



**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

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**ORIGINAL: ENGLISH**

**TRIAL CHAMBER I**

**Before:** Judge Erik Møse, presiding  
Judge Sergei Alekseevich Egorov  
Judge Florence Rita Arrey

**Registrar:** Adama Dieng

**Date:** 25 February 2010

**THE PROSECUTOR**

**v.**

**Ephrem SETAKO**

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

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**JUDGEMENT AND SENTENCE**

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**The Prosecution**  
Ifeoma Ojemeni Okali  
Simba Mawere  
Christiana Fomenky

**The Defence**  
Lennox Hinds  
Cainnech Lussiaà-Berdou

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## CHAPTER I: INTRODUCTION

### 1. OVERVIEW

#### *(i) Introduction*

1. This case concerns Lieutenant Colonel Ephrem Setako, who hails from Nkuli commune in Ruhengeri prefecture. In 1994, he was the head of the division of legal affairs in the Ministry of Defence in Kigali. Based on his alleged acts in Ruhengeri and Kigali, the Prosecution has charged him with six counts: genocide or complicity in genocide; murder and extermination as crimes against humanity; and serious violations (violence to life and pillage) of common Article 3 to the Geneva conventions and Additional Protocol II. The Defence disputes all charges. Below follows an overview of the main allegations.<sup>1</sup>

#### *(ii) Killing of Bernard Bajyagahe*

2. One Prosecution witness testified that, from January to March 1994, Setako attended monthly meetings at the home of Joseph Nzirorera in Mukingo commune, Ruhengeri prefecture. There prominent personalities discussed the extermination of Tutsis. After one such meeting in February 1994, Setako ordered the witness to kill a Tutsi man named Bajyagahe. The Chamber has doubts about the witness's account and has not relied on his evidence.

#### *(iii) Meeting at the Home of Joseph Nzirorera's Mother and Subsequent Attacks*

3. The evidence shows that on the morning of 7 April 1994, militiamen gathered at the Byangabo trading centre in Mukingo commune and then launched an attack on Tutsis in the neighbouring Rwankeri *cellule* and at the Busogo parish. Hundreds of Tutsis were killed at these locations, and their property was looted or destroyed.

4. According to the Indictment, the attacks were planned during a meeting of prominent personalities. It had been held earlier that morning at the home of Nzirorera's mother, not far from the trading centre. The Prosecution relies on three witnesses, of whom two allegedly observed Setako at the house. The Defence submits that Setako was in Kigali on 6 and 7 April.

5. The Chamber has doubts about the testimonies placing Setako at the meeting. Adequate corroboration is lacking. Although his alibi in Kigali carries limited weight, the Prosecution has not proved beyond reasonable doubt that Setako assisted in initiating these crimes.

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<sup>1</sup> In respect of some allegations, the Defence did not receive adequate notice (I.2.2). They are not included in this overview of events. The trial opened on 25 August 2008 and closed on 26 June 2009. The parties presented 56 witnesses in the course of 60 trial days. Closing arguments were heard on 5 and 6 November 2009. The Chamber pronounced its unanimous judgement on 25 February 2010. The written judgement was filed on 1 March 2010 after the conclusion of the editorial process.

*(iv) Meeting at Rukabu's House and Subsequent Attacks*

6. One Prosecution witness testified that Setako attended another meeting on the morning of 7 April 1994, at Rukabu's house in Nkuli commune. There he encouraged the assembled crowd to find and kill Tutsis. There is no dispute that Tutsis were killed and that their property was looted. But the Chamber has not found it established that Setako was at this meeting.

*(v) Killing of Ziragwira and Ibambasi*

7. Another Prosecution witness stated that, on 7 April 1994, he observed Setako standing near a roadblock in Nkuli commune while two Tutsi men named Ziragwira and Ibambasi were killed by *Interahamwe*. The Defence presented evidence that no violence occurred at the roadblock on that occasion, and that these Tutsis died under different circumstances. The Chamber has not found it established beyond reasonable doubt that they were killed as alleged in the Indictment.

*(vi) Killing of Rachel*

8. It is further alleged that, from 7 to 8 April 1994, Setako harboured a Tutsi woman named Rachel at his home in Nkuli commune. When confronted by an angry mob on the morning of 8 April, he purportedly shot her in the head. One Prosecution witness testified that he observed this event. The Defence presented witnesses and documentary evidence that Rachel was killed elsewhere by other persons. The allegation is dismissed.

