 52.
[264] Witness SLA testified that he was some 15 metres away from the commander's office when he saw Setako arrive. *See* T. 16 September 2008 p. 51. Witness SAT did not specify his distance from Setako, but stated that he was "not very far" from the camp headquarters. *See* T. 18 September 2008 p. 84.
[265] T. 16 September 2008 pp. 51, 52; T. 18 September 2008 p. 41.
[266] T. 18 September 2008 pp. 84, 85; T. 22 September 2008 p. 1.
[267] *See* T. 18 September 2008 pp. 39-41: (Q: Witness, in your statement of April 2003 and your testimony before this Tribunal, you said that on May 11, when Colonel Setako addressed you, he did so in the presence of two officers: Colonel Bivugabagabo and Lieutenant Mburuburengero. […] Q: Witness, do you recall that statement and your testimony? A: Thank you, Mr. President, Your Honour. I recall that statement. Q: Now, Witness, did you see Captain Hasengineza? Was he present? A: Mr. President, Your Honour, there were many people there. It could be that Mr. Hasengineza was there or maybe not. […] I did not take down the names of all the persons who were there. […] Q: Now, Witness, I -- you were asked on Tuesday by the Prosecutor, on direct -- […] Witness, do you recognise any office [*sic.*ğ -- military officer in the midst of the people that were in front of the commandant when -- the commandant's office when Ephrem Setako was saying those words? Answer: Thank you, Madam Prosecutor. Yes, there were two military officers, Lieutenant Mburuburengero and Marcel Bivugabagabo, who were also present, and there were also some junior soldiers there. Do you remember that statement, Witness? A: Yes, I did. Q: Now, Witness, during that exchange you did not mention Captain Hasengineza, is that because he was there and you forgot or you didn't see him? A: Thank you, Mr. President. Your Honour, he was there but I forgot to mention his name. Q: And, Witness, what role did he play, if any? A: Who are talking [*sic.*ğ about, Counsel? Q: I am talking about Hasengineza, who you say you

that Witnesses SLA and SAT provided corroborative accounts on various other details of the 11 May Killings, such as the time of Setako's arrival at Mukamira camp, the type of vehicle he arrived in, the place where the car stopped at the camp, the number of Tutsis transported and the composition of this group, as well as the time of the killing, the Appeals Chamber finds that the inconsistency concerning Hasengineza's presence was not significant.

119. For the same reason, the Appeals Chamber dismisses Setako's argument that Witnesses SLA and SAT differed in their descriptions of the role that Hasengineza played during the killings.

120. Since the Trial Chamber took into account any significant contradictions or inconsistencies between the testimonies of Witnesses SAT and SLA with regard to the 11 May Killings, Setako's arguments are dismissed.

(d) Alleged Fabrication and Manipulation of Evidence

121. Setako argued at trial that the testimony of certain Prosecution witnesses detained in Ruhengeri prison, including Witnesses SAT and SLA, had been manipulated by the Rwandan judicial authorities.[268] In support of his contention, Setako relied on: (i) the testimony of Defence Witness RBN who testified about a programme implemented in Rwandan prisons for training detainees to fabricate evidence against former officials;[269] (ii) Defence Exhibit 14, which contains excerpts of the trial testimony of Prosecution Witness BTH in the *Karemera et al.* case about the fabrication of evidence ("Witness BTH's Evidence");[270] and (iii) Prosecution Witness SAA who, according to Witness BTH's Evidence, was among the detainees trained in the fabrication of evidence.[271]

122. In addressing these contentions, the Trial Chamber noted that "[Setako's] supporting evidence focus[ed] primarily on Witness SAA and others implicated in attacks in Mukingo

forgot to mention. What role did he play, if any? A: What I can say is that Hasengineza and Bizabarimana were present when those people were killed. However, Hasengineza did not issue any instructions. What I know is that I have already explained who gave orders but Hasengineza did not play any role. When we went to kill those people, Hasengineza and Bizabarimana were both present.). The last answer of Witness SLA indicates that he might have had in mind the events of 25 April 1994 rather than the 11 May Killings. According to his testimony in examination-in-chief, on 25 April 1994, he participated in the killing of Tutsis who had been captured at a roadblock near Mukamira camp and that Bizabarimana and Hasengineza were present during these killings but did not issue any instructions. *See* T. 16 September 2008 pp. 45-49. In contrast, Witness SLA did not testify that he personally participated in the 11 May Killings. *See also* Trial Judgement, paras. 324-326, fn. 395.

[268] Trial Judgement, para. 339. *See also* Setako Final Trial Brief, paras. 145, 233, 283, 287, 542; T. 5 November 2009 p. 61.

[269] *See* T. 5 November 2009 p. 61.

[270] *See* T. 28 August 2008 pp. 20-22, 52; T. 2 September 2008 p. 74.

[271] *See* Setako Final Trial Brief, paras. 145, 233, 283, 287, 542.

commune".[272] It found that "no specific evidence" showed that any authorities or other prisoners had manipulated the testimony of Witnesses SAT and SLA and that Setako's assertion about manipulation was therefore speculative.[273]

123. On appeal, Setako submits that the Trial Chamber "mischaracterized" his evidence when it found that it was limited to the testimony of Witness SAA and other individuals implicated in the attacks in Mukingo commune.[274] He avers that Witnesses RBN and BTH testified about the fabrication of evidence against former officials based on a list provided to detainees in the Nkumba Solidarity camp in Rwanda ("Solidarity camp").[275] While these two witnesses expressly mentioned the role of Witness SAA in the fabrication of evidence, Setako stresses that Witness RBN was aware of other detainees who were requested to fabricate charges against Setako, although the witness did not remember their names.[276]

124. Setako further asserts that the Trial Chamber erred in finding that there was insufficient evidence supporting his allegation that Witnesses SLA and SAT had been manipulated by the Rwandan authorities.[277] Setako avers that Witness RBN confirmed Witness BTH's Evidence that Witness BTH was the coordinator of the fabrication of evidence at the Solidarity camp and Setako was "specifically targeted for fabrication of evidence" at the Solidarity camp.[278] Setako recalls that Witnesses SLA and SAT first accused him in the statements they provided in April 2003 while at the Solidarity camp.[279] He argues that this coincides with the period in which, according to Witnesses RBN and BTH, Setako's name appeared in detainees' confessions made at the Solidarity camp.[280]

125. The Prosecution responds that Setako does not demonstrate any error in the Trial Chamber's findings.[281] It submits that the Trial Chamber's findings were based on a careful review of the evidence.[282]

126. The Appeals Chamber discerns no error in the Trial Chamber's finding that Setako's evidence on manipulation "focus[ed] primarily on Witness SAA and others implicated in attacks in

[272] Trial Judgement, para. 339.
[273] Trial Judgement, para. 339.
[274] Setako Notice of Appeal, para. 40; Setako Appeal Brief, paras. 152, 153.
[275] Setako Appeal Brief, para. 152. *See also* Setako Appeal Brief, para. 144.
[276] Setako Appeal Brief, para. 152, *referring to* T. 18 May 2009 p. 77.
[277] Setako Notice of Appeal, para. 37.
[278] Setako Appeal Brief, para. 144, *referring to* T. 18 May 2009 pp. 76, 77. *See also* Setako Brief in Reply, para. 24.
[279] Setako Appeal Brief, paras. 144, 146.
[280] Setako Appeal Brief, para. 146, *referring to* Defence Exhibit 14, pp. 50, 52; T. 19 May 2009 pp. 4-6. *See also* Setako Brief in Reply, para. 24.
[281] Prosecution Response Brief, paras. 54, 55, 58.

Mukingo commune".[283] The Trial Chamber's use of the term "primarily" does not imply that it limited the scope of its examination to Witness SAA or that it failed to consider relevant evidence.

127. Although the Trial Chamber noted Witness RBN's testimony and Witness BTH's evidence,[284] it did not discuss them. The fact that the Trial Chamber dismissed Setako's allegation of fabrication indicates, however, that it accorded only limited weight to the evidence of these witnesses. Thus, the question before the Appeals Chamber is whether it was reasonable for the Trial Chamber to conclude that the evidence of Witnesses RBN and BTH did not cast doubt on the credibility of Witnesses SLA's and SAT's evidence.

128. The Trial Chamber correctly observed that there was "no specific evidence implicating any authorities or other prisoners in manipulating [Witnesses SLA's and SAT's] testimonies".[285] Nowhere in the excerpts of Witness BTH's testimony in the *Karemera et al*. case does he implicate Witnesses SLA and SAT in the fabrication of evidence against Setako.[286] Thus, Witness BTH's evidence does not suffice to cast doubt on the credibility of Witnesses SLA's and SAT's evidence in the present proceedings.

129. The Appeals Chamber further notes that Setako did not call Witness BTH to testify on this matter in his case and instead merely sought and obtained the admission of Witness BTH's testimony in the *Karemera et al*. case. In Setako's opinion, the allegation of fabrication of evidence made by Witness BTH was "a very serious issue that goes to the whole integrity of this process, and previous trials and convictions, if that allegation is true."[287] Thus, in the Appeals Chamber's view, if Setako thought that Witness BTH had additional information relevant to his contention of fabrication of evidence, it was incumbent on him to seek Witness BTH's appearance in the present case.

130. Witness RBN testified that, while he was in the Solidarity camp, he saw lists of alleged planners of the genocide in every commune,[288] which included Setako's name.[289] He testified

[282] Prosecution Response Brief, para. 54.
[283] Trial Judgement, para. 339.
[284] *See* Trial Judgement, fn. 410.
[285] Trial Judgement, para. 339. The Trial Chamber also noted that Witnesses SLA and SAT refuted having been "coached" in providing false testimony against former Rwandan officials. *See* Trial Judgement, fn. 411, *referring to* T. 18 September 2008 p. 7; T. 19 September 2008 p. 14.
[286] During cross-examination in the *Karemera et al.* case, Witness BTH spoke about three specific persons, who, according to him, provided false testimony before the Tribunal. *See* Defence Exhibit 14, pp. 55-58.
[287] T. 22 September 2008 p. 20.
[288] T. 18 May 2009 p. 67. *See also* T. 18 May 2009 p. 20. According to Witness RBN, these lists were regularly published since 1997. *See* T. 18 May 2009 pp. 20, 70.
[289] Witness RBN did not provide a date when Setako's name appeared in these lists (*see* T. 18 May 2009 pp. 20, 67, 70).

further that Witness BTH told him at the Solidarity camp in April 2003 that he had falsely accused Setako in connection with events in Nkuli and Mukingo communes[290] and that other detainees had fabricated evidence against Setako.[291]

131. During cross-examination, Witness RBN provided a list of individuals whose confessions he assisted and who had fabricated evidence against Setako.[292] Witnesses SLA and SAT did not appear on this list.[293] Furthermore, Witness RBN did not state how he learned that detainees, who had sought his assistance in drafting confessions, decided later to include Setako's name in them.[294]

132. As there was no specific evidence implicating any authorities or other prisoners in manipulating Witnesses SLA's and SAT's testimonies or in fabricating evidence,[295] it was reasonable for the Trial Chamber to conclude that the Defence evidence did not cast doubt on the credibility of Witnesses SLA's and SAT's evidence and that Setako's assertion that their evidence had been manipulated was speculative.

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

(e) Alleged Collusion

134. The Trial Chamber considered "the possibility of collusion" between Witnesses SLA and SAT, as alleged by Setako, and found that there was insufficient evidence to conclude that they had engaged in any collusion.[296]

135. Setako submits that the Trial Chamber erred in finding that the evidence was insufficient to show that collusion occurred.[297] He asserts that collusion between the two witnesses is demonstrated because they: (i) were incarcerated at Ruhengeri prison during the same period and released to the Solidarity camp on 29 January 2003, one day after Witness RBN's transfer to the Solidarity camp; (ii) were interviewed in the Solidarity camp on the same date; (iii) accused Setako for the first time only in April 2003 while in the Solidarity camp; and (iv) testified before the

[290] T. 18 May 2009 pp. 77-79.
[291] T. 18 May 2009 pp. 77, 81, 82.
[292] Defence Exhibit 136; T. 18 May 2009 pp. 21, 77.
[293] *See* Defence Exhibit 136.
[294] He testified that while he was at Ruhengeri prison, Setako's name did not come up in confessions made by the detainees whose writing he assisted. It was only after Witness RBN's transfer to Gisenyi prison 2002, that "the same persons who had asked me to help them changed tactics. They included Setako's name." *See* T. 18 May 2009 p. 76. The Appeals Chamber notes that the witness was unclear as to which detainees he referred and about his source supporting this information.
[295] *See* Trial Judgement, para. 339.
[296] Trial Judgement, fn. 409.
[297] Setako Notice of Appeal, paras. 38, 39; Setako Appeal Brief, paras. 146, 148.

Tribunal during the same week.[298] Setako further argues that, because the Trial Chamber failed to assess the circumstances under which Witnesses SLA and SAT testified, it was "not surprising that the witness[es] denied that they know each other and that they were interviewed privately."[299]

136. The Prosecution responds that the Trial Chamber reasonably rejected Setako's contention about collusion between Witnesses SLA and SAT as speculative.[300]

137. The Appeals Chamber recalls that collusion is "an agreement, usually secret, between two or more persons for a fraudulent, unlawful, or deceitful purpose."[301] If an agreement between witnesses for the purpose of untruthfully incriminating an accused is established, their evidence should be excluded pursuant to Rule 95 of the Rules.[302]

138. The Appeals Chamber finds that Setako does not demonstrate any error in the Trial Chamber's conclusion that the evidence before it was insufficient to establish that collusion had occurred. The Trial Chamber considered that Witnesses SLA and SAT were released from Ruhengeri prison in January 2003 and implicated Setako in their statements to the Tribunal's investigators while detained in the Solidarity camp in April 2003.[303] The Trial Chamber found that the proximity of the date of the two witnesses' April 2003 statements "likely follow[ed] from the fact that they were taken during the same investigative mission to the area in order to obtain information about Setako."[304] The Trial Chamber further accepted Witnesses SLA's and SAT's testimonies that they did not know each other and that their interviews with the Tribunal's investigators had been conducted privately.[305] The Trial Chamber also found that it was speculative to consider the fact that their testimonies commenced before the Tribunal during the same week as an indication of collusion.[306] On appeal, Setako does not show how the Trial Chamber erred in so finding. Instead, he merely speculates that Witnesses SLA and SAT fitted the profile of detainees

[298] Setako Notice of Appeal, para. 39; Setako Appeal Brief, para. 149.
[299] Setako Appeal Brief, para. 148.
[300] Prosecution Response Brief, para. 54.
[301] *Karera* Appeal Judgement, para. 234.
[302] Rule 95 of the Rules states: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." *See also Karera* Appeal Judgement, para. 234.
[303] Trial Judgement, para. 339, fn. 409, *referring to* T. 18 September 2008 pp. 1, 3, 4; T. 19 September 2008 pp. 7, 9, 11, 12.
[304] Trial Judgement, fn. 409.
[305] Trial Judgement, fn. 409. *See also* T. 18 September 2008 pp. 4, 5; Defence Exhibit 49; T. 19 September 2008 p. 8; Defence Exhibit 55.
[306] Trial Judgement, fn. 409. *See also* T. 18 September 2008 p. 5; T. 19 September 2008 p. 12.

who were selected to fabricate evidence as testified about by Witnesses BTH and RBN,[307] and points to issues that the Trial Chamber already addressed at trial.[308]

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

(f) Alleged Failure to Properly Take into Account the Fact that Witnesses SLA and SAT Were Accomplice Witnesses

140. Setako submits that the Trial Chamber did not treat Witnesses SLA's and SAT's evidence with appropriate caution.[309] In his view, this is demonstrated by the fact that the Trial Chamber accepted the witnesses' inconsistent testimonies even though both had criminal records, claimed to be his accomplices, and were contradicted by the Defence witnesses.[310]

141. Setako further submits that the Trial Chamber erred in concluding that Witnesses SLA and SAT were credible because they exposed themselves to new and very serious criminal liability by acknowledging that they had participated in the crimes on 25 April 1994.[311] He argues that, because Witnesses SLA and SAT are protected witnesses, their identity is withheld from the public, including the Rwandan authorities, and consequently, there is "no one in Rwanda who could publicly challenge Ŧtheir testimonyğ."[312] He further asserts that no Prosecution witness has ever been prosecuted in Rwanda for having admitted to crimes before the Tribunal.[313] He contends that the Trial Chamber abused its discretion in considering this a significant possibility.[314]

142. The Prosecution responds that the Trial Chamber duly applied caution in assessing Witnesses SLA's and SAT's evidence.[315] It asserts that the Trial Chamber did not err in considering that Witnesses SLA and SAT exposed themselves to criminal responsibility and that taking this risk reinforced their credibility.[316]

[307] Setako Appeal Brief, para. 150.
[308] Trial Judgement, para. 339, fn. 409. *See also* Setako Notice of Appeal, para. 39; Setako Appeal Brief, paras. 149, 151. Setako Final Trial Brief, paras. 144, 145. During cross-examination of Witness SLA, the Defence stressed the possibility of collusion between Witnesses SLA and SAT.
[309] Setako Notice of Appeal, para. 25; Setako Appeal Brief, paras. 98, 99, 166; AT. 29 March 2011 pp. 8, 39.
[310] Setako Appeal Brief, paras. 98, 99, 166.
[311] Setako Appeal Brief, para. 141, *referring to* Trial Judgement, para. 367.
[312] Setako Appeal Brief, para. 141.
[313] Setako Appeal Brief, para. 141. *See also* Setako Brief in Reply, para. 29.
[314] Setako Brief in Reply, para. 29.
[315] Prosecution Response Brief, para. 44; AT. 29 March 2011 pp. 26, 27.
[316] Prosecution Response Brief, para. 68.

143. The Appeals Chamber notes that a trial chamber has the discretion to rely upon evidence of accomplice witnesses.[317] However, when weighing the probative value of such evidence, the trial chamber is bound to carefully consider the totality of the circumstances in which it was tendered. In particular, consideration should be given to circumstances showing that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal or to lie.[318]

144. In the present case, the Trial Chamber was well aware of the criminal records of Witnesses SLA and SAT.[319] It also acknowledged that the witnesses were accomplices of Setako with regard to the killings on 25 April 1994 and, precisely for this reason, stated that it would view their evidence with caution.[320] It considered various credibility issues raised by the Defence, including allegations of fabrication and manipulation of evidence,[321] and, "out of an abundance of caution", only accepted the witnesses' evidence about the events at Mukamira camp where they corroborated each other.[322]

145. In these circumstances, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to rely on the evidence of Witnesses SLA and SAT. The Appeals Chamber discerns no error in the Trial Chamber's conclusion that the witnesses, who had not previously confessed to crimes with respect to 25 April 1994, exposed themselves to the risk of being held accountable for them in future criminal proceedings before Rwandan judicial authorities. The fact that they testified as protected witnesses did not render this consideration unreasonable.

146. Setako thus has not demonstrated that the Trial Chamber failed to exercise appropriate caution. Accordingly, the Appeals Chamber dismisses Setako's arguments.