*(vii) Attack on Ruhengeri Court of Appeal*

9. According to the Indictment, Setako provided weapons and initiated the training of militia at the Mukingo commune office on 11 April 1994 and urged them to kill Tutsis throughout the prefecture. Around 14 April, some of these militiamen allegedly killed Tutsis taking refuge at the Ruhengeri Court of Appeal. Setako was purportedly present during the attack and congratulated the assailants afterwards.

10. The Chamber has doubts about the credibility of the witness who testified that Setako participated in the meeting of 11 April. Also the testimony of the witness who stated that he observed Setako during the 14 April attack raises questions, in particular in light of Defence evidence that Setako was on an official mission in Zaire during that period. These allegations were therefore not established.

*(viii) Killings at Mukamira Military Camp*

11. The Indictment alleges that, on or about 25 April 1994, Setako ordered militiamen and soldiers at Mukamira camp to kill Tutsis staying there. That night, around 30 to 40 Tutsis were allegedly shot. Around 11 May, Setako purportedly returned to the camp with around 10 Tutsis and ordered their death.

12. Two Prosecution witnesses provided convincing and largely corroborated accounts of Setako's presence at the camp on 25 April and 11 May 1994 as well as the ensuing killings of Tutsis which followed his instructions on both occasions. The Chamber has found this evidence credible. The testimony of the Defence witnesses who did not know about these events carried only limited weight.

13. Accordingly, the Chamber finds Setako responsible for the killing of 30 to 40 Tutsis at Mukamira camp on 25 April and the death of around 10 others there on 11 May 1994.

*(ix) Ceremony Installing Juvénal Kajelijeli as Bourgmestre*

14. The Indictment alleges that Setako attended a ceremony in mid-May 1994 in Mukingo commune for the installation of Juvénal Kajelijeli as *bourgmestre*. Setako purportedly congratulated the *Interahamwe* and urged them to kill Tutsis in neighbouring areas. The Prosecution relied on one witness. The Chamber has not found this testimony credible.

*(x) Setako's Role as Liaison Officer in Kigali*

15. The Prosecution submits that Setako served as the unofficial liaison officer between the Ministry of Defence and the *Interahamwe* in the Kigali-Ville prefecture from April to July 1994. The purpose was to supply weapons to militia groups in the city. The Prosecution relies primarily on hearsay evidence. The Chamber has not found the allegation proved beyond reasonable doubt.

*(xi) Looting in Kigali*

16. The Indictment alleges that, during the events in 1994, militiamen looted and destroyed property in Kigali-Ville prefecture following orders or encouragement from Setako. There is no dispute that widespread looting occurred in Kigali, as it did in Ruhengeri prefecture. But the Prosecution presented no evidence of Setako's connection to these crimes. His responsibility has therefore not been established.

*(xii) Killings at Péage Roadblock in Kigali*

17. Two Prosecution witnesses claimed that, in May 1994, Setako drove two Tutsi girls to the Péage roadblock in Kigali-Ville prefecture and ordered the *Interahamwe* there to kill them. The Chamber has some doubts about the credibility of these witnesses, and it is not quite clear that they testified about the same location. The Prosecution has not proved this allegation beyond reasonable doubt.

*(xiii) Verdict*

18. The Chamber has found Ephrem Setako responsible pursuant to Article 6 (1) of the Statute for ordering the killing of 30 to 40 refugees at the Mukamira military camp on 25 April 1994, and for the killing of around 10 Tutsis at the camp on 11 May 1994. Setako is therefore guilty of genocide (Count 1), extermination as a crime against humanity (Count 4) and violence to life as a war crime (Count 5).

19. He is not guilty of complicity in genocide (Count 2), murder as a crime against humanity (Count 3) and pillage as a war crime (Count 6).

*(xiv) Sentencing*

20. The Chamber has considered the gravity of each of the crimes for which Setako has been convicted, as well as aggravating and mitigating circumstances. The Chamber sentences Ephrem Setako to a single sentence of 25 years of imprisonment. He shall remain in the custody of the Tribunal pending transfer to the state where he will serve his sentence.

## 2. PRELIMINARY MATTERS

### 2.1 Alleged Fair Trial Rights Violations

21. The Defence devotes the first part of its Closing Brief to fair trial rights. The section does not allege any violations, but it emphasises the presumption of innocence and the burden of proof. It concludes by requesting the Chamber to rigorously evaluate the evidence.<sup>2</sup> The Chamber has applied these principles.

22. In its Closing Brief, the Defence also makes several passing references to certain aspects of the procedure related to Setako's assignment of counsel, transfer to the Tribunal, and the Prosecution delay in seeking amendment of the Indictment.<sup>3</sup> These issues are not clearly identified as alleged fair trial rights violations. The Defence provides only cursory or incomplete information related to them, and does not discuss any possible prejudice.<sup>4</sup> For example, it alleges that Setako did not have counsel present during his initial 90-minute interview with Tribunal investigators after his arrest by Dutch authorities.<sup>5</sup> The Chamber has not been provided with the video or transcript of this interview to determine if this was in fact the case, or whether Setako waived his right to counsel.<sup>6</sup> No objection to this investigation was raised during the course of the proceedings. Even if there were a violation, the remedy would be the exclusion of the interview as evidence.<sup>7</sup> As it was not used during the proceedings, the Chamber can identify no prejudice.

23. Similarly, the Chamber finds no merit in the Defence assertion that the Prosecution's request for Setako's transfer to the Tribunal did not contain an "overview of the material upon which the Prosecutor relied" as required by Rule 40 *bis* (A).<sup>8</sup> The request was accompanied by an affidavit from the Chief of Investigations summarising the nature of the information the Prosecution had received during its ongoing investigations.<sup>9</sup>

24. The Defence further submits that the Prosecution disregarded Setako's right to trial without undue delay by waiting three years after the initial confirmation of his Indictment to seek its amendment on the eve of trial.<sup>10</sup> As a general matter, the amendment of an indictment is permissible at any stage of the proceedings where justified and consistent with the accused's right to a fair trial. The Chamber further recalls that it fully considered whether the amendments would unduly delay the trial or otherwise prejudice the Defence. As a result, it declined to allow most of the Prosecution's requested changes.<sup>11</sup>

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<sup>2</sup> Defence Closing Brief paras. 1-12. Part I is entitled "The Rights of Defendant Lt. Col. Ephrem Setako".

<sup>3</sup> Defence Closing Brief paras. 29, 31, 38, 45, 47.

<sup>4</sup> This contrasts with its arguments pertaining to evidence that is allegedly outside of the scope of the Tribunal's temporal jurisdiction and the Indictment, which are discussed below (I.2.2).

<sup>5</sup> Defence Closing Brief para. 29.

<sup>6</sup> This material was disclosed to the Defence by the Prosecution. See T. 7 May 2007 pp. 4-7.

<sup>7</sup> See *Bagosora et al.* Trial Judgement para. 91.

<sup>8</sup> Defence Closing Brief para. 31.

<sup>9</sup> Order for Transfer and Provisional Detention (TC), 26 February 2004 p. 3 ("Having heard the Prosecutor in *ex parte* proceedings this 26th day of February 2004, and having considered all the evidence before us, including an Affidavit by the Chief of Investigations at the Office of the Prosecutor, dated 19 February 2004, attached to the Request"). See also Request for Transfer and Provisional Detention under Article 40 *bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, 25 February 2004.

<sup>10</sup> Defence Closing Brief paras. 38, 45.

<sup>11</sup> Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007, paras. 8-12.



25. Finally, the Defence asserts that Setako was without “authorised” representation during “a crucial time of the pre-trial phase” between 16 November 2007, when the Registrar withdrew Mr. Stefan Kirsch as Lead Counsel, and 22 November 2007, when Professor Lennox Hinds was appointed to this position.<sup>12</sup> The Chamber observes that, even after the Registrar issues a decision on withdrawal, the original Lead Counsel remains competent and duty-bound to represent the accused until formally replaced, thus eliminating any possible gap in representation.<sup>13</sup> Consequently, the Defence’s assertion is incorrect. There is also no evidence that, during this period, Mr. Kirsch was unable or unwilling to fulfil these duties if required.

## 2.2 Notice and Pre-1994 Events

26. Before the commencement of trial, the Defence filed three motions requesting the Chamber to preclude the Prosecution from presenting evidence related to certain incidents which pre-date the temporal jurisdiction of the Tribunal (1 January to 31 December 1994) or are not specifically pleaded in the Indictment.<sup>14</sup> On the first day of trial, 25 August 2008, the Chamber briefly addressed the Defence’s requests. It explained that, consistent with its practice, these matters should be addressed at the time the impugned evidence was presented. The Chamber further held that, in conformity with case law, pre-1994 evidence could be admissible for several purposes, including context, demonstrating intent or a deliberate pattern and practice.<sup>15</sup> However, there was a limit as to how interested the Chamber was in such evidence.<sup>16</sup>

27. With this preliminary ruling in mind, the Chamber has held the Defence’s three motions in abeyance until its final deliberations. It considers their substance here in light of the record as a whole along with other specific objections raised by the Defence during the course of the trial and in its closing written and oral submissions.