2. Alleged Errors in Assessing Defence Evidence

147. In order to challenge Witnesses SLA's and SAT's testimony that he ordered the 25 April and 11 May Killings, Setako called four Defence witnesses (NBO, NEC, NDI, and NCA) to testify at trial. All four witnesses lived at Mukamira camp during April and May 1994 and testified that no Tutsis were killed there.[323] Setako further relied on an expert witness on Rwandan *Gacaca* proceedings, who testified that if the 25 April and 11 May Killings had occurred they would have

[317] *Muvunyi II* Appeal Judgement, para. 37; *Nchamihigo* Appeal Judgement, paras. 42, 305; *Muvunyi I* Appeal Judgement, para. 128.
[318] *Muvunyi II* Appeal Judgement, para. 37; *Nchamihigo* Appeal Judgement, paras. 47, 305; *Muvunyi I* Appeal Judgement, para. 128.
[319] *See* Trial Judgement, fns. 393, 398.
[320] Trial Judgement, para. 339. *See also* Trial Judgement, para. 367.
[321] Trial Judgement, paras. 338-359, 367.
[322] *See* Trial Judgement, para. 367.

been mentioned in *Gacaca* records.[324] Setako tendered various *Gacaca* documents into evidence and argued that there was no reference to these killings.[325] He also introduced documentary evidence to refute Witnesses SLA's and SAT's assertion that they received military training as part of a civil defence force at Mukamira camp.[326] Finally, Setako testified that he was not at Mukamira camp when the 25 April and 11 May Killings occurred.[327]

148. On appeal, Setako submits that the Trial Chamber: (a) rejected the Defence witnesses' testimonies for improper reasons;[328] (b) wrongly concluded that a civil defence programme existed at Mukamira camp when the 25 April and 11 May Killings occurred;[329] (c) improperly diminished the weight of the expert testimony and the tendered *Gacaca* documents;[330] and (d) did not give sufficient weight to his alibi evidence.[331]

149. The Appeals Chamber will consider these challenges in turn.

(a) Alleged Rejection of Defence Witnesses' Testimonies for Improper Reasons

(i) Death of Mironko's Relatives during the 25 April Killings

150. According to Witness SAT, two soldiers named Mironko and Bizumuremyi lost relatives as a result of the 25 April Killings.[332] Witness NEC testified that she knew a Tutsi first sergeant named Mironko and his family at Mukamira camp and was unaware of any Tutsis being killed in the camp.[333] Witness NCA testified that she met the wife of a soldier called Mironko at Mukamira camp, and that, to her knowledge, no Tutsis were killed in the camp between mid-April and July 1994.[334] The Trial Chamber considered this evidence.[335] It held that the Defence witnesses' evidence in general did not raise doubt about the occurrence of the 25 April Killings.[336]

[323] *See* Trial Judgement, paras. 321, 333-337.
[324] *See* Trial Judgement, para. 365. *See also* Trial Judgement, paras. 73, 78-80.
[325] *See* Trial Judgement, paras. 73, 81, 365.
[326] *See* Trial Judgement, para. 359.
[327] *See* Trial Judgement, paras. 331, 332.
[328] Setako Notice of Appeal, paras. 26, 27, 59-66; Setako Appeal Brief, paras. 86-88, 100-110, 211-248; Setako Brief in Reply, paras. 44-56.
[329] Setako Notice of Appeal, para. 28; Setako Appeal Brief, paras. 111-115; Setako Brief in Reply, para. 14.
[330] Setako Notice of Appeal, paras. 53-58; Setako Appeal Brief, paras. 187-210; Setako Brief in Reply, paras. 62-66.
[331] Setako Notice of Appeal, para. 67; Setako Appeal Brief, paras. 250-253; Setako Brief in Reply, paras. 57-61.
[332] T. 18 September 2008 p. 83; T. 22 September 2008 pp. 7-9.
[333] T. 19 May 2009 pp. 14, 16, 24, 32.
[334] T. 27 May 2009 pp. 2, 10.
[335] Trial Judgement, paras. 329, 334, 335, 337, 362.
[336] Trial Judgement, para. 364.

151. Setako submits that the Trial Chamber erred by failing to find that Witnesses NEC and NCA contradicted Witness SAT and raised reasonable doubt about the Prosecution's case.[337] He suggests that Witness SAT named Mironko as someone who lost relatives in the 25 April Killings in order to support his testimony that this event took place.[338] Therefore, the Trial Chamber should not have ignored the evidence of Witnesses NEC and NCA that no Tutsis were killed at Mukamira camp and that Mironko and his family, in particular, survived.[339]

152. The Prosecution responds that Setako's challenges are vague and unsubstantiated.[340] It contends that the Trial Chamber assessed the evidence of Witnesses NEC and NCA and resolved the inconsistencies between their respective accounts and that of Witness SAT.[341] According to the Prosecution, the Trial Chamber's findings were reasonable.[342]

153. In considering whether Witnesses NEC and NCA contradicted Witness SAT's testimony that Mironko's relatives died in the 25 April Killings, the Trial Chamber explained that: (i) it was not clear whether Witnesses SAT, NEC, and NCA referred to the same Mironko; (ii) Witness NCA only discussed meeting Mironko's wife, while Witness SAT did not specify which member of Mironko's family had been killed; and (iii) Witness NEC did not specify whether she saw Mironko's family after 25 April 1994.[343] The Trial Chamber thus did not ignore Witnesses NEC's and NCA's evidence.

154. Regarding Setako's contention that the Trial Chamber erred in its reasoning, the Appeals Chamber recalls that the task of weighing and assessing evidence lies primarily with the trier of fact.[344] Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a trial chamber.[345] It will only interfere where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[346]

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[337] Setako Notice of Appeal, para. 63; Setako Appeal Brief, paras. 230-237; Setako Brief in Reply, paras. 52, 53.
[338] Setako Brief in Reply, para. 53.
[339] Setako Appeal Brief, para. 236; Setako Brief in Reply, para. 53.
[340] Prosecution Response Brief, para. 107.
[341] Prosecution Response Brief, para. 107. The Prosecution incorrectly refers to Defence Witness NDI, although her testimony did not concern Mironko. The Appeals Chamber understands the Prosecution to actually mean Witness NCA. Furthermore, the Prosecution refers to paragraph 264 of the Trial Judgement. However, this part of the Trial Judgement is unrelated to Mukamira camp. The Appeals Chamber considers this to be an unintentional error and interprets the Prosecution's claim to concern paragraph 362 of the Trial Judgement, which discusses inconsistencies between the testimony of Witnesses SAT, NEC, and NCA concerning Mironko and his family.
[342] Prosecution Response Brief, paras. 107-109.
[343] Trial Judgement, para. 362.
[344] *Musema* Appeal Judgement, para. 18. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 14.
[345] *Kalimanzira* Appeal Judgement, paras. 9, 186; *Rukundo* Appeal Judgement, para. 10; *Musema* Appeal Judgement, para. 18; *Boškoski and Tarčulovski* Appeal Judgement, para. 14.
[346] *Kalimanzira* Appeal Judgement, para. 9; *Rukundo* Appeal Judgement, para. 10; *Musema* Appeal Judgement, para. 18; *Boškoski and Tarčulovski* Appeal Judgement, paras. 13, 14.

155. While all witnesses referred to above testified that Mironko was a Tutsi soldier stationed at Mukamira camp,[347] none of them provided specific identification details. Witness SAT only named Mironko as one of two Tutsi soldiers who had lost family members in the 25 April Killings.[348] Witness NEC asserted that Mironko was a driver who transported troops to the war front.[349] Witness NCA believed Mironko was a cook, without excluding the possibility that he could also have been a driver.[350] The Appeals Chamber is not satisfied that no reasonable trier of fact could have doubted that the witnesses testified about the same person.

156. Despite its doubts about Mironko's identification, the Trial Chamber considered whether Witnesses NCA and NEC contradicted Witness SAT's assertion that relatives of Mironko had died in the 25 April Killings. In the Appeals Chamber's view, it was reasonable for the Trial Chamber to conclude that the testimony of Witnesses NCA and NEC did not raise reasonable doubt about Witness SAT's evidence.

157. As the Trial Chamber pointed out, Witness SAT did not specify which member of Mironko's family had died during the 25 April Killings. Witness NCA testified to having lived in Mukamira's corporals' canteen for about two weeks, starting from 16 or 17 April 1994.[351] During that time, she sang in the canteen's choir, which was conducted by Mironko's wife.[352] She also saw Mironko often around the canteen's kitchen and was introduced to him by her fiancé.[353] It is not clear from this testimony to what extent Witness NCA had contact with Mironko and his wife after 25 April 1994, and whether she was in a position to know about the fate of any of Mironko's other relatives.[354]

158. The Trial Chamber also correctly noted that Witness NEC's evidence was unspecific as to whether she observed members of the Mironko family on or after 25 April 1994. She merely stated that she was Mironko's neighbour at Mukamira camp; discussed the shooting of Habyarimana's

[347] T. 18 September 2008 p. 83; T. 22 September 2008 pp. 7-9; T. 19 May 2009 pp. 14, 24; T. 26 May 2009 p. 66; T. 27 May 2009 p. 10.
[348] T. 18 September 2008 p. 83; T. 22 September 2008 pp. 7-9.
[349] T. 19 May 2009 p. 24.
[350] T. 27 May 2009 p. 10.
[351] T. 26 May 2009 pp. 63, 65.
[352] T. 26 May 2009 pp. 65, 66.
[353] T. 27 May 2009 p. 10.
[354] Witness NCA was unable to recall the name of Mironko's wife and acknowledged that she never saw her again after leaving the canteen in early May 1994. *See* T. 26 May 2009 p. 66; T. 27 May 2009 p. 10.

plane with the Mironko family on 7 April 1994;[355] and saw Mironko inside Mukamira camp between 20 and 25 April 1994.[356]

159. The Appeals Chamber therefore dismisses Setako's argument.

(ii) Presence of Hasengineza at Mukamira Camp

160. Witnesses SLA and SAT testified that Hasengineza participated in the killing of Tutsis at Mukamira camp on 25 April and/or 11 May 1994.[357] In assessing their evidence, the Trial Chamber acknowledged the evidence of Witnesses NEC and NDI that Hasengineza had been transferred to another post and was not seen at the camp during the war even though his family maintained a residence there.[358] The Trial Chamber concluded that this evidence did not call into question the Prosecution evidence, "given the Defence witnesses' limited basis of knowledge in matters of military deployment."[359]

161. Setako submits that the Trial Chamber erred by failing to find that the testimony of Witnesses NEC and NDI raised doubt about Hasengineza's presence at Mukamira camp on 25 April and 11 May 1994.[360] He asserts that both witnesses were well positioned to make accurate observations about Hasengineza and clearly contradicted Witnesses SLA and SAT.[361] In his opinion, the Trial Chamber failed to provide sufficient reasoning as to why it rejected their evidence.[362] In particular, Setako argues that the Trial Chamber abused its discretion by requiring Witnesses NEC and NDI to have knowledge of matters of military deployment as a prerequisite for accepting their testimony.[363] He submits that Witnesses NEC and NDI did not need specialised knowledge because they were not expert witnesses, but witnesses of fact.[364]

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[355] T. 19 May 2009 pp. 13, 14.
[356] T. 19 May 2009 p. 24.
[357] *See* T. 16 September 2008 p. 48; T. 18 September 2008 pp. 40, 41, 45, 46, 84, 85; T. 22 September 2008 pp. 1-3. *See also* Trial Judgement, paras. 324, 328, 330. Only Witness SLA testified that Hasengineza participated in the killing of Tutsis arrested at a roadblock on 25 April 1994 at Mukamira camp. The Trial Chamber did not convict Setako for these killings. *See* Trial Judgement, paras. 324, 367. Regarding Setako's assertion that Witnesses SLA and SAT contradicted each other as to the presence of Hasengineza during the 11 May Killings, *see supra*, Section III.B.1.(c)(ii).
[358] Trial Judgement, para. 363.
[359] Trial Judgement, para. 363.
[360] Setako Notice of Appeal, para. 64; Setako Appeal Brief, paras. 238-242; Setako Brief in Reply, paras. 49, 54-56.
[361] Setako Appeal Brief, para. 240; Setako Brief in Reply, para. 56.
[362] Setako Brief in Reply, paras. 49, 56, *referring to Kalimanzira* Appeal Judgement, paras. 185, 186. According to Setako, the *Kalimanzira* Appeal Judgement shows that a trial chamber must "sufficiently explain its reasoning when rejecting defence witness testimony that clearly contradicts the testimony of a prosecution witness, especially when the defence witness is well positioned to observe material facts."
[363] Setako Notice of Appeal, para. 65; Setako Appeal Brief, para. 243; AT. 29 March 2011 pp. 5, 6.
[364] Setako Appeal Brief, para. 245.

162. The Prosecution responds that the Trial Chamber properly assessed Witnesses SLA's and SAT's evidence on Hasengineza and gave a plausible explanation as to why Witnesses NEC and NDI did not raise reasonable doubt about the Prosecution's case.[365]

163. The Appeals Chamber rejects Setako's argument that the Trial Chamber required Witnesses NEC and NDI to have expert knowledge. The Trial Chamber did not disregard the testimony of these witnesses for lack of such knowledge. It simply found that their evidence was insufficient to challenge the Prosecution's case. Furthermore, although the Trial Chamber could have discussed in greater detail why Witnesses NEC and NDI had a "limited basis of knowledge in matters of military deployment"[366] and how this affected their testimonies, this does not amount to a failure to provide a reasoned opinion.

164. Witnesses NEC and NDI had a limited knowledge of Hasengineza's whereabouts. Witness NDI testified that she visited Hasengineza's family residence while staying at Mukamira camp, without seeing him there.[367] It is apparent from her testimony that she never met Hasengineza personally, but only had contact with his wife, and that she did not ask Hasengineza's wife about her husband.[368] Witness NEC testified that Hasengineza was no longer at Mukamira camp in 1994, but had been replaced by Hitayezu.[369] In cross-examination, she admitted that she did not know where Hasengineza had been transferred.[370] Witness NEC also asserted that Hasengineza used to visit his family at Mukamira camp and that she did not see him doing so after President Habyarimana's plane was shot down.[371] However, as she explained, the sole basis for this knowledge was that she could see the road from her house, which Hasengineza used to drive up to his family's home.[372]

165. Witnesses NEC and NDI were thus not well positioned to make accurate observations about Hasengineza's presence at Mukamira camp on 25 April and 11 May 1994. Consequently, the Trial Chamber's finding that Witnesses NEC and NDI had a "limited basis of knowledge in matters of military deployment" reflected their limited information regarding Hasengineza's whereabouts. It was therefore reasonable for the Trial Chamber to conclude that their evidence failed to raise doubt

[365] Prosecution Response Brief, paras. 105, 111.
[366] *See* Trial Judgement, para. 363.
[367] T. 11 May 2009 pp. 31, 52.
[368] T. 11 May 2009 p. 31.
[369] T. 19 May 2009 p. 13.
[370] T. 19 May 2009 p. 22.
[371] T. 19 May 2009 p. 22.
[372] T. 19 May 2009 p. 23.

about Witnesses SLA's and SAT's testimonies that Hasengineza participated in the killing of Tutsis on 25 April and/or 11 May 1994.

166. According to Setako, Prosecution Exhibit 86 shows that Hasengineza was the Commander of the 73rd Battalion and thus not under the command of Bizabarimana at Mukamira camp when the 25 April and 11 May Killings occurred.[373] He points out that the Trial Chamber did not address this evidence in the Trial Judgement.[374]

167. The Prosecution does not specifically respond to this challenge.

168. The Appeals Chamber notes that this exhibit is a list from the Rwandan Ministry of Defence, dated 5 March 1994, on the "situation of the officers of the Rwandan army at 1 March 1994" ("List"). The List refers to "Captain Boniface Hasengineza" as the Commander of the 73rd Battalion.[375] While the Defence confronted Witnesses SLA and SAT with the assertion that Hasengineza was the Commander of the 73rd Battalion and therefore was not at Mukamira camp in April and May 1994,[376] it did not bring the List to the attention of the witnesses or the Trial Chamber. Neither did the Defence refer to the List when it discussed Hasengineza's presence at Mukamira camp in its Final Trial Brief.[377]

169. Moreover, the List does not show that Hasengineza was not under the command of Bizabarimana at Mukamira camp when the 25 April and 11 May Killings occurred. In any event, in his appeal, Setako does not explain the relevance of this issue. The question rather is whether the List raises doubt about Hasengineza's presence at Mukamira camp on 25 April and 11 May 1994. The List does not provide any indication as to the location of the 73rd Battalion or Hasengineza's position in April and May 1994.[378] It was therefore not capable of casting doubt on evidence implicating Hasengineza in the 25 April and 11 May Killings.

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[373] Setako Appeal Brief, para. 241.
[374] Setako Brief in Reply, para. 55.
[375] Prosecution Exhibit 86, p. 19. The Defence tendered a list entitled "*Situation Officiers Armée Rwandaise, Minadef, 5 Mars 1994*", which was admitted into evidence as Defence Exhibit 184 (*see* T. 24 June 2009 pp. 58, 60, 61; T. 25 June 2009 p. 1). This list is not identical to Prosecution Exhibit 86, but also mentions "Captain Boniface Hasengineza" as Commander of the 73rd Battalion (*see* Defence Exhibit 184, p. 17).
[376] T. 18 September 2008 pp. 45, 46; T. 22 September 2008 p. 2.
[377] *See* Setako Final Trial Brief, paras. 388, 431, 432.
[378] The Defence mentioned during cross-examination of Witnesses SAT and SLA that the 73rd Battalion had its headquarters in Ruhondo, more than 50 kilometres from Mukamira camp (*see* T. 18 September 2008 pp. 45, 46; T. 22 September 2008 p. 2). However, this remains only an assertion not supported by any evidence in the trial record. During Setako's cross-examination, he concurred with the Prosecution that the 73rd Battalion was based within the Ruhengeri operational sector, but rejected the assertion that it was based at Mukamira camp, when not "in the frontline". Setako, however, conceded that he had no knowledge on this issue as he "was not living in Mukamira camp" and that he "did not follow" Hasengineza's movements and was not in a position to know "how he moved about." *See* T. 25 June 2009 pp. 37, 38.

170. For the foregoing reasons, the Appeals Chamber dismisses Setako's arguments.

(iii) Varying Vantage Points and Limited Knowledge of Camp Activities

171. The Trial Chamber found that the Defence witnesses' lack of knowledge about the 25 April and 11 May Killings could be explained by their varying vantage points and the fact that they were civilians with limited knowledge of camp activities.[379]

172. Setako submits that the Trial Chamber abused its discretion in rejecting the Defence witnesses' evidence on these grounds.[380] He points out that, according to Witnesses SLA and SAT, the 25 April Killings were conducted in an open and conspicuous manner, with the victims being taken from their individual residences at Mukamira camp and marched to the armoury where they were shot.[381] Setako suggests that this could not have been done without the Defence witnesses observing the events, seeing the victims' bodies, noticing the scent of decay, or at least learning about the killings later.[382] He argues that the same applies to the 11 May Killings.[383] Setako further contends that no complaints were filed by Tutsi soldiers who allegedly lost relatives in the 25 April Killings.[384] He finally asserts that the Trial Chamber failed to provide a "reasoned and balanced evaluation" of Witness NDI's testimony.[385] In his view, the Trial Chamber's conclusion that Witness NDI's testimony was inconclusive as to her ability to see the victim's bodies "defies logic and common sense".[386]

173. The Prosecution responds that Setako relies on irrelevant factors, which the Trial Chamber correctly disregarded.[387] In its view, Setako impermissibly seeks a *de novo* review of his case.[388]

174. The Appeals Chamber notes that the Defence submitted at trial that the Defence witnesses would have observed or learned about killings of Tutsis at Mukamira camp.[389] It recalls that a party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate

[379] Trial Judgement, para. 361.
[380] Setako Notice of Appeal, paras. 59, 60; Setako Appeal Brief, paras. 85, 88, 109, 211-216, 219, 220; Setako Brief in Reply, para. 45.
[381] Setako Appeal Brief, paras. 86, 87. AT. 29 March 2011 pp. 11, 12.
[382] Setako Appeal Brief, paras. 86-88, 109, 212-220; Setako Brief in Reply, para. 45; AT. 29 March 2011 pp. 11, 12.
[383] Setako Appeal Brief, para. 109.
[384] Setako Appeal Brief, paras. 212, 214.
[385] Setako Notice of Appeal, para. 61; Setako Appeal Brief, paras. 217-220.
[386] Setako Appeal Brief, para. 218, *referring to* Trial Judgement, fn. 449. *See also* Setako Appeal Brief, para. 88.
[387] Prosecution Response Brief, paras. 100, 102.
[388] Prosecution Response Brief, para. 99.
[389] *See* Setako Final Trial Brief, paras. 387-391, 430, 431, 434-437, 441; T. 19 May 2009 p. 35.

that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[390]

175. Setako does not demonstrate such an error. The Trial Chamber discussed in detail the limited movements of the Defence witnesses around Mukamira camp and the substantial distance of their housing from the armoury and the command centre, where the 25 April and 11 May Killings occurred.[391] In light of this evidence, it was reasonable for the Trial Chamber to find that the Defence witnesses' varying vantage points explained why they did not personally observe the killings or the bodies of the victims afterwards. Setako's argument that the scent of the decaying bodies would have been noticeable is speculative and is therefore dismissed.

176. The Appeals Chamber also rejects Setako's argument that the Trial Chamber's assessment of Witness NDI's testimony "defies logic and common sense". The Trial Chamber did not accept that Witness NDI was actually able to observe the 25 April and 11 May Killings. It merely noted her testimony that she passed the armoury twice a week to attend church services,[392] and acknowledged that this would have made her the best placed of the Defence witnesses to see the corpses of the victims.[393] However, the Trial Chamber doubted this testimony because Witness NEC testified that only soldiers were permitted near the arms depot.[394] The Trial Chamber further stated that, even if Witness NDI's testimony on this point were accepted, it would have been "inconclusive as to whether she would have been in a position – in time and space – to see the bodies [of the victims of the 25 April and 11 May Killings]".[395] Setako does not demonstrate that the Trial Chamber was unreasonable in making these findings.

177. The Appeals Chamber further finds that it was not unreasonable for the Trial Chamber to rely on Witnesses SLA's and SAT's testimonies about the occurrence of the 25 April and 11 May Killings even though the Defence witnesses stated that they did not hear about killings of Tutsis at Mukamira camp.[396] As the Trial Chamber stated, the Defence witnesses were civilians with limited knowledge of camp activities. In particular, it is apparent from the Defence witnesses' testimonies

[390] *Renzaho* Appeal Judgement, para. 11; *Kalimanzira* Appeal Judgement, para. 10; *Nchamihigo* Appeal Judgement, para. 11; *Bikindi* Appeal Judgement, para. 13.
[391] *See* Trial Judgement, para. 361, fn. 448. *See also* Trial Judgement, paras. 333, 334, 336; T. 6 May 2009 pp. 36, 52, 55; T. 11 May 2009 pp. 52, 62; T. 19 May 2009 p. 31; T. 26 May 2009 p. 66; T. 27 May 2009 p. 2.
[392] T. 11 May 2009 pp. 36, 37.
[393] Trial Judgement, fn. 449.
[394] Trial Judgement, para. 361. *See also* T. 19 May 2009 pp. 31, 32.
[395] Trial Judgement, fn. 449.
[396] *See* Trial Judgement, paras. 333, 335, 336, 337, 360.

that they did not know all people living in the camp.[397] It is also undisputed that Mukamira camp was significant in size.[398] Based on this, it was reasonable to find that the Defence witnesses' assertion that they would have received information about the 25 April and 11 May Killings carried limited weight and did not cast doubt on the testimonies of Witnesses SLA and SAT.

178. The Appeals Chamber will not address Setako's assertion that no Tutsi soldiers complained about the loss of relatives due to the 25 April Killings since that is mere speculation.[399]

179. For these reasons, the Appeals Chamber dismisses Setako's arguments.

(iv) Witness SLA's Testimony that All Tutsis Were Killed on 25 April 1994

180. The Trial Chamber noted Setako's argument that Witness SLA's "assertion that all Tutsis in [Mukamira] camp were killed and Witness SAT's testimony about the killings stand in contrast to the evidence of each of the Defence witnesses, including two Tutsis (Witnesses NEC and NCA), who testified that the Tutsis they knew at the camp survived."[400] The Trial Chamber held that Witness SLA "did not have a sufficient basis of knowledge concerning the full scope of persons at the camp to reliably determine that all Tutsis had been killed."[401] It added that the Defence witnesses also lacked full knowledge of all activities or persons at Mukamira camp and concluded that "[t]he Defence evidence therefore does not raise doubt about the killings on 25 April."[402]

181. Setako submits that the Trial Chamber erred in failing to provide a reasoned opinion and find reasonable doubt in the Prosecution's case, given that Witness SLA's assertions were contradicted by the testimonies of Witnesses NEC and NCA.[403] He contends that Witnesses NEC and NCA "by their very appearance before the Tribunal, refuted [Witness] SLA's allegations that all Tutsis were killed."[404] In his view, the Trial Chamber erroneously chose to disregard the certainty with which Witness SLA testified.[405]

182. The Prosecution does not specifically respond to these challenges.

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[397] *See* T. 6 May 2009 pp. 32, 35; T. 11 May 2009 pp. 30, 31, 35-37, 43, 46-48; T. 19 May 2009 pp. 22, 27, 32; T. 26 May 2009 pp. 65, 66; T. 27 May 2009 pp. 6-9, 11.
[398] *See* Trial Judgement, para. 361.
[399] Setako's contention that neither he nor the 25 April and 11 May Killings were mentioned in *Gacaca* documents is analyzed elsewhere in this Judgement. *See infra*, Section III.B.2.(c).
[400] Trial Judgement, para. 364.
[401] Trial Judgement, para. 364.
[402] Trial Judgement, para. 364.
[403] Setako Notice of Appeal, para. 66; Setako Appeal Brief, paras. 83, 224, 247-249; AT. 29 March 2011 p. 6.
[404] Setako Appeal Brief, para. 248; AT. 29 March 2011 p. 6.
[405] Setako Appeal Brief, para. 248; AT. 29 March 2011 p. 10.

183. The Appeals Chamber notes that the impugned findings relate only to the 25 April Killings. As the trial record shows, Witness SLA indeed testified that no Tutsis residing at Mukamira camp survived these killings.[406] This assertion was obviously refuted by the fact that Witnesses NEC and NCA remained alive. However, as stated above, the Trial Chamber took this contradiction into account.[407] It was within its discretion to find Witness SLA's testimony nonetheless credible. The Appeals Chamber reiterates that the Trial Chamber reasonably concluded that Witnesses SLA and SAT provided largely consistent accounts of the 25 April Killings.[408] In light of this corroboration, it was reasonable for the Trial Chamber to rely on Witness SLA even though he wrongly claimed that all Tutsis at Mukamira camp were killed. Setako fails to show that the Trial Chamber erred in resolving the conflict with the Defence witnesses' testimony by finding that neither Witness SLA nor the Defence witnesses had full knowledge of all persons and activities at Mukamira camp.

184. Accordingly, the Appeals Chamber dismisses Setako's argument.

(v) Impartiality of the Defence Witnesses

185. The Trial Chamber found that the evidence of Witnesses NBO, NEC, NDI, and NCA carried limited weight because "[e]ach of them survived the events based on the protection of the Rwandan military, and thus may be inclined to give favourable testimony about their time there."[409] With regard to Witness NBO, the Trial Chamber added that the fact that her husband was related to an accused before the Tribunal raised questions about her impartiality.[410]

186. Setako submits that the Trial Chamber erred in doubting the impartiality of the Defence witnesses based on these grounds.[411] He argues that there was no evidence of their bias, which would have allowed the Trial Chamber to diminish the weight of their testimony.[412] In particular, Setako points out that: (i) the Defence witnesses did not know each other and Witness NBO did not know him;[413] (ii) Witnesses NEC and NCA were Tutsis;[414] (iii) Witness NEC's father and brother

[406] T. 16 September 2008 p. 50; T. 18 September 2008 pp. 20, 21.
[407] Trial Judgement, para. 364.
[408] *See supra,* Section III.B.1.(c)(i).
[409] Trial Judgement, para. 360.
[410] Trial Judgement, para. 360.
[411] Setako Notice of Appeal, paras. 26, 27; Setako Appeal Brief, paras. 84, 100-106, 110; Setako Brief in Reply, para. 47; AT. 29 March 2011 p. 11.
[412] Setako Appeal Brief, paras. 100, 102, 106.
[413] Setako Appeal Brief, paras. 106, 107.
[414] Setako Appeal Brief, paras. 103, 104.

were killed as alleged accomplices of the *Inkotanyi*, which made her a reliable witness;[415] and (iv) none of the Defence witnesses had a criminal record or any motivation to lie.[416]

187. The Prosecution responds that the Trial Chamber noted that the Defence witnesses had a motivation to lie.[417]

188. The Appeals Chamber recalls that it is primarily for the trier of fact to determine whether a particular witness may have an incentive to distort the truth.[418] However, the mere fact that the Defence witnesses lived or found refuge at Mukamira camp due to their relationships with soldiers does not in and of itself imply that they gave a tainted account in order to protect Setako from criminal responsibility. This Tribunal has considered that, under certain circumstances, the fact that a witness was saved by the accused may be relevant to the witness's credibility assessment.[419] Setako does not appear to have played any role in the protection of the Defence witnesses. The trial record also does not reveal any other evidence that the Defence witnesses were biased in favour of Setako.[420]

189. Similarly, the fact that Witness NBO's husband was related to an accused before this Tribunal does not necessarily indicate that she would have distorted her testimony to the benefit of Setako. In particular, the Appeals Chamber observes that her husband's relative was not implicated in any charges concerning killings at Mukamira camp.

190. Accordingly, the Appeals Chamber finds that the Trial Chamber erred when it found that the testimony of Witnesses NBO, NEC, NDI, and NCA carried limited weight because their impartiality was doubtful.

191. However, the Appeals Chamber is not convinced that this error invalidates the Trial Judgement or that it occasioned a miscarriage of justice. As discussed above, Setako's other specific challenges to the Trial Chamber's assessment of the Defence witnesses' testimony are unfounded. It was reasonable for the Trial Chamber to ultimately conclude that the Defence

[415] Setako Appeal Brief, paras. 102, 103.
[416] Setako Appeal Brief, para. 229. *See also* Setako Brief in Reply, para. 48.
[417] AT. 29 March 2011 pp. 28, 29. *See also* Prosecution Response Brief, paras. 104, 105.
[418] *Gacumbitsi* Appeal Judgement, para. 71.
[419] *See Kajelijeli* Appeal Judgement, para. 19; *Ndindabahizi* Trial Judgement, paras. 321, 322, 336, 338, 343, 345 (rejecting the Prosecution's argument that several Defence witnesses were biased in favour of the accused because he or his family saved their lives and the witnesses acknowledged that they owed the accused a debt of gratitude); *Kajelijeli* Trial Judgement, para. 223.
[420] The Appeals Chamber notes that the Defence witnesses were not asked during their testimony whether they knew each other. It will therefore not discuss this assertion made by Setako.

witnesses' evidence did not raise reasonable doubt about the Prosecution case. Consequently, its error relating to the Defence witnesses' impartiality had no impact on the Judgement.

192. For these reasons, Setako's arguments are dismissed.

(b) Existence of a Civil Defence Programme

193. Witnesses SLA and SAT testified that, in April 1994, they were recruited into the civil defence force in Nkuli commune and received military training at Mukamira camp.[421] The Trial Chamber stated that it had considered the accounts of Witnesses SLA and SAT in the context of documentary evidence tendered by the Defence in support of its claim that no civil defence force existed at the time ("Documentary Evidence").[422] The Trial Chamber concluded that the Documentary Evidence only concerned the "formal implementation of the civil defence programme on a national scale" and did not call into question the consistent, first-hand evidence of training at Mukamira camp.[423] In a footnote accompanying this finding, the Trial Chamber noted "that the existence of informal or regional measures concerning civil defence pre-date[s] the distribution of these documents"; in support, it referred to findings in the *Bagosora et al.* Trial Judgement that regional civil defence programmes existed from 1990 onwards.[424]

194. Setako submits that the Trial Chamber erred in failing to find that the Documentary Evidence raised reasonable doubt about the testimony of Witnesses SLA and SAT.[425] He also contends that the Trial Chamber erred in law by relying on a fact that was established in the *Bagosora et al.* trial.[426] According to Setako, the Trial Chamber thereby violated Rule 94(B) of the Rules because the relevant fact was not admitted into evidence in his trial; he was not heard on the issue and was thus prevented from producing evidence in rebuttal;[427] and the fact in question had "not been finally determined".[428]

195. The Prosecution does not specifically respond to these challenges.

196. The Appeals Chamber observes that Witnesses SLA and SAT both testified that, together with other civil defence force recruits, they attended the 25 April Meeting, where Setako urged the

[421] T. 16 September 2008 pp. 39-43; T. 18 September 2008 pp. 11-13, 77, 78, 81, 82, 85, 86; T. 19 September 2008 pp. 17, 18; T. 22 September 2008 pp. 3, 4, 14, 15, 17. *See also* Trial Judgement, paras. 322, 327.
[422] *See* Trial Judgement, para. 359, fns. 444, 445. The Trial Chamber referred to Defence Exhibits 56, 57, and 100.
[423] *See* Trial Judgement, para. 359.
[424] *See* Trial Judgement, fn. 446, *referring to Bagosora et al.* Trial Judgement, paras. 460-495.
[425] Setako Notice of Appeal, para. 28; Setako Appeal Brief, paras. 111-115; AT. 29 March 2011 p. 14.
[426] Setako Appeal Brief, para. 113.
[427] Setako Appeal Brief, paras. 113, 114; AT. 29 March 2011 p. 14.
[428] Setako Appeal Brief, para. 115.

killing of Tutsis at Mukamira camp,[429] and participated in the ensuing killing of Tutsis.[430] Furthermore, according to Witness SLA, members of the civil defence were involved in the 11 May Killings.[431] Consequently, Witnesses SLA's and SAT's assertion that a civil defence force was in place at Mukamira camp at the time was relevant to a key aspect of their testimonies.

197. The Trial Chamber did not refer to evidence on the trial record in the present case when noting that informal or regional civil defence measures existed before the establishment of a civil defence on a national scale. Rather, it appears to have relied on an extraneous source, namely a discussion of facts in the *Bagosora et al.* Trial Judgement.[432]

198. In doing so, the Trial Chamber in fact took judicial notice of facts from another proceeding before the Tribunal. The only legal basis for such an approach would have been Rule 94 of the Rules, which provides:

> (A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.
>
> (B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

199. The existence of informal or regional civil defence measures prior to the implementation of civil defence on a national scale in Rwanda cannot be qualified as a fact of common knowledge under Rule 94(A) of the Rules.[433] The relevant parts of the *Bagosora et al.* Trial Judgement could therefore have been judicially noticed in Setako's trial only as adjudicated facts pursuant to Rule 94(B) of the Rules.

200. The Appeals Chamber recalls that taking judicial notice of adjudicated facts or documentary evidence under Rule 94(B) of the Rules is a method of achieving judicial economy and harmonizing judgements of the Tribunal while ensuring the right of the accused to a fair, public,

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[429] T. 16 September 2008 pp. 43-45; T. 18 September 2008 pp. 15-17, 21, 22, 55, 56, 77-82.
[430] T. 16 September 2008 pp. 46, 49, 50; T. 18 September 2008 pp. 17-20, 24-26, 82, 83; T. 19 September 2008 pp. 2-6. Only Witness SAT testified that he participated in the 25 April Killings (*see* Trial Judgement, para. 329). Witness SLA testified that, on 25 April 1994, he was involved in the killing of Tutsis that had been arrested at a roadblock near Mukamira camp (*see* Trial Judgement, para. 324). The Trial Chamber did not convict Setako for this latter incident (*see* Trial Judgement, para. 367).
[431] T. 16 September 2008 pp. 49-52.
[432] While it is apparent that the *Bagosora et al.* Trial Judgement was only among several sources, the Trial Chamber did not disclose any other sources upon which it relied. *See* Trial Judgement, fn. 446.
[433] This category is confined to facts, which are not subject to reasonable dispute, that is commonly accepted or universally known facts, such as general facts of history or geography. *See Bikindi* Appeal Judgement, para. 99; *Semanza* Appeal Judgement, para. 194.

and expeditious trial.[434] For this reason, Rule 94(B) of the Rules requires a trial chamber to hear the parties before deciding to take judicial notice. In addition, the fact in question has to be "adjudicated". According to established jurisprudence, this latter requirement is only met if the fact is determined in a final judgement, meaning that no appeal has been instituted against it or, if instituted, the fact in question has been upheld.[435] Here, the Trial Chamber took judicial notice of facts addressed in the *Bagosora et al.* Trial Judgement without hearing the parties and while the *Bagosora et al.* Trial Judgement was still pending appeal.[436] The Appeals Chamber therefore finds that the Trial Chamber violated Rule 94(B) of the Rules.

201. However, this error does not invalidate the Trial Chamber's conclusions. The Trial Chamber correctly found that Witnesses SLA and SAT gave detailed and largely consistent accounts of their recruitment into a local civil defence force and their military training at Mukamira camp in April 1994.[437] The Defence thoroughly cross-examined the witnesses on the nature of their military training without revealing any inconsistencies on this issue.[438] Setako did not contend otherwise either at trial or on appeal. Instead, he asserts that the Documentary Evidence refutes the existence of a civil defence force at Mukamira camp in April and May 1994.[439]

202. The Documentary Evidence consists of Defence Exhibits 56, 57, and 100. Defence Exhibit 56 contains a directive by Prime Minister Jean Kambanda on the organisation of civil defence, addressed to all prefects on 25 May 1994. This directive demanded that the communal police and reservists train young civilians in the secteurs.[440] It also requested the prefects to set up civil defence committees in the secteurs, communes, and prefectures in order to ensure coordination

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[434] *The Prosecutor v. Édouard Karemera et al*., Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 39; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005, para. 12.