### 2.2.1 Legal Principles: Notice

28. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.<sup>17</sup> The Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds.<sup>18</sup>

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<sup>12</sup> Defence Closing Brief para. 47.

<sup>13</sup> Directive on the Assignment of Defence Counsel, 15 June 2007, Article 20 (A) (“Where the assignment of Counsel is withdrawn by the Registrar or where the services of assigned Counsel are discontinued, the Counsel assigned may not withdraw from acting until either a replacement Counsel has been provided by the Tribunal or by the suspect or accused, or the suspect or accused has declared his intention in writing to conduct his own defence.”).

<sup>14</sup> 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.

<sup>15</sup> T. 25 August 2008 pp. 24-25, quoting *Nahimana et al.* Appeal Judgement para. 315.

<sup>16</sup> T. 25 August 2008 p. 72.

<sup>17</sup> *Bagosora et al.* Trial Judgement para. 110, citing *Muvunyi* Appeal Judgement para. 18, *Seromba* Appeal Judgement paras. 27, 100, *Simba* Appeal Judgement para. 63, *Muhimana* Appeal Judgement paras. 76, 167, 195, *Gacumbitsi* Appeal Judgement para. 49, *Ndindabahizi* Appeal Judgement para. 16.

<sup>18</sup> *Bagosora et al.* Trial Judgement para. 110, citing *Muvunyi* Appeal Judgement para. 18, *Ntagerura et al.* Appeal Judgement para. 27, *Kvočka et al.* Appeal Judgement para. 30, *Niyitegeka* Appeal Judgement para. 194, *Kupreškić et al.* Appeal Judgement para. 92.

Defects in an indictment may come to light during the proceedings because the evidence turns out differently than expected; this calls for the Trial Chamber to consider whether a fair trial requires an amendment of the indictment, an adjournment of proceedings, or the exclusion of evidence outside the scope of the indictment.<sup>19</sup> In reaching its judgement, a Trial Chamber can only convict the accused of crimes that are charged in the indictment.<sup>20</sup>

29. The Appeals Chamber has held that criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible “the identity of the victim, the time and place of the events and the means by which the acts were committed”.<sup>21</sup> Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the “particular acts” or “the particular course of conduct” on the part of the accused which forms the basis for the charges in question.<sup>22</sup>

30. If the Prosecution intends to rely on the theory of joint criminal enterprise to hold an accused criminally responsible as a principal perpetrator of the underlying crimes rather than as an accomplice, the indictment should plead this in an unambiguous manner and specify on which form of joint criminal enterprise the Prosecution will rely.<sup>23</sup> In addition, the Prosecution must also plead the purpose of the enterprise, the identity of the co-participants, and the nature of the accused’s participation in the enterprise.<sup>24</sup>

31. When it is the intention of the Prosecution to rely on the theory of superior responsibility to hold an accused criminally responsible for a crime under Article 6 (3) of the Statute, the indictment should plead the following: (1) that the accused is the superior of subordinates sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (2) the criminal conduct of those others for whom he is alleged to be responsible; (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.<sup>25</sup>

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<sup>19</sup> *Bagosora et al.* Trial Judgement para. 110, citing *Muvunyi* Appeal Judgement para. 18, *Ntagerura et al.* Appeal Judgement para. 27, *Kvočka et al.* Appeal Judgement para. 31, *Niyitegeka* Appeal Judgement para. 194, *Kupreškić et al.* Appeal Judgement para. 92.

<sup>20</sup> *Bagosora et al.* Trial Judgement para. 110, citing *Muvunyi* Appeal Judgement para. 18, *Nahimana et al.* Appeal Judgement para. 326, *Ntagerura et al.* Appeal Judgement para. 28, *Kvočka et al.* Appeal Judgement para. 33.

<sup>21</sup> *Bagosora et al.* Trial Judgement para. 111, citing *Muhimana* Appeal Judgement para. 76, *Gacumbitsi* Appeal Judgement para. 49, *Ntakirutimana* Appeal Judgement para. 32, quoting *Kupreškić et al.* Appeal Judgement para. 89. See also *Ndindabahizi* Appeal Judgement para. 16.

<sup>22</sup> *Bagosora et al.* Trial Judgement para. 111, citing *Ntagerura et al.* Appeal Judgement para. 25.

<sup>23</sup> *Simba* Trial Judgement para. 389, citing *Krnjelac* Appeal Judgement paras. 138-145, *Ntakirutimana*, Appeal Judgement paras. 475-484, *Kvočka et al.* Appeal Judgement paras. 41-42.