[435] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98,41-A, Decision on Anatole Nsengiyumva's Motion for Judicial Notice, 29 October 2010, para. 7; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicamumpaka's Motion for Judicial Notice, 11 February 2004, paras. 4, 5.

[436] The Appeals Chamber notes that the *Bagosora et al*. Trial Chamber's findings on the existence of civil defence programmes as such were not appealed. Only Nsengiyumva challenged the adequacy of his notice of the allegations and the Trial Chamber's findings on his responsibility over civil defence forces in 1994. *See Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Nsengiyumva's Appeal Brief, filed 1 February 2010 (confidential) and 2 February 2010 (public), paras. 20-22, 35, 41, 59, 61, 63, 64, 77, 80, 121, 136.

[437] Trial Judgement, paras. 322, 327, 340; T. 16 September 2008 pp. 39-43; T. 18 September 2008 pp. 11-13, 77, 78, 81, 85, 86; T. 19 September 2008 pp. 18-20; T. 22 September 2008 pp. 3, 4, 14, 15, 17. The Trial Chamber also correctly pointed out that the October 2002 statement of Witness SLA and the September 2002 statement of Witness SAT are consistent with their testimony that they received military training at Mukamira camp. *See* Trial Judgement, paras. 350, 352. *See also* Defence Exhibit 45, p. 5; Defence Exhibit 53, p. 6.

[438] T. 18 September 2008 pp. 11-13; T. 22 September 2008 pp. 3, 4.

[439] Setako Notice of Appeal, para. 28; Setako Appeal Brief, paras. 111, 112.

[440] Defence Exhibit 56, para. 7.

of civil defence operations.[441] The entire system was to be generally supervised by a national coordination committee.[442] Defence Exhibit 57 is an instruction by the Interior Minister on the implementation of the Prime Minister's directive, issued to all prefects on 25 May 1994. It ordered the prefects to, *inter alia*, establish the civil defence committees, prepare lists of persons who could train civilians, and select recruits for the civil defence programme.[443] Defence Exhibit 100 is a telegram from the Ministry of Defence, dated 30 April 1994, calling for the mobilisation of retired officers for the civil defence.[444]

203. The Trial Chamber took the Documentary Evidence into account and noted correctly that it concerned the formal establishment of a civil defence programme on a national scale.[445] By itself, this evidence did not call into question the reliable evidence of Witnesses SAT and SLA that civil defence force structures and military training of civilians existed earlier on a local level. Moreover, Defence Exhibit 100 shows that measures relating to civil defence were undertaken before the Rwandan Government officially decided to implement a national civil defence programme on 25 May 1994. The Appeals Chamber further observes that, during Setako's testimony before the Trial Chamber, the Prosecution confronted him with evidence that members of the civilian population in Kigali-ville, Ruhengeri, Gisenyi, and Byumba prefectures underwent military training before April 1994.[446] Although Setako maintained that the measures were separate from "civil defence",[447] he acknowledged that civilians received military training in these areas prior to the formalisation of a national civil defence programme.[448]

204. For the foregoing reasons, the Appeals Chamber dismisses Setako's arguments.

(c) *Gacaca* Proceedings and Defence Expert Testimony

205. At trial, Setako argued that neither his name nor events with which he had been charged were mentioned in Rwandan national proceedings.[449] He called Expert Witness Bert Ingelaere, who provided a report ("Expert Report") and testified about the probability that the allegations against

[441] Defence Exhibit 56, paras. 8.1-8.8.
[442] Defence Exhibit 56, para. 8.9.
[443] Defence Exhibit 57, p. 1.
[444] *See also* T. 25 June 2009 p. 39.
[445] Trial Judgement, para. 359.
[446] T. 25 June 2009 pp. 38-40; T. 26 June 2009 pp. 6-16. The Prosecution referred to Prosecution Exhibits 82 and 83.
[447] T. 26 June 2009 p. 12.
[448] T. 25 June 2009 pp. 39, 40; T. 26 June 2009 pp. 6, 7, 9-12.
[449] *See* Trial Judgement, para. 73.

Setako would be recorded in *Gacaca* proceedings.[450] In addition, Setako tendered various *Gacaca* documents, which did not mention him or particular incidents in which he allegedly took part.[451]

206. The Trial Chamber found in general that it could only attach limited weight to Witness Ingelaere's testimony and the *Gacaca* documents relied upon by Setako.[452] When assessing the 25 April and 11 May Killings, the Trial Chamber noted the Defence's reference to Witness Ingelaere and Setako's argument that these killings would have been mentioned in *Gacaca* proceedings if true, but were in fact not mentioned.[453] It found that Setako's argument was speculative and insufficient to call into question the convincing, and corroborated, first-hand evidence of Witnesses SLA and SAT.[454]

207. Setako submits that the Trial Chamber improperly diminished the weight of Witness Ingelaere's conclusions and the tendered *Gacaca* documents.[455] In his opinion, the Trial Chamber failed to evaluate why the Prosecution did not produce independent evidence in order to refute the predictions of Witness Ingelaere and show that Setako's name was mentioned in relevant *Gacaca* proceedings.[456] He points out that the *Gacaca* documents he provided were naturally selective because they came from jurisdictions where he had allegedly committed crimes.[457] He also contends that the Trial Chamber erroneously held that Witness Ingelaere had not considered the specific context of *Gacaca* proceedings in Ruhengeri and Kigali.[458] Setako argues that Witness Ingelaere was accepted by the Trial Chamber as an expert on Rwandan *Gacaca* proceedings and conducted extensive field research, including in Ruhengeri and Kigali.[459] He further submits that Witness Ingelaere freely admitted at trial that his assessment was limited due to shortcomings of the *Gacaca* system, but nevertheless maintained that the crimes at Mukamira camp would have been mentioned in proceedings if true.[460] He contends that the Trial Chamber should have carefully considered whether one reasonable inference to be drawn from Witness Ingelaere's testimony and the tendered *Gacaca* documents was that no massacres occurred at Mukamira camp.[461] In Setako's view, the Trial Chamber chose to ignore this evidence in favour of the inconsistent testimonies of

[450] T. 23 June 2009 pp. 2-14; T. 24 June 2009 pp. 1-39. The Expert Report was filed as Defence Exhibit 177.
[451] The trial record contains a substantial number of documents from Rwandan judicial proceedings. Neither the Trial Judgement nor Setako in his Appeal Brief provides a list of which documents the Defence relied on for its argument that Setako was not mentioned in *Gacaca* proceedings.
[452] *See* Trial Judgement, paras. 73-85, in particular paras. 82-84.
[453] *See* Trial Judgement, para. 365.
[454] *See* Trial Judgement, para. 365.
[455] Setako Notice of Appeal, paras. 53, 57; Setako Appeal Brief, paras. 187-190, 202; AT. 29 March 2011 pp. 14, 15.
[456] Setako Appeal Brief, paras. 75, 78, 189, 190, 209; Setako Brief in Reply, paras. 63, 64; AT. 29 March 2011 p. 15.
[457] Setako Appeal Brief, para. 189, *referring to* Trial Judgement, para. 82; Setako Brief in Reply, para. 64.
[458] Setako Notice of Appeal, para. 56; Setako Appeal Brief, paras. 197-201, *referring to* Trial Judgement, para. 83.
[459] Setako Appeal Brief, para. 197.
[460] Setako Appeal Brief, paras. 199, 200, 204-208; Setako Brief in Reply, para. 66.

Witnesses SLA and SAT, despite the fact that the alleged killings were also not mentioned by other witnesses in Rwanda.[462]

208. Setako also asserts that the Trial Chamber erred in attaching weight to Prosecution evidence that his name was mentioned in *Gacaca* proceedings conducted in Ruhengeri prison in 1999.[463] He argues that, although he was included as an "accused living abroad" in the minutes of these proceedings, he was not identified as having participated in any specific crime or in relation to any event adjudicated at Ruhengeri prison.[464] Setako finally contends that the Trial Chamber mischaracterised his arguments concerning killings at the Ruhengeri Court of Appeal on 14 April 1994.[465] He stresses that he never claimed that these killings did not occur, but only asserted that he did not participate in them.[466]

209. The Prosecution responds that the Trial Chamber thoroughly considered Witness Ingelaere's evidence and the *Gacaca* documents and properly concluded that they did not raise reasonable doubt about the Prosecution's case.[467] It submits that it was not obliged to offer "independent evidence" to refute Witness Ingelaere's predictions.[468]

210. The Appeals Chamber recalls that it may summarily dismiss challenges to findings on which the conviction of the accused does not rely.[469] Accordingly, it dismisses Setako's contention that the Trial Chamber misinterpreted his arguments concerning the killings at the Ruhengeri Court of Appeal and erroneously considered that his name was mentioned in *Gacaca* proceedings at Ruhengeri prison.[470] Setako has pointed to nothing in the Trial Judgement indicating that the Trial Chamber attached any weight to this evidence in the context of the 25 April and 11 May Killings.

211. For the same reason, the Appeals Chamber will not address Setako's argument that the *Gacaca* documents he provided were naturally selective because they came from jurisdictions where he was alleged to have committed crimes. This assertion relates to a Trial Chamber finding which concerned the probative value of the tendered *Gacaca* documents in relation to the Amended

[461] Setako Appeal Brief, paras. 195, 196, 210.
[462] Setako Appeal Brief, paras. 191, 192, 210.
[463] Setako Notice of Appeal, para. 23; Setako Appeal Brief, paras. 77, 78, *referring to* Trial Judgement, para. 84.
[464] Setako Appeal Brief, para. 78; Setako Brief in Reply, para. 63.
[465] Setako Notice of Appeal, para. 21; Setako Appeal Brief, paras. 74, 75.
[466] Setako Appeal Brief, para. 74; Setako Brief in Reply, para. 65.
[467] Prosecution Response Brief, paras. 29, 124, 126, 130, 133, 137, 138; AT. 29 March 2011 pp. 35, 36.
[468] Prosecution Response Brief, paras. 126, 132.
[469] *See Renzaho* Appeal Judgement, paras. 251, 384; *D. Milošević* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 20.
[470] As Setako himself acknowledges (*see* Setako Appeal Brief, para. 75), the Trial Chamber acquitted him of the killings at the Ruhengeri Court of Appeal on 14 April 1994. *See* Trial Judgement, paras. 257-274.

Indictment charges as a whole.[471] Rather, the essential question here is whether the *Gacaca* documents raised a reasonable doubt specifically about the occurrence of the 25 April and 11 May Killings.

212. In his Expert Report, Witness Ingelaere concluded that the 25 April Meeting and the 25 April Killings "will probably be" mentioned in *Gacaca* proceedings because authority figures were present at the meeting and incited the killing of Tutsis.[472] He further submitted that the 11 May Killings "will be" mentioned since authority figures were involved in the arrest and transportation of the victims and the incitement to violence occurred in their presence.[473]

213. The Trial Chamber took into account Witness Ingelaere's evidence when assessing the 25 April and 11 May Killings.[474] The Appeals Chamber is not convinced by Setako's argument that the Trial Chamber erred in finding that Witness Ingelaere had not considered the specific context of the *Gacaca* proceedings in Ruhengeri and Kigali. This conclusion was not rendered unreasonable by the fact that Witness Ingelaere conducted field research in these areas.[475] Witness Ingelaere himself acknowledged that, for a variety of reasons, *Gacaca* proceedings do not necessarily uncover the "truth" about the genocide in Rwanda.[476] In particular, he stated that the location of trials could influence their process and outcome.[477] On cross-examination, the Prosecution confronted him with the argument that it was less likely for Setako to be mentioned in *Gacaca* proceedings in Mukingo and Nkuli communes because the population there was largely Hutu. As the Trial Chamber noted, Witness Ingelaere thereupon conceded that he was not familiar with that particular community.[478] Since Mukamira camp was located in the Nkuli and Mukingo region, this concession was specifically relevant to the 25 April and 11 May Killings.

214. Furthermore, Witness Ingelaere did not verify whether the 25 April and 11 May Killings were indeed discussed during relevant *Gacaca* proceedings.[479] Based on the Amended Indictment, the Prosecution's Pre-Trial Brief, and the testimonies of Witnesses SLA and SAT, he merely

[471] *See* Trial Judgement, para. 82.
[472] *See* Expert Report, pp. 57-60.
[473] *See* Expert Report, pp. 61, 62. During his testimony at trial, Witness Ingelaere generally explained that, if the Amended Indictment charges against Setako as a whole were true, their quantity, the diversity of areas where the crimes were committed, and Setako's position as a high-level authority figure in 1994 would have led to the appearance of his name in *Gacaca* proceedings. Witness Ingelaere further stated that incidents in which Setako was claimed to have physically perpetrated violence himself, or where he allegedly incited others to commit crimes in the presence of a crowd, had an increased probability of being recorded. T. 24 June 2009 pp. 19, 20. *See also* Expert Report, pp. 27, 28; Trial Judgement, para. 80.
[474] *See* Trial Judgement, para. 365.
[475] T. 24 June 2009 p. 5.
[476] Trial Judgement, para. 83, *referring to* Expert Report, pp. 13, 20, 24, 25.
[477] T. 24 June 2009 pp. 19, 31, 32; Expert Report, p. 25. *See also* Trial Judgement, para. 83.
[478] Trial Judgement, fn. 130, *referring to* T. 24 June 2009 pp. 33, 34.

predicted the likelihood that these crimes would be recorded.[480] This prediction was not sufficient to raise reasonable doubt about the Prosecution's case, and Setako has failed to support it with convincing documentation from *Gacaca* proceedings.

215. At trial, Setako did not indicate which *Gacaca* documents admitted into evidence were relevant to the 25 April and 11 May Killings. On appeal, the Defence stated that it had submitted three documents relating to Mukamira secteur at trial and that only one of them had "any probative value".[481] This document, which is a judgement of the High Court of Mukamira, does not mention Setako or the 25 April and 11 May Killings. However, it is not clear when the crimes adjudicated during those proceedings were committed.[482] This single piece of evidence is insufficient to support Setako's contention that neither he nor the killings were ever mentioned in *Gacaca* proceedings.

216. The Appeals Chamber finally rejects Setako's argument that the Trial Chamber failed to evaluate why the Prosecution did not produce independent evidence showing that Setako's name was mentioned in relevant *Gacaca* documents.

217. For the foregoing reasons, the Appeals Chamber dismisses Setako's argument.

(d) Presence of Setako at Mukamira Camp

218. The Trial Chamber noted Setako's testimony that: (i) he did not go to Mukamira camp between 4 April and 4 July 1994;[483] (ii) after a mission to Kinshasa, he returned to his work at the Ministry of Defence in Kigali on 22 April 1994, where he was involved in a judicial investigation from 24 April to 8 May 1994;[484] and (iii) he travelled to Gitarama town for an investigation around 9 and 10 May 1994.[485] The Trial Chamber observed that Setako did "not provide an itinerary for 11 May."[486] Overall, it concluded that "Setako's evidence that he remained in Kigali during this period conducting an investigation at the Ministry of Defence is both uncorroborated and lacking in detail."[487]

[479] Expert Report, p. 29.
[480] Expert Report, pp. 26, 27.
[481] AT. 29 March 2011 p. 15, *referring to* "document number 44", included in a letter of the Defence addressed to the Prosecution, dated and filed 13 May 2009. *See also* AT. 29 March 2011 p. 17, where the Defence stated that although "document 45 and 46" (included in the same letter of 13 May 2009) also dealt with Mukamira secteur, it did not believe these documents to have probative value. The Appeals Chamber notes that "document number 44" was also admitted into evidence as Prosecution Exhibit 29.
[482] *See* Prosecution Exhibit 29.
[483] Trial Judgement, para. 332.
[484] Trial Judgement, para. 331.
[485] Trial Judgement, para. 332.
[486] Trial Judgement, para. 332.
[487] Trial Judgement, para. 366.

219. Setako submits that his evidence raised reasonable doubt about his presence at Mukamira camp on 25 April and 11 May 1994 and that the Trial Chamber erred in failing to give it sufficient weight.[488] He argues that the Trial Chamber should not have rejected his testimony for lack of corroboration because corroboration is not a prerequisite for accepting evidence.[489] He adds that, in light of the contradictions in Witnesses SLA's and SAT's testimonies, the fact that his testimony was uncorroborated could not have been a basis for rejection.[490] Setako further asserts that the investigative activities he testified about were more consistent with his job functions as a judicial officer than those attributed to him by Witnesses SLA and SAT.[491] Finally, he contends, it was unreasonable to believe that he was able to travel from Kigali to Mukamira camp at the time, given the distance between the two locations and the ongoing fighting in the area.[492]

220. The Prosecution responds that Setako fails to identify any error in the Trial Chamber's assessment of his testimony.[493] In its view, it was demonstrated at trial that this testimony was not credible in light of the convincing evidence provided by Witnesses SAT and SLA.[494]

221. Contrary to Setako's assertion, the Trial Chamber did not consider corroboration to be a prerequisite for accepting his testimony. It merely took the lack of corroboration into account as one factor when weighing his evidence. Additional factors were that Setako's testimony lacked detail, that he maintained a home near Mukamira camp, and that his family was present in the area.[495]

222. Setako's submission that the Trial Chamber erred in dismissing his evidence for lack of corroboration due to contradictions in the testimonies of Witnesses SLA and SAT is unclear. If Setako claims that the Trial Chamber was compelled to accept his testimony because Witnesses SLA's and SAT's testimonies deviated from each other, the Appeals Chamber disagrees. The Appeals Chamber recalls that a trial chamber has the discretion to decide on the weight, if any, to

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[488] Setako Notice of Appeal, para. 67; Setako Appeal Brief, paras. 250-253.
[489] Setako Appeal Brief, para. 252, *referring to Gacumbitsi* Appeal Judgement, para. 72, *Nahimana et al.* Trial Judgement, para. 97, *Kajelijeli* Trial Judgement, para. 41, *Akayesu* Trial Judgement, para. 135; Setako Brief in Reply, para. 59.
[490] Setako Brief in Reply, para. 59.
[491] Setako Appeal Brief, para. 252; Setako Brief in Reply, paras. 57, 59.
[492] Setako Appeal Brief, para. 252.
[493] Prosecution Response Brief, para. 123.
[494] Prosecution Response Brief, paras. 116, 119, 123. According to the Prosecution, it is significant that "Setako conceded to have visited Mukamira camp between 4 April and 4 July 1994." *See* Prosecution Response Brief, para. 118. However, this is a clear misrepresentation of Setako's testimony. As the Trial Chamber noted (*see* Trial Judgement, para. 332), Setako testified to having visited Mukamira camp on 4 April 1994 before leaving Nkuli commune and then again on 3 or 4 July 1994. *See* T. 24 June 2009 p. 47; T. 25 June 2009 pp. 27, 28, 30, 31.
[495] *See* Trial Judgement, paras. 331, 366. Setako does not challenge the Trial Chamber's consideration of the latter two factors.

accord to a piece of evidence, regardless of whether or not that evidence is corroborated.[496] This discretion is not affected by purported inconsistencies in other evidence.

223. The essential question is whether it was reasonable for the Trial Chamber to conclude that Setako's testimony failed to raise reasonable doubt about Witnesses SLA's and SAT's assertions that he was present at Mukamira camp and participated in the 25 April and 11 May Killings.

224. Neither the Trial Chamber nor the parties on appeal designated Setako's evidence concerning his whereabouts between 24 April and 11 May 1994 as alibi evidence.[497] However, Setako clearly denies having been in a position to commit the 25 April and 11 May Killings at Mukamira camp because he was not there at the time. This amounts to raising an alibi.[498] The Appeals Chamber recalls that an accused does not bear the burden of proving his alibi beyond reasonable doubt. He must simply produce evidence that is likely to raise a reasonable doubt about the Prosecution's case.[499] Where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true. Where the alibi evidence does *prima facie* account for the accused's activities at the time of the commission of the crime, the Prosecution must eliminate the reasonable possibility that the alibi is true.[500]

225. At trial, Setako testified that, from 22 April 1994 onwards, he went to work at his office in the Ministry of Defence in Kigali, where he performed his "daily tasks".[501] He contended that, starting on 24 April 1994, he conducted a judicial investigation against a commander at Mutara.[502] Setako argued that this investigation lasted approximately two weeks, until 8 May 1994, and that during that time he summoned witnesses for questioning to his office in Kigali.[503] He further asserted that, on approximately 9 or 10 May 1994, he went on a mission to Gitarama in order to

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[496] *See Gacumbitsi* Appeal Judgement, para. 72; *Niyitegeka* Appeal Judgement, para. 92; *Muhimana* Appeal Judgement, para. 101.
[497] At trial, Setako only provided notice of an alibi for the periods 6 to 12 April and 12 to 21 April 1994. *See* Setako's Notice of Alibi. *See also* Setako Pre-Trial Brief, paras. 16, 17. This alibi evidence is discussed in paragraphs 275-319 of the Trial Judgement. While the Trial Chamber accorded limited evidentiary value to Setako's alibi for the period of 6 to 12 April 1994 (*see* Trial Judgement, para. 305), it found that the Prosecution had not eliminated the reasonable possibility that Setako was on a mission in Kinshasa from 12 until 21 April 1994 (*see* Trial Judgement, para. 319).
[498] *Renzaho* Appeal Judgement, para. 303; *Zigiranyirazo* Appeal Judgement, para. 17; *Karera* Appeal Judgement, para. 330; *Niyitegeka* Appeal Judgement, para. 60; *Kajelijeli* Appeal Judgement, para. 42.
[499] *Renzaho* Appeal Judgement, para. 303; *Zigiranyirazo* Appeal Judgement, para. 17; *Karera* Appeal Judgement, para. 330; *Niyitegeka* Appeal Judgement, para. 60; *Kajelijeli* Appeal Judgement, para. 42.
[500] *Renzaho* Appeal Judgement, para. 303; *Zigiranyirazo* Appeal Judgement, para. 18. The Appeals Chamber recalls that, according to Rule 67(A)(ii)(a) of the Rules, the Defence shall notify the Prosecution of its intent to raise an alibi as early as reasonably practical and before the commencement of the trial. The Appeals Chamber further recalls that a trial chamber may take the failure to give a notice of alibi timely into account when weighing the credibility of the alibi. *See Nchamihigo* Appeal Judgement, para. 97. Here, the Prosecution did not object to Setako's alibi evidence based on lack of notice.
[501] T. 22 June 2009 p. 35.
[502] T. 22 June 2009 pp. 35-37.

investigate charges against a commander at Bugesera. This investigation took one day, and Setako returned to Kigali on the same day.[504]

226. During his testimony, Setako could not recall the exact dates of these investigations.[505] His assertion that he questioned witnesses in his office in Kigali for two weeks from 24 April 1994 onwards lacked any detail. In particular, Setako did not specifically comment on his whereabouts on 25 April 1994. Furthermore, as noted by the Trial Chamber, Setako did not provide an itinerary for 11 May 1994. He merely asserted that he returned to Kigali from a one-day mission to Gitarama on 9 or 10 May 1994 and that it took him time to write and transmit the results of his investigations.[506]

227. Setako's submission, that the activities he testified about were more consistent with his job functions than those attributed to him by Witnesses SLA and SAT at Mukamira camp, is irrelevant. The Trial Chamber did not question that he conducted judicial investigations in April and May 1994. Rather, it did not accept that these activities precluded him from being present at Mukamira camp on 25 April and 11 May 1994. Setako's claim that he could not have travelled from Kigali to Mukamira camp at the time is a mere assertion unsupported by any evidence on the trial record and is therefore dismissed. The Appeals Chamber thus finds that Setako has not shown that the Trial Chamber erred in finding that his alibi evidence did not raise reasonable doubt about Witnesses SLA's and SAT's testimony.

228. For the foregoing reasons, the Appeals Chamber dismisses Setako's arguments.

3. Conclusion

229. The Appeals Chamber notes that the general argument underlying Setako's appeal is that his convictions were not safe because Witnesses SLA and SAT were not credible and, furthermore, that the Defence evidence raised reasonable doubt about their accounts of events. The Appeals Chamber has considered Setako's specific arguments relating to the Trial Chamber's assessment of the evidence. It finds that Setako has not demonstrated that no reasonable trier of fact could have relied on the evidence of Witnesses SLA and SAT to conclude that Setako ordered the 25 April and 11 May Killings.

[503] T. 22 June 2009 pp. 35, 37.
[504] T. 22 June 2009 pp. 36, 37. Setako further testified that he led a third investigation between 16 and 18 May 1994 and, starting from 30 May 1994, participated in negotiations with the RPF. *See* T. 22 June 2009 pp. 37-42; T. 25 June 2009 pp. 41-46.
[505] T. 22 June 2009 pp. 36, 37.

[506] T. 22 June 2009 p. 38. The Appeals Chamber notes that this statement of Setako was related to the question whether, aside from the three investigations he testified about during 24 April and 18 May 1994, there were any other activities that he conducted in May 1994.

C. Alleged Violation of the Standard and Burden of Proof

230. Setako submits that the Trial Chamber's assessment of the Prosecution and Defence evidence shows that the Trial Chamber failed to correctly apply the standard of proof of beyond reasonable doubt.[507] He argues that the Trial Chamber erroneously shifted the burden of proof to the Defence by requiring it to disprove the Prosecution's case[508] and that it applied a higher standard of proof to the Defence evidence than to the Prosecution evidence.[509] Setako asserts that "given the contradictions and inconsistencies between the testimonies of [Witnesses] SLA and SAT, and taking into account the testimony of defense witnesses NEC, NCA, NBO and NDI, no reasonable trier of fact could have been satisfied of [Setako's] guilt beyond a reasonable doubt."[510]

231. The Prosecution responds that Setako fails to identify any legally incorrect test used by the Trial Chamber[511] and that he was not required to prove anything.[512]

232. The Appeals Chamber observes that the Trial Chamber did not use the phrase "beyond reasonable doubt" in making its factual findings on the 25 April and 11 May Killings.[513] However, at the outset of the "Factual Findings" section of the Trial Judgement, the Trial Chamber noted that, "[i]n its factual findings, the Chamber considers whether the Prosecution has proved beyond reasonable doubt the material facts, both pleaded in the Indictment and pursued at the close of its case".[514] Furthermore, in making its legal findings on the 25 April and 11 May Killings, the Trial Chamber used phrases such as "the only reasonable conclusion"[515] and "there is no doubt".[516] Accordingly, the Trial Chamber correctly set out the applicable standard and burden of proof.

233. Setako's argument that the Trial Chamber incorrectly applied the standard and burden of proof hinges on a reiteration of specific challenges to the Trial Chamber's assessment of the evidence, which have been addressed above.[517] The Appeals Chamber recalls its finding that,

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[507] Setako Notice of Appeal, paras. 9-14; Setako Appeal Brief, paras. 25-52; AT. 29 March 2011 pp. 4-6.
[508] Setako Notice of Appeal, paras. 10, 11; Setako Appeal Brief, paras. 33-40; Setako Brief in Reply, paras. 11, 14.
[509] Setako Notice of Appeal, para. 14; Setako Appeal Brief, paras. 47-52.
[510] Setako Brief in Reply, para. 10. *See also* AT. 29 March 2011 p. 39; Setako Appeal Brief, paras. 29, 37.
[511] Prosecution Response Brief, paras. 21, 31, 32.
[512] Prosecution Response Brief, para. 25; AT. 29 March 2011 pp. 22, 23.
[513] *See* Trial Judgement, para. 368.
[514] Trial Judgement, para. 91.
[515] Trial Judgement, para. 472.
[516] Trial Judgement, para. 473.
[517] As to Setako's argument that Witnesses SLA and SAT provided significantly inconsistent testimonies on the 25 April and 11 May Killings (Setako Notice of Appeal, paras. 9, 12; Setako Appeal Brief, paras. 29-32, 41-45; Setako Brief in Reply, para. 10; AT. 29 March 2011 p. 5), *see supra*, Section III.B.1.(c). As to Setako's argument that Defence Witnesses NBO, NCE, NDI, and NCA contradicted the testimonies of Witnesses SLA and SAT because they would have known if any massacres occurred at Mukamira camp and stated no Tutsis were killed there in April and May 1994 (Setako Appeal Brief, para. 37), *see supra*, Section III.B.2.(a)(iii). As to Setako's argument that Witnesses NCA and

despite certain inconsistencies in the testimonies of Witnesses SLA and SAT, it was reasonable for the Trial Chamber to find that they provided largely consistent accounts of the fundamental features of the 25 April and 11 May Killings.[518]

234. It was further reasonable to conclude that the Defence evidence did not raise doubt as to Setako's responsibility for these killings. Although the Trial Chamber erred in doubting the impartiality of the Defence witnesses,[519] this does not show that it shifted the burden of proof or applied a higher standard to their evidence by requiring them to prove that no killings occurred.[520] The Trial Chamber concluded that the Defence witnesses' lack of knowledge about the 25 April and 11 May Killings could be explained by their varying vantage points and the fact that they were civilians with limited knowledge of activities at Mukamira camp.[521] As stated above, it was reasonable for the Trial Chamber to accord limited weight to the Defence witnesses' testimony for these reasons.[522]

235. For these reasons, the Appeals Chamber dismisses Setako's arguments.

NEC contradicted Witness SLA's statement that all Tutsis were killed on 25 April 1994 (Setako Appeal Brief, paras. 49-51; AT. 29 March 2011 p. 6), *see supra*, Section III.B.2.(a)(iv). As to the Trial Chamber's finding on the presence of Hasengineza at Mukamira camp (Setako Appeal Brief, paras. 31, 48), *see supra*, Section III.B.2.(a)(ii). As to the Trial Chamber's evaluation of Expert Witness Ingelaere's report (Setako Appeal Brief, para. 38), *see supra*, Section III.B.2.(c). As to the Trial Chamber's assessment of Defence documentary evidence on the civil defence programme (Setako Appeal Brief, para. 39), *see supra*, Section III.B.2.(b).

[518] *See supra*, Section III.B.1.

[519] *See supra*, Section III.B.2.(a)(v).

[520] *Contra* Setako Appeal Brief, para. 47; AT. 29 March 2011 p. 5.

[521] Trial Judgement, para. 361.

[522] *See supra*, Section III.B.2.(a)(iii).

D. Alleged Error in Finding Setako Responsible for Ordering the Killings at Mukamira Camp

236. Setako submits that the Trial Chamber erred in finding him responsible pursuant to Article 6(1) of the Statute for ordering the 25 April and 11 May Killings.[523] He contends that there is no evidence that he possessed the "authority to order" and that the soldiers or civil defence force trainees at Mukamira camp were compelled to obey his orders.[524] He further submits that the Trial Chamber erred by failing to require proof of a superior-subordinate relationship between him and the soldiers and militiamen at Mukamira camp.[525]

237. Setako concedes that he was a "high ranking judicial officer", but contends that, when viewed in context, his rank and apparent authority were not sufficient to demonstrate that he had the authority to compel others to commit crimes.[526] He points out that, since no conviction was entered for the other crimes charged in the Amended Indictment,[527] "the Trial Chamber was not in a position to draw any inferences [from] past acts or similar acts of ordering" on his part to support its conclusion that he ordered the 25 April and 11 May Killings.[528]

238. Setako further argues that he had no command position or experience at Mukamira camp;[529] was not assigned there as a judicial officer;[530] had never before issued an order at the camp;[531] and was not introduced to those in attendance.[532] Setako also notes that the "direct superiors" of the soldiers and militiamen attending the 25 April Meeting were present at the camp.[533]

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[523] Setako Notice of Appeal, para. 16; Setako Appeal Brief, paras. 58-62, *referring to* Trial Judgement para. 449; AT. 29 March 2011 pp. 6-8, 38, 40.
[524] Setako Notice of Appeal, para. 16; Setako Appeal Brief, paras. 58-62; AT. 29 March 2011 pp. 6-8. *See also* Setako Brief in Reply, para. 17, *referring to Semanza* Appeal Judgement, para. 361, *Bagosora et al.* Trial Judgement, para. 2008.
[525] Setako Notice of Appeal, para. 17; Setako Appeal Brief, paras. 58-63.
[526] Setako Appeal Brief, paras. 60, 62; Setako Brief in Reply, para. 18.
[527] Setako Appeal Brief, para. 60, *referring to Bagosora et al.* Trial Judgement, paras. 2183-2185. Setako compares his case with that of Anatole Nsengiyumva, an accused in the *Bagosora et al.* case where the Trial Chamber found that the only reasonable conclusion was that Anatole Nsengiyumva ordered the killing of Alphonse Kabiligi. The Trial Chamber indicated that it had viewed these events in the context of "other parallel crimes being committed in Kigali by elite units and other soldiers in the wake of the death of President Habyarimana, which were also ordered or authorised by the highest military authority." *Bagosora et al.* Trial Judgement, para. 2184. *See also* Setako Appeal Brief, para. 62.
[528] Setako Appeal Brief, para. 60.
[529] Setako Appeal Brief, paras. 61, 62.
[530] Setako Appeal Brief, paras. 61, 62. Setako argues that he was not conducting any investigations as a judicial officer at Mukamira camp and that his alleged orders there were "outside the context of his job functions". Setako Appeal Brief, para. 62.
[531] Setako Appeal Brief, para. 61.
[532] Setako Appeal Brief, para. 61.
[533] Setako Appeal Brief, para. 61.

239. The Prosecution responds that whether an accused has the authority required for a finding of responsibility for "ordering" under Article 6(1) of the Statute is a question of fact.[534] It argues that Setako's assertion that the Prosecution was required to prove that "the individuals receiving the order would be compelled to follow it" is inconsistent with the established jurisprudence.[535] According to the Prosecution, Setako's authority to give orders at Mukamira camp on 25 April 1994 and 11 May 1994 was established based on his high rank in the Rwandan army, his appearance at the camp with other high-ranking military and civilian leaders, and the fact that individuals who followed his orders knew of his high-ranking position.[536] The Prosecution contends that, contrary to Setako's assertion, the question whether the people at Mukamira camp were formally required to follow his orders is irrelevant.[537] More relevant were the indicia of authority publicly demonstrated by Setako and perceived by "his interlocutors."[538]

240. The Appeals Chamber recalls that ordering requires that a person in a position of authority instruct another person to commit an offence.[539] A person in a position of authority may incur responsibility for ordering if the order has a direct and substantial effect on the commission of the illegal act.[540] No formal superior-subordinate relationship between the accused and the perpetrator is required.[541] The authority envisaged by ordering under Article 6(1) of the Statute may be informal or of a purely temporary nature.[542] It is sufficient that there is proof of a position of authority on the part of the accused that would compel another person to commit a crime.[543] Whether such authority exists is a question of fact.[544]

241. The Trial Chamber correctly recalled these principles at the outset of its legal analysis on Setako's responsibility.[545] Setako does not challenge the Trial Chamber's statement of law, but

[534] Prosecution Response, para. 38.
[535] Prosecution Response, para. 38. *See also* AT. 29 March 2011 pp. 23-25.
[536] Prosecution Response, para. 39.
[537] Prosecution Response, para. 40.
[538] Prosecution Response, para. 40; AT. 29 March 2011 p. 23.
[539] *See, e.g., Kalimanzira* Appeal Judgement, para. 213; *Semanza* Appeal Judgement, paras. 361, 363.
[540] *See Renzaho* Appeal Judgement, para. 315; *Nahimana et al*. Appeal Judgement, paras. 481, 492; *Gacumbitsi* Appeal Judgement, para. 185; *Kamuhanda* Appeal Judgement, para. 75; *Kayishema and Ruzindana* Appeal Judgement, para. 185.
[541] *Nahimana et al*. Appeal Judgement, fn. 1162; *Semanza* Appeal Judgement, para. 361; *Kordi} and Čerkez* Appeal Judgement, para. 28; *Boškoski and Tarčulovski* Appeal Judgement, para. 164.
[542] *Semanza* Appeal Judgement, para. 363.
[543] *Semanza* Appeal Judgement, para. 361; *Boškoski and Tarčulovski* Appeal Judgement, para. 164.
[544] *Semanza* Appeal Judgement, para. 363.
[545] Trial Judgement, para. 449.

contends that it erred by failing to require the "proof of some position of authority on Ғhisğ part" that compelled the perpetrators to commit the 25 April and 11 May Killings.[546]

242. In concluding that Setako was criminally responsible under Count 1 (genocide)[547] for ordering the 25 April and 11 May Killings, the Trial Chamber stated that it was convinced that Setako instructed soldiers and militiamen at Mukamira camp to kill Tutsis there.[548] It explained that, "Ғağs a lieutenant colonel, who hailed from the area, in particular one invited to address such a large gathering at the camp, there is no doubt that ҒSetakoğ was a person in a position of authority."[549] The Trial Chamber also found that the "proximity of the killing to ҒSetako'sğ actions at the camp on Ғ25 April and 11 May 1994ğ shows that his instructions substantially contributed to the killings."[550] In concluding that Setako was criminally responsible under Count 4 (extermination as a crime against humanity) and Count 5 (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 ordering the 25 April Killings, the Trial Chamber referred to its conclusions, as well as the underlying reasons, already provided under Count 1 (genocide).[551] The Appeals Chamber finds no error in the Trial Chamber's reasoning in support of its conclusion that Setako possessed the requisite authority for ordering.

243. In addition, the Appeals Chamber finds that the following specific circumstances, which are apparent from credible evidence on the record, lead to the only reasonable conclusion that Setako had the required authority when he instructed soldiers and militiamen to kill Tutsis on 25 April 1994. He was given the floor in front of a large gathering of soldiers and militiamen while in the company of military[552] and civilian authorities.[553] According to Witness SLA, Bizabarimana, the Mukamira camp commander, presented Setako to the group and Setako introduced himself.[554] In this context, the only reasonable conclusion was that the audience, who were soldiers and civil defence force trainees, knew that Setako was a high-ranking officer. That they felt compelled to

[546] Setako Appeal Brief, para. 58. *See also* Setako Appeal Brief, para. 59; Setako Brief in Reply, para. 17; AT. 29 March 2011 p. 38.
[547] Trial Judgement, para. 473.
[548] Trial Judgement, para. 473.
[549] Trial Judgement, para. 473.
[550] Trial Judgement, para. 473.
[551] *See* Trial Judgement, paras. 481, 482, 490, 491.
[552] The Appeals Chamber recalls that Witnesses SLA and SAT testified that Bizimungu and Bizabarimana, the commander of Mukamira camp were present. *See* Trial Judgement, paras. 323, 328, 341. In addition, Witness SAT testified that Bivugabagabo, Hasengineza, and Mburuburengero were among those in attendance. *See* Trial Judgement, paras. 328, 341.
[553] The Appeals Chamber recalls that Witnesses SLA and SAT testified that Kajelijeli and Gatsimbanyi were present. *See* Trial Judgement, paras. 323, 328, 341.
[554] *See* Trial Judgement, para. 323.

follow his orders is evidenced by the fact that Setako used clear and imperious language and was given silent approval by the military and civilian authorities present.[555]

244. Similarly, it was reasonable for the Trial Chamber to find that Setako had the required authority when he ordered soldiers and civil defence force trainees to kill Tutsis whom he had brought to Mukamira camp on 11 May 1994. Setako had previously given similar instructions, on 25 April 1994, and his orders had been obeyed. According to Witness SLA, on 11 May 1994, Setako spoke to Bivugabagabo and Mburuburengero in the presence of soldiers and civil defence force members.[556] He reminded the crowd of his previous instructions that no Tutsis should be in the camp or the region and criticised the passivity of the civil defence force.[557] According to Witness SAT, Setako instructed Hasengineza to kill the Tutsis.[558] The victims were killed the same night, near the armoury of the camp.[559] On these facts, the only reasonable conclusion was that the soldiers and civil defence force trainees to whom Setako gave instructions regarded him as speaking with authority and felt compelled to obey him.

245. For the foregoing reasons, the Appeals Chamber dismisses Setako's argument.

[555] *Cf. Semanza* Appeal Judgement, paras. 362-364 (where the Appeals Chamber found that Semanza had the necessary authority to render him liable for ordering the attacks and killings at Musha church, based on the evidence that he directed attackers to kill Tutsi refugees who had been separated from the Hutu refugees at Musha church and the Trial Chamber's findings that the refugees were then executed on the directions of Semanza).
[556] *See* Trial Judgement, para. 326.
[557] *See* Trial Judgement, para. 326.
[558] *See* Trial Judgement, para. 330.
[559] *See* Trial Judgement, paras. 326, 330.

E. Alleged Error Relating to the Nexus Between the Killings at Mukamira Camp and an Armed Conflict

246. In considering whether the 25 April Killings amounted to a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, the Trial Chamber correctly recalled the threshold elements of Article 4 of the Statute, namely: (i) the existence of a non-international armed conflict; (ii) the existence of a nexus between the alleged violation and the armed conflict; and (iii) the fact that the victims were not directly taking part in the hostilities at the time of the alleged crime.[560] The Trial Chamber concluded that: (i) during the period relevant to the Amended Indictment charges, there was a non-international armed conflict between the Rwandan government forces ("Government Forces"), on one side, and the Rwandan Patriotic Front ("RPF"), on the other;[561] (ii) the 25 April Killings had the requisite nexus to this armed conflict;[562] and (iii) the victims of the 25 April Killings were not taking an active part in the hostilities.[563]

247. Setako submits that the Trial Chamber erred in finding that a nexus existed between the killings of civilians at Mukamira camp and the armed conflict involving the Government Forces and the RPF.[564] He claims that the Prosecution failed to establish that the 25 April and 11 May Killings were in furtherance of or in connection with the armed conflict.[565] He asserts that the criminal acts must be sufficiently and directly connected to the armed conflict.[566] According to Setako, the fact that the 25 April Killings took place at a military camp, were ordered by a military officer, and carried out by soldiers and civil defence force trainees are not sufficient to create the required nexus between the crimes and the armed conflict.[567]

248. The Prosecution responds that the Trial Chamber correctly concluded that there was a nexus between the 25 April Killings and the armed conflict.[568] It claims that Setako's orders were given in furtherance of the armed conflict, pointing to the evidence of Witness SLA that soldiers and civil

[560] Trial Judgement, para. 484.
[561] Trial Judgement, para. 485.
[562] Trial Judgement, paras. 486, 487.
[563] Trial Judgement, para. 488.
[564] Setako Notice of Appeal, para. 19; Setako Appeal Brief, paras. 69-72; AT. 29 March 2011 pp. 9, 47, 48. Setako pleads this alleged error under section "a) Errors of Law, (4) Trial Chamber's Duty to Provide a 'Reasoned Opinion'". Setako erroneously includes the 11 May Killings in his summary of the Trial Chamber's finding relevant to the present argument. The Appeals Chamber recalls that the Trial Chamber only convicted Setako for the 11 May Killings under Count 1 (genocide). The Prosecution's contention, in its appeal, that the Trial Chamber erred in failing to convict Setako of violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 5) for the 11 May Killings is considered below under Section IV. A. *See also* Setako Brief in Reply, para. 21.
[565] Setako Appeal Brief, para. 72.
[566] Setako Appeal Brief, paras. 70, 71.
[567] Setako Appeal Brief, para. 72.
[568] Prosecution Response Brief, paras. 47-53.

defence force recruits were told to consider Tutsis and other RPF allies to be the enemy and were trained to be ready to fight them as such.[569]

249. The Appeals Chamber recalls that the required nexus need not be a causal link, but that the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed, or the purpose for which it was committed.[570] The Appeals Chamber has thus held that "if it can be established […] that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict."[571] To find a nexus, it is sufficient that the alleged crimes be closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.[572]

250. In finding that there was a nexus between the 25 April Killings and the armed conflict, the Trial Chamber noted the ongoing conflict between the Government Forces and the RPF, which was identified with the Tutsi ethnic minority in Rwanda.[573] It considered that this created the situation and provided a pretext for extensive killings and other abuses of the civilian population at the time.[574] It noted that such killings began within hours of the death of President Habyarimana on 6 April 1994, and on the same day as the resumption of active hostilities between the RPF and the Government Forces.[575] It considered that the 25 April Killings were ordered by Setako, an army officer, in a military camp, and were executed by soldiers and militiamen.[576] These considerations led the Trial Chamber to find that Setako and the assailants who committed the killings were acting in furtherance of the armed conflict or under its guise.[577]

251. The Appeals Chamber does not see any error in this approach. In addition, the Appeals Chamber notes that the perpetrators of the killings at Mukamira camp were assailants stationed at the camp.[578] Witnesses SLA and SAT testified that, prior to the killings and during their combat training, soldiers and civil defence force recruits were told to consider Tutsis and RPF allies to be the enemy and that, on 25 April 1994, Setako pointed to Tutsis as the target for the soldiers and

[569] Prosecution Response Brief, para. 47.
[570] *Rutaganda* Appeal Judgement, para. 569, *citing Kunarac* Appeal Judgement, para. 58. *See also Staki}* Appeal Judgement, para. 342.
[571] *Rutaganda* Appeal Judgement, para. 569, *citing Kunarac* Appeal Judgement, para. 58. *See also Staki}* Appeal Judgement, para. 342.
[572] *Tadi}* Appeal Decision on Jurisdiction, para. 70.
[573] Trial Judgement, para. 486.
[574] Trial Judgement, para. 486.
[575] Trial Judgement, para. 486.
[576] Trial Judgement, para. 486.
[577] Trial Judgement, para. 487.
[578] Trial Judgement, paras. 323-325, 328, 329, 368.

civil defence force recruits assembled.[579] These elements establish that the 25 April Killings were closely related to the hostilities. It is immaterial that, as asserted by Setako, at that point in time there may have been no fighting between the RPF and the Government Forces in the area of Mukamira camp, given that hostilities were taking place in other parts of the territory controlled by the parties to the conflict.

252. For the foregoing reasons, the Appeals Chamber dismisses Setako's argument.

[579] *See* Trial Judgement, paras. 323, 328.

IV. APPEAL OF THE PROSECUTION

A. Failure to Enter a Conviction for the 11 May Killings as a War Crime (Ground 1)

253. The Appeals Chamber recalls that the Trial Chamber convicted Setako of genocide under Article 6(1) of the Statute for ordering both the 25 April and 11 May Killings.[580] In relation to the 25 April Killings only, it further entered 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.[581]

254. The Prosecution submits that the Trial Chamber erred in law in failing to convict Setako of violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 5) for the 11 May Killings.[582] It requests that the Appeals Chamber enter such a conviction against Setako.[583]

255. Setako opposes this ground of appeal.[584] He refers to his own appeal in which he argues that the Trial Chamber erred in finding him responsible for the 11 May Killings, and asserts that it is accordingly immaterial that the Trial Chamber did not address this charge in relation to Count 5.[585] He adds that, as with the 25 April Killings, there was insufficient evidence to prove the requisite nexus between the 11 May Killings and the armed conflict.[586]

256. The Amended Indictment charged Setako under Count 5 with the 11 May Killings as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.[587] This allegation was not subsequently abandoned because both the Prosecution Pre-Trial Brief[588] and the Prosecution Final Trial Brief stated that the charge under Count 5 in relation to the 11 May Killings continued to be pursued.[589] Accordingly, it was incumbent on the Trial Chamber to make a finding on Setako's responsibility for the 11 May Killings under Count 5. The Appeals Chamber therefore finds that the Trial Chamber erred because it failed to make such a finding. In light of this error, the Appeals Chamber will turn to consider, on the basis of the Trial Chamber's

[580] Trial Judgement, paras. 368, 474, p. 131 (Verdict).
[581] Trial Judgement, paras. 482, 491, p. 131 (Verdict).
[582] Prosecution Notice of Appeal, paras. 4, 5; Prosecution Appeal Brief, paras. 23-29; AT. 29 March 2011 p. 42.
[583] Prosecution Notice of Appeal, para. 6; Prosecution Appeal Brief, para. 30.
[584] Setako Response Brief, paras. 6, 7; AT. 29 March 2011 pp. 47, 48.
[585] Setako Response Brief, para. 8; AT. 29 March 2011 p. 47.
[586] Setako Response Brief, paras. 8-15; AT. 29 March 2011 pp. 47, 48.
[587] Amended Indictment, paras. 44, 64 ("[T]he Prosecutor adopts and incorporates for the purposes of Count 5, all facts as described and detailed in paragraphs 29 to 58 of this Indictment."). The Appeals Chamber notes that Setako does not challenge that he was charged under Count 5 for the 11 May Killings.
[588] *See* Prosecution Pre-Trial Brief, paras. 155, 212.
[589] *See* Prosecution Final Trial Brief, paras. 105, 106, 171.

factual findings, whether the Trial Chamber ought to have convicted Setako for the 11 May Killings under Count 5.

257. To establish the culpability of an accused for the crime 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, the Prosecution bears the onus of proving, in addition to the threshold elements of Article 4 of the Statute recalled above,[590] the following specific elements:

1) the death of a victim taking no active part in the hostilities;
2) that the death was the result of an act or omission of the accused or of one or more persons for whom the accused is criminally responsible;
3) the intent of the accused or of the person or persons for whom he is criminally responsible
   a) to kill the victim; or
   b) to wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death.[591]

258. The Appeals Chamber recalls that it has dismissed Setako's challenges to the Trial Chamber's finding that he ordered the 11 May Killings.[592] The Appeals Chamber recalls the Trial Chamber's findings that, on 11 May 1994, Setako gave instructions to kill nine or 10 Tutsis he had brought in his vehicle to Mukamira camp; that these Tutsis were killed on the same day near the armoury of the camp; and that Setako's instructions substantially contributed to the killings.[593] Based on these findings, which remain undisturbed on appeal, the Appeals Chamber finds that no reasonable trier of fact could have concluded that Setako did not intend to kill the Tutsis he brought to Mukamira camp on 11 May 1994 and that their death resulted from his order to kill them.

259. The Appeals Chamber further recalls that Setako has not challenged the Trial Chamber's finding that there was a non-international armed conflict between the Government Forces and the RPF during the period covered by the Amended Indictment.[594]

260. The Trial Chamber did not make a finding as to whether the victims of the 11 May Killings were taking an active part in the hostilities. However, it found that Setako brought the victims with

[590] *See supra*, para. 246.
[591] *Kvočka et al.* Appeal Judgement, para. 261; *Kordi} and Čerkez* Appeal Judgement, para. 37; *Čelebići* Appeal Judgement, para. 423.
[592] *See supra*, Section III. B.1.(c)(ii) and D.
[593] Trial Judgement, paras. 471, 473.
[594] *See* Trial Judgement, para. 485.

him to Mukamira camp, which indicates that they were under his control.[595] The Appeals Chamber further recalls that a person will not be considered to be taking an active part in the hostilities if he or she "is in the power of an adverse Party".[596] Moreover, Witnesses SLA and SAT both testified that the victims included at least one woman and a baby.[597] The Appeals Chamber is therefore satisfied that, at the time of the offence, the victims of the 11 May Killings were not taking an active part in the hostilities.

261. As stated above, the Trial Chamber found that there was a nexus between the 25 April Killings at Mukamira camp and the armed conflict in Rwanda.[598] The Appeals Chamber has already dismissed Setako's challenges to this finding.[599] It finds that the Trial Chamber's reasons for concluding that the nexus requirement was fulfilled in relation to the 25 April Killings are equally applicable to the 11 May Killings. The 11 May Killings occurred in the context of the same armed conflict, which provided a pretext for the killings. Furthermore, Setako, a military officer, ordered other soldiers and militiamen to commit the 11 May Killings at Mukamira, which was a military camp. Accordingly, the Appeals Chamber is satisfied that there was a nexus between the armed conflict and the 11 May Killings.

262. In view of the foregoing, the Appeals Chamber grants the Prosecution's first ground of appeal and convicts, Judge Pocar dissenting, Setako 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 ordering the 11 May Killings.

[595] *See* Trial Judgement, paras. 368, 471.
[596] *See Strugar* Appeal Judgement, para. 175, *referring to* Article 41(2) of Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3. *See also Semanza* Trial Judgement, paras. 363-366, *referring to* Article 3 common to the Geneva Conventions and ICRC Commentaries to the Geneva Conventions, p. 40.
[597] *See* Trial Judgement, paras. 326, 330.
[598] Trial Judgement, paras. 486, 487.
[599] *See supra,* Section III.E.

B. Failure to Make Legal Findings on Article 6(3) Responsibility (Ground 2)

263. In the Legal Findings section of the Trial Judgement, the Trial Chamber stated that it would "only discuss in its legal findings, to the extent necessary, whether [Setako's] instructions of 25 April and 11 May 1994 demonstrate his superior responsibility over [the] assailants at Mukamira camp."[600] However, having found Setako guilty of ordering the 25 April and 11 May Killings pursuant to Article 6(1) of the Statute, the Trial Chamber stated that it did not need to consider his responsibility under Article 6(3) of the Statute since it would be impermissible to enter a conviction on both bases.[601]

264. The Prosecution submits that the Trial Chamber erred in failing to make a finding on Setako's responsibility as a superior pursuant to Article 6(3) of the Statute in relation to the 25 April and 11 May Killings.[602] It contends that the evidence on the record concerning Setako's role in the 25 April and 11 May Killings supports a finding that the requirements of superior responsibility were satisfied.[603] The Prosecution submits that, as a result of its error, the Trial Chamber did not fully adjudicate all allegations against Setako and was not able to consider Setako's superior authority as an aggravating factor in sentencing.[604] It requests that the Appeals Chamber find that Setako bears responsibility under Article 6(3) of the Statute and that the manner in which he exercised his authority constitutes an aggravating circumstance.[605]

265. Setako opposes the Prosecution's contentions. He argues that the Trial Chamber did make a finding in relation to his responsibility pursuant to Article 6(3) of the Statute and found him not guilty because the Prosecution failed to sufficiently plead or lead evidence that he was responsible as a superior for the 25 April and 11 May Killings.[606]

266. The Appeals Chamber recalls that it is inappropriate to convict an accused for a specific count under both Article 6(1) and Article 6(3) of the Statute.[607] When, for the same count and the same set of facts, the accused's responsibility is pleaded pursuant to both provisions and the accused could be found liable under both, the Trial Chamber should enter a conviction on the basis

[600] Trial Judgement, para. 463.
[601] Trial Judgement, para. 474.
[602] Prosecution Notice of Appeal, paras. 7-12; Prosecution Appeal Brief, paras. 31-40.
[603] Prosecution Notice of Appeal, para. 10; Prosecution Appeal Brief, para. 39.
[604] Prosecution Notice of Appeal, para. 10; Prosecution Appeal Brief, paras. 37, 38.
[605] Prosecution Notice of Appeal, paras. 11, 12; Prosecution Appeal Brief, para. 40.
[606] Setako Response Brief, paras. 16-37.
[607] *Renzaho* Appeal Judgement, para. 564; *Nahimana et al.* Appeal Judgement, para. 487.

of Article 6(1) of the Statute alone and consider the superior position of the accused as an aggravating factor in sentencing.[608] The Trial Chamber correctly recalled these principles.[609]

267. 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 need therefore only consider the Prosecution's contention that the Trial Chamber erred by failing to make a finding on Setako's responsibility under Article 6(3) of the Statute for the purpose of sentencing.[610]

268. The Appeals Chamber finds that, since the Amended Indictment charged Setako cumulatively under Articles 6(1) and 6(3) of the Statute, the Trial Chamber was required to make a finding as to whether Setako incurred superior responsibility for the purpose of sentencing. The Trial Chamber's failure to make such a finding constituted an error of law. The Appeals Chamber will assess whether this error has an impact on the Trial Judgement.

269. The Appeals Chamber recalls that, for liability of an accused to be established under Article 6(3) of the Statute, the Prosecution must prove that: (i) a crime over which the Tribunal has jurisdiction was committed; (ii) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (*i.e.*, he had the material ability to prevent or punish commission of the crime by his subordinate); (iii) the accused knew or had reason to know that the crime was going to be committed or had been committed; and (iv) the accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by the subordinate.[611]

270. In support of its assertion that Setako had effective control over the perpetrators of the 25 April and 11 May Killings, the Prosecution argues that he was a high-ranking military officer "whose orders were immediately and unquestioningly complied with by the soldiers and militiamen at Mukamira Camp" and that he had the power to prevent or punish the soldiers there "by initiating investigations against them for collaboration and other violations of military regulations."[612]

271. The Appeals Chamber notes that, at trial, the Prosecution submitted essentially the same arguments to contend that Setako bore superior responsibility for all crimes with which he had been

[608] *Renzaho* Appeal Judgement, para. 564; *Nahimana et al.* Appeal Judgement, para. 487.
[609] Trial Judgement, para. 474.
[610] The Prosecution has not substantiated its contention that the failure to enter findings on Setako's superior *responsibility* under Article 6(3) of the Statute for the 25 April and 11 May Killings has led to a miscarriage of justice. *See* Prosecution Notice of Appeal, paras. 10, 11.
[611] *Nahimana et al.* Appeal Judgement, para. 484. *See also Gacumbitsi* Appeal Judgement, para. 143; *Bagilishema* Appeal Judgement, paras. 24-62; *Halilovi}* Appeal Judgement, paras. 59, 210; *Blaškić* Appeal Judgement, paras. 53-85; *Čelebići* Appeal Judgement, paras. 182-314.

charged.[613] The Trial Chamber rejected this general assertion, finding that: (i) the fact that Setako was a person of influence and an authority figure did not on its own demonstrate that he was a superior; (ii) there was no evidence that his position as lieutenant colonel in the Rwandan army and head of the division of legal affairs in the Ministry of Defence vested him with any particular legal authority over members of the armed forces, apart from his section at the Ministry; and (iii) it had not been established that Setako exercised authority over militia groups or members of the population.[614] The Appeals Chamber discerns no error in these findings.

272. Furthermore, the Appeals Chamber recalls that a superior's authority to issue orders is one indicator of effective control, but that it does not automatically establish such control.[615] Consequently, the fact that the 25 April and 11 May Killings were committed upon Setako's orders is not sufficient to show that he exercised effective control over the perpetrators within the meaning of Article 6(3) of the Statute.

273. Neither at trial nor on appeal did the Prosecution elaborate on Setako's functions and powers at Mukamira camp, in particular in relation to the camp commander, Bizabarimana. Moreover, with the exception of Witness SAT, the identity of the perpetrators of the 25 April Killings remains unknown.[616] Witness SAT was a member of the civil defence.[617] The Prosecution has advanced no argument or evidence to establish that Setako possessed effective control over the civil defence forces at Mukamira camp. It has also failed to establish that Setako exercised effective control over any of the unidentified perpetrators of the 25 April Killings.[618] Similarly, Witnesses SLA and SAT did not testify as to the identity of those responsible for committing the 11 May

[612] Prosecution Appeal Brief, para. 39.
[613] Specifically, the Prosecution argued that Setako's superior authority in relation to all charges followed from: (i) Setako's "position in society", which provided him "influence and authority"; (ii) the fact that he was instrumental in the establishment of the *interahamwe* group at least in Mukingo commune and in the arming and military training of *interahamwe* and civil defence; (iii) the fact that he ordered the offences charged in the Amended Indictment; and (iii) his power under Rwandan disciplinary law to enforce discipline among any soldier junior to himself and to order them to desist from unlawful or wrongful activities. *See* Prosecution Final Trial Brief, paras. 149-151.
[614] Trial Judgement, para. 461.
[615] *See Strugar* Appeal Judgement, paras. 253, 254, 256; *Halilović* Appeal Judgement, para. 207. The Appeals Chamber notes that convictions under Article 6(3) of the Statute are generally based on a thorough analysis of various indicators of effective control. *See, e.g., Kajelijeli* Appeal Judgement, paras. 90, 91; *Kayishema and Ruzindana* Appeal Judgement, para. 298; *Karera* Trial Judgement, paras. 562-568; *Halilović* Appeal Judgement, paras. 69, 154, 207; *Orić* Appeal Judgement, para. 159.
[616] Neither the Prosecution nor the Defence asked Witnesses SLA and SAT during their testimony to identify any (other) participant of the 25 April Killings. *See* T. 16 September 2008 pp. 49, 50; T. 18 September 2008 pp. 19-24, 82, 83; T. 19 September 2008 pp. 2-6. The Trial Chamber therefore did not make a finding on who the perpetrators were, but merely stated that Witness SAT "and less than 10 other assailants" fired on the victims. *See* Trial Judgement, para. 329. *See also* Trial Judgement, para. 368.
[617] T. 18 September 2008 pp. 77, 78.
[618] The Appeals Chamber notes that in its Final Trial Brief, the Prosecution maintained that the 25 April and 11 May Killings were an example of Setako's superior authority because they were carried out "mostly by soldiers". *See*

Killings.[619] The Prosecution has failed to point to evidence which would establish that Setako had effective control over these unidentified individuals. In fact, the Prosecution did not even address Setako's relationship to individuals who were named by Witnesses SLA and SAT as being present when he handed over the victims at the camp.[620]

274. In light of these considerations, the Appeals Chamber finds that the Prosecution did not establish beyond reasonable doubt that Setako had responsibility for the 25 April and 11 May Killings as a superior pursuant to Article 6(3) of the Statute. Consequently, although the Trial Chamber erred in not making a finding on his superior responsibility, its error did not have an impact on the Trial Judgement. Accordingly, the Appeals Chamber dismisses the Prosecution's second ground of appeal.

Prosecution Final Trial Brief, para. 151. This vague argument is insufficient to establish a superior-subordinate relationship between Setako and the perpetrators.

[619] *See* T. 16 September 2008 pp. 49-54; T. 18 September pp. 39-41, 84, 85; T. 22 September 2008 pp. 1-3.

[620] Witness SLA testified that Bivugabagabo, Mburuburengero, junior soldiers, and members of the civil defence force were present when Setako arrived with the victims at Mukamira camp and arranged for their killing. *See* T. 16 September 2008 pp. 52; T. 18 September 2008 p. 41. Witness SAT stated that Setako handed the victims over to Hasengineza. *See* T. 18 September 2008 pp. 84, 85; T. 22 September 2008 p. 1.

C. Prosecution's Sentencing Appeal (Ground 3)

275. The Trial Chamber sentenced Setako to a single term of 25 years of imprisonment for his convictions for genocide (Count 1), extermination as a crime against humanity (Count 4), 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 (Count 5).[621]

276. The Prosecution appeals this sentence. It submits that the Trial Chamber erred in law and in fact and abused its discretion in determining Setako's sentence.[622] It requests that the Appeals Chamber correct the errors and to increase the sentence to life imprisonment.[623]

277. The Appeals Chamber addresses these arguments in turn, bearing in mind that trial chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise penalties to fit the circumstances of the accused and the gravity of the crime.[624] As a rule, the Appeals Chamber will revise a sentence only if the appealing party demonstrates that the trial chamber committed a discernible error in exercising its sentencing discretion or that it failed to follow the applicable law.[625]

1. Alleged Errors in Relation to the Assessment of the Gravity of the Offence

(a) Primacy of the Gravity of the Offences

278. The Prosecution contends that the Trial Chamber insufficiently took into account the sentencing practice of the Tribunal to the effect that the gravity of the offence must be the primary consideration in sentencing.[626]

279. Setako responds that the Trial Chamber gave primacy to the gravity of his offences in determining the appropriate sentence.[627]

280. The Appeals Chamber is not persuaded by the Prosecution's assertion. The Trial Chamber was well aware that the gravity of a crime is a factor to be considered in sentencing.[628] It also noted

[621] Trial Judgement, paras. 508, 509.
[622] Prosecution Notice of Appeal, paras. 13-29; Prosecution Appeal Brief, paras. 41-75; AT. 29 March 2011 pp. 42, 44-46.
[623] Prosecution Notice of Appeal, para. 29; Prosecution Appeal Brief, paras. 76, 77; AT. 29 March 2011 p. 46.
[624] *See Renzaho* Appeal Judgement, para. 606; *Muvunyi II* Appeal Judgement, para. 63; *Kalimanzira* Appeal Judgement, para. 224; *Rukundo* Appeal Judgement, para. 240; *Nchamihigo* Appeal Judgement, para. 384.
[625] *See Renzaho* Appeal Judgement, para. 606; *Muvunyi II* Appeal Judgement, para. 63; *Kalimanzira* Appeal Judgement, para. 224; *Rukundo* Appeal Judgement, para. 240; *Nchamihigo* Appeal Judgement, para. 384.
[626] Prosecution Notice of Appeal, para. 16; Prosecution Appeal Brief, paras. 49-51; AT. 29 March 2011 pp. 44, 45.
[627] Setako Response Brief, paras. 47, 48; AT. 29 March 2011 p. 51.
[628] Trial Judgement, paras. 494, 497.

that the gravity of the offence is the primary consideration for imposing a sentence.[629] Furthermore, there is no indication that the Trial Chamber in fact failed to give due consideration to the gravity of Setako's crimes. It recalled that "Setako, a senior military officer, ordered the killings of 30 to 40 Tutsis at Mukamira military camp on 25 April 1994 and nine or 10 others on 11 May 1994. This is a direct form of participation. These crimes are grave and resulted in a significant toll of human suffering."[630] Nonetheless, the Trial Chamber considered that, "[a]lthough Setako's crimes are grave, the Chamber is not satisfied that he is deserving of the most serious sanction available under the Statute."[631] In this regard, it noted that Setako was not a "main architect of the larger body of crimes committed in Ruhengeri prefecture or Kigali."[632] The fact that the Trial Chamber ultimately decided not to impose the maximum sentence does not demonstrate that it failed to view the gravity of the offence as the primary consideration in imposing a sentence.

(b) Setako's Role

281. The Prosecution asserts that the Trial Chamber failed to consider that Setako was the "primary player" and that he "took the lead" in the commission of the 25 April and 11 May Killings.[633] Conversely, it submits that the Trial Chamber erred in considering that Setako was not a "main architect" of the crimes committed in Ruhengeri prefecture and Kigali.[634] The Prosecution also claims that the Trial Chamber failed to consider that Setako personally located and transported additional victims to Mukamira camp on 11 May 1994 in order to have them killed.[635]

282. Setako responds that he cannot be considered a "main architect" of crimes as suggested by the Prosecution.[636] He further submits that the Prosecution relies on facts not in evidence when it claims that he was involved in the selection of victims he is alleged to have transported.[637]

283. Contrary to the Prosecution's contention, the Trial Chamber took into account that Setako was a "primary player" in the commission of the crimes for which he was convicted. It recalled that Setako was convicted of ordering the 25 April and 11 May Killings and noted that "[t]his is a direct form of participation."[638] The Trial Chamber was thus well aware of Setako's position of

[629] Trial Judgement, fn. 594.
[630] Trial Judgement, para. 499 (internal citation omitted).
[631] Trial Judgement, para. 501.
[632] Trial Judgement, para. 501.
[633] Prosecution Notice of Appeal, para. 15; Prosecution Appeal Brief, paras. 44-48; AT. 29 March 2011 p. 44.
[634] Prosecution Notice of Appeal, para. 18; Prosecution Appeal Brief, paras. 53-58; AT. 29 March 2011 p. 53.
[635] Prosecution Notice of Appeal, para. 21; Prosecution Appeal Brief, paras. 44-48, 62; AT. 29 March 2011 p. 44.
[636] Setako Response Brief, paras. 52, 53.
[637] Setako Response Brief, para. 42; AT. 29 March 2011 p. 50.
[638] Trial Judgement, para. 499.

authority.[639] In concluding that "[t]he evidence does not show that [Setako] was a main architect of the larger body of crimes committed in Ruhengeri prefecture or Kigali",[640] the Trial Chamber simply clarified that it did not consider him to be one of the most senior members of a command structure in Rwanda or one of the leaders or planners of the wider conflict, which, according to the jurisprudence of Tribunal, would call for a heavier sentence.[641] The Prosecution has not demonstrated that, in so holding, the Trial Chamber committed a discernible error in exercising its sentencing discretion.

284. Further, the Appeals Chamber considers that, in assessing Setako's participation in the 11 May Killings, the Trial Chamber was aware of his role in transporting the victims to Mukamira camp.[642]

(c) Repeated Nature of Crimes

285. The Prosecution submits that the Trial Chamber failed to take note of the systematic, repeated nature of Setako's crimes.[643]

286. The Appeals Chamber notes that the Trial Chamber recalled in the Sentencing section that Setako ordered the 25 April and 11 May Killings[644] and was thus well aware of the repeated nature of the crimes. The Prosecution did not argue, in its Final Trial Brief or closing arguments, that the fact that the crimes were committed on two separate days at the same location demonstrated that the crimes were particularly grave.[645] The Appeals Chamber recalls that Rule 86(C) of the Rules clearly indicates that sentencing submissions shall be addressed during closing arguments. It was therefore the Prosecution's responsibility to identify the circumstances it wished to have considered and it failed to do so. In view of the lack of specific pleadings at trial, the Appeals Chamber finds no error in the fact that the Trial Chamber did not expressly consider whether the repeated nature of the crimes increased their gravity. Accordingly, this argument is dismissed.

[639] *See* Trial Judgement, paras. 473, 499.
[640] Trial Judgement, para. 501.
[641] *See Musema* Appeal Judgement, para. 383 ("the most senior members of a command structure, that is, the leaders and planners of a particular conflict, should bear heavier criminal responsibility than those lower down the scale, such as the foot soldiers carrying out the orders.").
[642] *See* Trial Judgement, para. 471.
[643] Prosecution Notice of Appeal, para. 17; Corrigendum to the Prosecution Notice of Appeal, para. 2; Prosecution Appeal Brief, para. 52; AT. 29 March 2011 p. 44.
[644] Trial Judgement, para. 499.
[645] *See* Prosecution Final Trial Brief, pp. 69-71.

(d) Safe Haven

287. The Prosecution further argues that the Trial Chamber did not give sufficient weight to the fact that Setako ordered killings at Mukamira camp, a place where victims took refuge and which they regarded as a safe haven.[646]

288. Again, the Appeals Chamber notes that the Prosecution did not raise this argument in its Final Trial Brief or its closing arguments.[647] Furthermore, although the Trial Chamber did not explicitly consider that Mukamira camp was a place of refuge for the victims of the 25 April Killings in the Sentencing section, the Trial Chamber noted this fact in another part of the Trial Judgement, hence demonstrating that it was well aware of the vulnerable nature of the victims.[648] Accordingly, this argument is dismissed.

2. Alleged Error in the Assessment of Individual, Aggravating, and Mitigating Factors

289. The Prosecution submits that the Trial Chamber erred in assessing the aggravating and mitigating factors.[649] The Appeals Chamber has already considered and rejected above the Prosecution's contention that the Trial Chamber erred in failing to take into account Setako's superior responsibility as an aggravating factor.[650] It will now address the Prosecution's remaining arguments.

(a) Aggravating Factors

290. The Prosecution submits that the Trial Chamber failed to consider Setako's position as a military lawyer and legal advisor as an aggravating factor.[651]

291. Setako responds that the Trial Chamber considered his professional position in the context of his abuse of his role as an influential figure.[652]

292. The Appeals Chamber is satisfied that, in finding that Setako's abuse of his superior position or influence was an aggravating factor, the Trial Chamber took into account his position as a military lawyer and legal advisor.[653] The Prosecution's argument is therefore dismissed.

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[646] Prosecution Notice of Appeal, para. 19; Prosecution Appeal Brief, para. 60; AT. 29 March 2011 p. 45.
[647] *See* Prosecution Final Trial Brief, pp. 69-71; T. 5 November 2009.
[648] *See* Trial Judgement, paras. 329, 340, 368.
[649] Prosecution Notice of Appeal, paras. 23-27; Prosecution Appeal Brief, paras. 65-75; AT. 29 March 2011 pp. 45, 46.
[650] *See supra*, paras. 263-274.
[651] Prosecution Notice of Appeal, paras. 24, 26; Prosecution Appeal Brief, paras. 68, 69.
[652] Setako Response Brief, paras. 64-66.
[653] *See* Trial Judgement, paras. 505, 506 (recalling Setako's background).

(b) Mitigating Factors

293. The Prosecution submits that the Trial Chamber erred when it took into consideration, as an individual and mitigating factor, that the Prosecution had presented evidence during trial concerning allegations that it either had withdrawn or was not allowed to add to the indictment.[654] It argues that a reduction in the sentence for this reason would have required a finding that Setako was prejudiced by a specific pre-trial delay resulting from the Prosecution's conduct.[655] The Prosecution submits that the Trial Chamber did not make such a finding and that this "flies in the face of fair trial principles" since the Prosecution needed to know how much delay it supposedly caused.[656] It further contends that the Trial Chamber itself contributed to the prolongation of the trial because, before and during trial, Setako requested the Trial Chamber to exclude all the evidence at issue, but the Trial Chamber did not act.[657] In the Prosecution's view, the Trial Chamber could not "both allow […] the Prosecution [to] put in evidence over an objection and then later on fault the Prosecution for having put on that evidence."[658]

294. Setako responds that the Prosecution cannot blame the Trial Chamber for its own failure to establish its theory of the case and to tailor the evidence it adduced in support of such theory.[659] He argues that the Prosecution's failure prolonged the trial and violated his right to a fair trial.[660] He asserts that, in any case, a trial chamber has considerable discretion when determining a sentence.[661]

295. In assessing Setako's sentence, the Trial Chamber stated that "the Prosecution presented a substantial body of evidence based on allegations that it had either withdrawn from the Indictment, or which it was not allowed to add to it".[662] While it noted that the trial had proceeded rapidly, the Trial Chamber considered that "this should be taken into account in sentencing."[663]

296. The Appeals Chamber acknowledges that some of the evidence at issue was the subject of three Defence motions filed before trial requesting that the Prosecution be precluded from presenting evidence relating to pre-1994 allegations which the Trial Chamber deferred deciding

[654] Prosecution Notice of Appeal, para. 27; Prosecution Appeal Brief, paras. 70-75; AT. 29 March 2011 pp. 45, 46.
[655] Prosecution Notice of Appeal, para. 27; Prosecution Appeal Brief, paras. 74, 75.
[656] AT. 29 March 2011 p. 46.
[657] Prosecution Appeal Brief, paras. 72, 73; AT. 29 March 2011 p. 46.
[658] AT. 29 March 2011 p. 46.
[659] Setako Response Brief, para. 68; AT. 29 March 2011 pp. 51, 52.
[660] Setako Response Brief, paras. 69-72.
[661] Setako Response Brief, para. 72.
[662] Trial Judgement, para. 506, *referring to* Trial Judgement Section I.2.2 "Notice and Pre-1994 Events".
[663] Trial Judgement, para. 506.

upon until its final deliberations.[664] Nonetheless, the Appeals Chamber recalls that the Prosecution's request to amend the 22 March 2004 Indictment in 2007 to add a count of conspiracy to commit genocide which would have been supported by pre-1994 allegations, was denied.[665] Accordingly, the Prosecution was well aware that the pre-1994 allegations were not permitted to form part of its case and it was therefore the Prosecution's responsibility to limit the evidence it presented to the case it was permitted to pursue. Furthermore, as the Trial Chamber noted, the Prosecution presented evidence on a number of allegations which: (i) it had sought to add to the indictment but which were explicitly denied by the Trial Chamber;[666] (ii) it sought to have removed from the indictment;[667] (iii) it could have sought to add to the indictment but failed to do so;[668] or (iv) it explicitly stated it was not pursuing a conviction for.[669] The Appeals Chamber recalls that it is the Prosecution's responsibility to know its case before proceeding to trial and to present its case accordingly.[670]

297. However, despite this, the Trial Chamber did not conclude that Setako's right to a fair and expeditious trial had been violated by the presentation of the evidence at issue.[671] Instead, it decided to take into account this issue in sentencing, notwithstanding the fact that the trial "proceeded rapidly".[672] In view of the fact that the Trial Chamber did not find that there was a violation of Setako's fair trial rights, the Appeals Chamber finds that the Trial Chamber abused its discretion in considering this issue as a factor in the determination of Setako's sentence. The Appeals Chamber will consider the impact of this error on the sentence, if any, in the section below.

298. For the foregoing reasons, the Appeals Chamber allows the Prosecution's third ground of appeal in part.

3. Impact of the Appeals Chamber's Findings on Setako's Sentence

299. The Appeals Chamber recalls that it has entered, Judge Pocar dissenting, a conviction 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 in relation to the

[664] Trial Judgement, paras. 26, 27, *referring to* Motion *in Limine* for Exclusion of Evidence, 28 May 2008; Setako Defence Addendum to Its Motion *In Limine* for Exclusion of Evidence, 22 August 2008; Urgent Motion *In Limine* for Exclusion of Evidence Irrelevant or Falling Outside the Scope of the Indictment, 25 August 2008.
[665] Trial Judgement, paras. 39, 40, *referring to* Decision of 18 September 2007.
[666] *See* Trial Judgement, paras. 42, 52, 56.
[667] *See* Trial Judgement, paras. 43, 44, 46.
[668] *See* Trial Judgement, paras. 60, 63.
[669] *See* Trial Judgement, para. 46.
[670] *See Muvunyi II* Appeal Judgement, para. 18; *Ntagerura et al*. Appeal Judgement, para. 27.
[671] *See* Trial Judgement, para. 506. *See also* Trial Judgement, Section I.2. "Preliminary Matters".
[672] Trial Judgement, para. 506.

11 May Killings.[673] In addition, the Appeals Chamber has found that the Trial Chamber erred in considering as a mitigating factor for Setako's sentence that the Prosecution presented evidence during trial concerning irrelevant allegations.[674] Nevertheless, the Appeals Chamber notes that the Trial Chamber decided on Setako's sentence based on a full picture of the proven material allegations against him. The Appeals Chamber therefore finds that an increase in the sentence is not warranted.

300. As a consequence, the Appeals Chamber affirms Setako's sentence of 25 years of imprisonment.

[673] *See supra*, para. 262.
[674] *See supra*, para. 297.

V. DISPOSITION

301. 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.

Done in English and French, the English text being authoritative.

Patrick Robinson Presiding Judge	Mehmet Güney Judge	Fausto Pocar Judge
Liu Daqun Judge	Carmel Agius Judge	

Judge Pocar appends a partially dissenting opinion.

Done this 28th day of September 2011 at Arusha, Tanzania.

[Seal of the Tribunal]

VI. PARTIALLY DISSENTING OPINION OF JUDGE POCAR

1. In this Judgement, the Appeals Chamber 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 a conviction under Count 5 of the Amended Indictment.[1] I agree with the Majority's reasoning and conclusion that the Trial Chamber committed an error in failing to enter a conviction for the 11 May Killings under Count 5 of the Amended Indictment.[2] However, I disagree with the Majority's decision to enter a conviction against Setako on appeal.[3]

2. For the reasons already expressed in my dissenting opinions in the *Mrk{i} and [ljivančanin*,[4] *Gali}*,[5] *Semanza*,[6] and *Rutaganda*[7] cases, I hereby reaffirm that I do not believe that the Appeals Chamber has the power to remedy an error of the Trial Chamber by subsequently entering a new conviction on appeal. The Appeals Chamber is bound to apply Article 24(2) of the Statute in compliance with fundamental principles of international human rights law as enshrined in, *inter alia*, the International Covenant on Civil and Political Rights of 1966 ("ICCPR").[8] Article 14(5) of the ICCPR provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". Accordingly, the right to appeal a conviction should be granted to an accused before the Tribunal in all situations. However, the new conviction imposed on Setako on appeal denies him that right.

3. In this case, I believe that the Appeals Chamber had two possible avenues before it under Article 24 of the Statute. The first avenue was to find that the Trial Chamber committed an error of law in not making a finding on Setako's responsibility for the 11 May Killings under Count 5 of the Amended Indictment, and to remit the matter to the Trial Chamber for it to address the consequences of this error, thereby preserving the accused's right of appeal. Against this approach, one may argue that reasons of efficiency would militate against remitting the case to the Trial

[1] Appeal Judgement, para. 301. *See also* Appeal Judgement, para. 262.
[2] Appeal Judgement, paras. 256-261.
[3] Appeal Judgement, paras. 262, 301.
[4] *Prosecutor v. Mrk{i} and [ljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009, Partially Dissenting Opinion of Judge Pocar, pp. 171-177, paras. 1-13.
[5] *Prosecutor v. Stanislav Gali}*, Case No. IT-98-29-A, Judgement, 30 November 2006, Partially Dissenting Opinion of Judge Pocar, p. 187, para. 2.
[6] *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, Dissenting Opinion of Judge Pocar, pp. 131-133, paras. 1-4.
[7] *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, Dissenting Opinion of Judge Pocar, pp. 1-4.
[8] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entered into force* 23 March 1976.

Chamber in order to recognise an accused's right to appeal. However, I believe that this position falls against the long-standing jurisprudence of the Appeals Chamber, which has repeatedly stated that concerns about efficiency in the administration of justice may never outweigh human rights standards.[9]

4. Remittal to a trial chamber is not the only avenue possible when an error is identified by the Appeals Chamber.[10] The Appeals Chamber always possesses a margin of discretion in its choice of remedy, provided that this discretion is exercised on proper judicial grounds, balancing factors such as "fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case [at] hand and considerations of public interest"[11] – and provided also that the exercise of this discretion does not cause prejudice to the parties.

5. Thus, the second avenue available to the Appeals Chamber was the one taken in the *Krsti}* Appeal Judgement.[12] In that case, the Appeals Chamber found that the trial chamber committed an error of law in disallowing the appellants' convictions for extermination and for persecutions as crimes against humanity, on grounds that they were impermissibly cumulative with his conviction for genocide based on the same facts.[13] However, rather than entering two new convictions on appeal against the appellant, the Appeals Chamber simply pronounced the trial chamber's findings erroneous and, in the Disposition, noted that the trial chamber had incorrectly disallowed the convictions.[14] The Appeals Chamber corrected the trial chamber's error of law without entering a new conviction and thus, the appellant's right to an appeal was not violated. This approach was also adopted*, inter alia*, in the *Staki}* Appeal Judgement.[15] Following such an avenue, rather than the

[9] *See*, *e.g.*, *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 8; *Prosecutor v. Edouard Karemera et al.,* Case No. ICTR-98-44-AR15*bis*.3, Decision on Appeals Pursuant to Rule 15*bis*(D), 20 April 2007, paras. 24, 28; *Prosecutor v. Jovica Stani{i} and Franko Simatovi},* Case No. IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of the Proceedings, 16 May 2008, para. 19; *Prosecutor v. Jadranko Prli} et al.,* Case No. IT-04-74-AR73.9, Decision on Slobodan Praljak's Appeal Against the Trial Chamber's Decision of 18 May 2008 on Translations, 4 September 2008, para. 25.

[10] *See Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement"), paras. 72, 73, 77 (where the Appeals Chamber found that the Trial Chamber's conclusion that there was insufficient evidence to show an intent to destroy the group, did not meet the standard for acquittal under Rule 98*bis*(B) of the Rules of Procedure and Evidence, and sustained the prosecution's appeal on this point; however, after pointing out that the choice of remedy lay in its discretion and that this discretion must be exercised on proper judicial grounds, the Appeals Chamber declined to reverse the acquittal entered by the Trial Chamber and to remit the case for further proceedings, including a retrial, considering that it was not in the interests of justice to do so and that the facts of the case did not constitute "appropriate circumstances").

[11] *Jelisić* Appeal Judgement, para. 73.

[12] *Prosecutor v. Radislav Krsti}*, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krsti}* Appeal Judgement").

[13] *Krsti}* Appeal Judgement, paras. 219-229.

[14] *Krsti}* Appeal Judgement, p. 87.

[15] *Prosecutor v. Milomir Staki}*, Case No. IT-97-24-A, Judgement, 22 March 2006, para. 141.

first one, may be preferable when the Appeals Chamber would consider, as in the present case, that a conviction should have no impact on the sentence.[16]

6. In this case, the Majority has taken neither of these approaches. As stated previously, I agree that the Trial Chamber erred in law. However, I cannot agree to correct those errors using an approach which, I believe, is also an error. Therefore, I respectfully dissent with the Majority's decision to enter a new conviction against Setako on appeal.

Done in English and French, the English text being authoritative.

Judge Fausto Pocar

Dated this twenty-eighth day of September 2011,
at Arusha,
Tanzania.

[Seal of the Tribunal]

[16] Appeal Judgement, para. 299.

VII. ANNEX A – PROCEDURAL HISTORY

1. The main aspects of the appeal proceedings are summarised below.

A. Notices of Appeal and Briefs

2. Trial Chamber I rendered the judgement in this case on 25 February 2010 and filed the written Trial Judgement on 1 March 2010.

1. Setako's Appeal

3. Setako's Notice of Appeal was filed on 12 April 2010.[1] On the same day, Setako filed a motion for an extension of time to file his Appeal Brief.[2] The Appeals Chamber granted this motion on 2 July 2010[3] and ordered Setako to file his Appeal Brief no later than 40 days after being served with the French translation of the Trial Judgement.[4] On the same day, the Appeals Chamber denied the Prosecution's motion to dismiss Setako's Notice of Appeal.[5]

4. The French translation of the Trial Judgement was filed on 9 August 2010.[6] Setako filed his confidential Appeal Brief on 8 September 2010.[7] The Prosecution responded on 18 October 2010.[8] Setako filed his Brief in Reply on 2 November 2010.[9]

2. Prosecution's Appeal

5. The Prosecution filed its Notice of Appeal on 29 March 2010[10] and its Appeal Brief on 14 June 2010.[11] On 16 July 2010, the Appeals Chamber granted Setako an extension of time to file his Response Brief and ordered him to file it no later than 15 days after being served with the French translation of the Trial Judgement or the French translation of the Prosecution's Appeal

[1] Setako Notice of Appeal, sent to the Registry on 31 March 2010, filed on 12 April 2010.
[2] Motion for an Extension of Time to File Appellant's Brief, 12 April 2010.
[3] Decision on Ephrem Setako's Motion for Extension of Time for the Filing of Appellant's Brief ("Decision on Motion for Extension of Time"), 2 July 2010.
[4] Decision on Motion for Extension of Time, para. 8.
[5] Decision on the Prosecution's Motion to Dismiss Ephrem Setako's Notice of Appeal, 2 July 2010.
[6] *Jugement Portant Condamnation*, 9 August 2010.
[7] Setako Appeal Brief, filed confidentially on 8 September 2010. On 24 March 2011, Setako filed the "Public Redacted Version of Ephrem Setako's Appellant's Brief" in compliance with the Order Relating to Setako's Submissions issued by the Pre-Appeal Judge on 16 March 2011 ("Order Relating to Setako's Submissions").
[8] Prosecution Response Brief, 18 October 2010.
[9] Setako Brief in Reply, filed confidentially on 2 November 2010. *See also* Corrigendum to Appellant's Brief in Reply, 3 November 2010. On 23 March 2011, Setako indicated, in compliance with the Order Relating to Setako's Submissions, that there was no basis for maintaining the confidentiality of his Brief in Reply and related corrigendum.
[10] Prosecution Notice of Appeal, 29 March 2010. *See also* Corrigendum to Prosecutor's Notice of Appeal, 31 March 2010.
[11] Prosecution Appeal Brief, 14 June 2010. *See also* Corrigendum to Prosecutor's Appellant's Brief, 6 July 2010.

Brief, whichever was later.[12] Setako filed his Response Brief on 18 August 2010.[13] The Prosecution did not file a brief in reply.

B. Assignment of Judges

6. On 31 March 2010, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal: Judge Patrick Robinson, presiding, Judge Mehmet Güney, Judge Fausto Pocar, Judge Liu Daqun, and Judge Carmel Agius.[14] On 10 September 2010, Presiding Judge Robinson designated himself as the Pre-Appeal Judge.[15]

C. Hearing of the Appeals

7. The Appeals Chamber issued a Scheduling Order for the Appeal Hearing and an Order for the Preparation of the Appeal Hearing respectively on 15 March 2011 and 25 March 2011. On 29 March 2011, the parties presented their oral arguments at a hearing held in Arusha, Tanzania.

[12] Decision on Ephrem Setako's Motion for an Extension of Time for the Filing of the Respondent's Brief, 16 July 2010.
[13] Setako Response Brief, 18 August 2010.
[14] Order Assigning Judges to a Case Before the Appeals Chamber, 31 March 2010.
[15] Order Designating a Pre-Appeal Judge, 10 September 2010.

VIII. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. ICTR

AKAYESU

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Trial Judgement").

BAGOSORA et al.

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, Judgement and Sentence, 18 December 2008 ("*Bagosora et al.* Trial Judgement").

Théoneste Bagosora et al. v. The Prosecutor, Case No. ICTR-98-41-A, Nsengiyumva's Appeal Brief, 1 February 2010 (confidential) and 2 February 2010 (public).

Théoneste Bagosora et al. v. The Prosecutor, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motion for Judicial Notice, 29 October 2010.

BAGILISHEMA

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement (Reasons), 3 July 2002 ("*Bagilishema* Appeal Judgement").

BIKINDI

Simon Bikindi v. The Prosecutor, Case No. ICTR-01-72-A, Judgement, 18 March 2010 ("*Bikindi* Appeal Judgement").

BIZIMUNGU et al.

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-T, Decision on Bicamumpaka's Motion for Judicial Notice, 11 February 2004.

GACUMBITSI

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement").

KAJELIJELI

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003 ("*Kajelijeli* Trial Judgement").

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement").

KALIMANZIRA

Callixte Kalimanzira v. The Prosecutor, Case No. ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement").

KAMUHANDA

Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement").

KANYARUKIGA

Gaspard Kanyarukiga v. The Prosecutor, Case No. ICTR-02-78-AR73, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents, 19 February 2010.

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2. ICTY

BLAŠKIĆ

Prosecutor v. Tihomir Bla{kić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Bla{kić* Appeal Judgement").

BOŠKOSKI and TARČULOVSKI

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ČELEBIĆI

Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

HALILOVI]

Prosecutor v. Sefer Halilovi}, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilovi}* Appeal Judgement").

HARADINAJ et al.

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KORDIĆ and ČERKEZ

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KRAJIŠNIK

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KRSTI]

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KUNARAC

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KVOČKA et al.

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MILOŠEVIĆ

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ORI]

Prosecutor v. Naser Ori}, Case No. IT-03-68-A, Judgement, 3 July 2008 ("*Ori}* Appeal Judgement").

STAKI]

Prosecutor v. Milomir Staki}, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Staki}* Appeal Judgement").

STRUGAR

Prosecutor v Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement").

TADI]

Prosecutor v. Du{ko Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadi}* Appeal Decision on Jurisdiction").

B. Defined Terms and Abbreviations

AT.

Transcript from Appeal Hearing held on 29 March 2011 in *Ephrem Setako v. The Prosecutor*, Case No. ICTR-04-81-A. All references are to the official English transcript, unless otherwise indicated.

Defence

Ephrem Setako or his defence team, as appropriate

fn. (fns.)

footnote (footnotes)

ICTR or Tribunal

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994

ICTY

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

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page (pages)

para. (paras.)

paragraph (paragraphs)

Practice Direction on Formal Requirements for Appeals from Judgement

Practice Direction on Formal Requirements for Appeals from Judgement, International Criminal Tribunal for Rwanda, 5 July 2005

Prosecution

Office of the Prosecutor

RPF

Rwandan Patriotic Front

Rules

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

Rwandan Organic Law No. 8/96

Organic Law No. 8/96 of August 1996 on the Organization of Prosecutions for Offences constituting the Crimes of Genocide or Crimes against Humanity committed since October 1, 1990 ("Rwandan Organic Law No. 8/96")

Statute

Statute of the International Criminal Tribunal for Rwanda established by Security Council Resolution 955

T.

Trial transcript from the hearings in *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T. All references are to the official English transcript, unless otherwise indicated

C. Cited Filings, Decisions, and Orders in the *Setako* Case

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Indictment, 16 March 2004 ("Original Indictment").

Indictment, 22 March 2004 ("22 March 2004 Indictment").

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Decision on the Prosecution's Request to Amend the Indictment, 18 September 2007 ("Decision of 18 September 2007").

Amended Indictment, 24 September 2007 ("24 September 2007 Indictment").

Amended Indictment Filed Pursuant to the Decision of Trial Chamber Dated 3 March 2008, 10 March 2008 ("10 March 2008 Indictment").

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Decision on Defence Motion Concerning Defects in the Amended Indictment, 17 June 2008.

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The Prosecutor's Pre-Trial Brief Pursuant to Rule 73bis (B)(ii) of the Rules of Procedure and Evidence, 25 July 2008 ("Prosecution Pre-Trial Brief").

Setako Defence Addendum to Its Motion *In Limine* for Exclusion of Evidence, 22 August 2008.

Urgent Motion *In Limine* for Exclusion of Evidence Irrelevant or Falling Outside the Scope of the Indictment, 25 August 2008.

2. Trial (*Ephrem Setako v. The Prosecutor*, Case No. ICTR-04-81-T)

Setako Defence Pre-Defence Brief, 7 April 2009 (confidential) ("Setako Pre-Trial Brief").

Lt. Col Ephrem Setako's Notice of Alibi (Rule 67 of the R.P.E), 7 April 2009 (confidential) ("Setako Notice of Alibi").

Prosecutor's Closing Brief, 2 October 2009 (confidential) ("Prosecution Final Trial Brief").

Corrigendum to the Prosecutor's Closing Brief Filed on 2 October 2009, 7 October 2009 (confidential).

Defence Closing Brief, 2 October 2009 (confidential) ("Setako Final Trial Brief").

Judgement and Sentence, 25 February 2010 ("Trial Judgement").

3. Appeal (*Ephrem Setako v. The Prosecutor*, Case No. ICTR-04-81-A)

Notice of Appeal, 29 March 2010 ("Prosecution Notice of Appeal").

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Notice of Appeal, 12 April 2010 ("Setako Notice of Appeal").

Motion for an Extension of Time to File Appellant's Brief, 12 April 2010.

Prosecutor's Appellant's Brief, 14 June 2010 ("Prosecution Appeal Brief").

Decision on the Prosecution's Motion to Dismiss Ephrem Setako's Notice of Appeal, 2 July 2010.

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Decision on Ephrem Setako's Motion for an Extension of Time for the Filing of the Respondent's Brief, 16 July 2010.

Ephrem Setako's Respondent's Brief, 18 August 2010 ("Setako Response Brief").

Order Designating a Pre-Appeal Judge, 10 September 2010.

Prosecutor's Respondent's Brief, 18 October 2010 ("Prosecution Response Brief").

Appellant's Brief in Reply, 2 November 2010 ("Setako Brief in Reply").

Corrigendum to Appellant's Brief in Reply, 3 November 2010.

Scheduling Order, 15 March 2011.

Order Relating to Setako's Submissions, 16 March 2011.

Public Redacted Version of Ephrem Setako's Appellant's Brief, 24 March 2011 ("Setako Appeal Brief").

Order for the Preparation of the Appeal Hearing, 25 March 2011.