<sup>24</sup> *Simba* Trial Judgement para. 389, citing *Kvočka et al.* Appeal Judgment paras. 28, 42.

<sup>25</sup> *Bagosora et al.* Trial Judgement para. 112, citing *Muvunyi* Appeal Judgement para. 19, *Nahimana et al.* Appeal Judgement para. 323, *Ntagerura et al.* Appeal Judgement paras. 26, 152. See also *Naletilić and Martinović* Appeal Judgement para. 67, *Blaškić* Appeal Judgement para. 218.

32. A superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes in order to incur liability under Article 6 (3) of the Statute.<sup>26</sup> The Appeals Chamber has held that an accused is sufficiently informed of his subordinates where they are identified as coming from a particular camp and under their authority.<sup>27</sup> It has also clarified that physical perpetrators of the crimes can be identified by category in relation to a particular crime site.<sup>28</sup>

33. The Appeals Chamber has previously stated that “the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue”.<sup>29</sup> Moreover, in certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates of the commission of the crimes.<sup>30</sup>

34. Finally, the Appeals Chamber has held that a Trial Chamber may infer knowledge of the crimes from the widespread and systematic nature and a superior’s failure to prevent or punish them from the continuing nature of the violations. These elements follow from reading the indictment as a whole.<sup>31</sup>

35. An indictment lacking this precision is defective; however, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.<sup>32</sup> The principle that a defect in an indictment may be cured is not without limits.<sup>33</sup> The Appeals Chamber has held that a Pre-Trial Brief in certain circumstances can provide such information.<sup>34</sup>

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<sup>26</sup> *Bagosora et al.* Trial Judgement para. 113, citing *Muvunyi* Appeal Judgement para. 55, *Blagojević and Jokić* Appeal Judgement para. 287.

<sup>27</sup> *Bagosora et al.* Trial Judgement para. 113, citing *Muvunyi* Appeal Judgement para. 56, *Ntagerura et al.* Appeal Judgement paras. 140-141, 153.

<sup>28</sup> *Bagosora et al.* Trial Judgement para. 113, citing *Simba* Appeal Judgement paras. 71-72 (concerning identification of other members of a joint criminal enterprise), *Simba* Trial Judgement paras. 392-393.

<sup>29</sup> *Bagosora et al.* Trial Judgement para. 114, citing *Ntagerura et al.* Appeal Judgement para. 26 n. 82, quoting *Blaškić* Appeal Judgement para. 218. See also *Muvunyi* Appeal Judgement para. 58.

<sup>30</sup> *Bagosora et al.* Trial Judgement para. 114, citing *Muvunyi* Appeal Judgement para. 58, *Muhimana* Appeal Judgement para. 79, *Gacumbitsi* Appeal Judgement para. 50, *Kupreškić et al.* Appeal Judgement para. 89.

<sup>31</sup> *Bagosora et al.* Trial Judgement para. 115, citing *Muvunyi* Appeal Judgement para. 62.

<sup>32</sup> *Bagosora et al.* Trial Judgement para. 116, citing *Muvunyi* Appeal Judgement para. 20, *Seromba* Appeal Judgement para. 100, *Simba* Appeal Judgement para. 64, *Muhimana* Appeal Judgement paras. 76, 195, 217, *Gacumbitsi* Appeal Judgement para. 49, *Ntagerura et al.* Appeal Judgement paras. 28, 65.

<sup>33</sup> *Bagosora et al.* Trial Judgement para. 116, quoting *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, para. 30 (“[T]he ‘new material facts’ should not lead to a ‘radical transformation’ of the Prosecution’s case against the accused. The Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused. Further, if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the indictment and the Trial Chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence.”; internal citations omitted).

<sup>34</sup> *Bagosora et al.* Trial Judgement para. 116, citing *Muhimana* Appeal Judgement para. 82, *Gacumbitsi* Appeal Judgement paras. 57-58, *Ntakirutimana* Appeal Judgement para. 48, *Naletilić and Martinović* Appeal Judgement para. 45.

## 2.2.2 Pre-1994 Events

36. As noted above, the Defence sought to exclude evidence preceding the temporal jurisdiction of the Tribunal. On a closer examination of the procedural history of the case, the Chamber considers that the Defence objections to such events more aptly raise notice concerns.

37. In its Closing Brief, the Prosecution mentions several preparatory acts allegedly involving Setako which occurred before 1994. These include planning meetings, the formation and training of militia groups, night patrols and the arrest, mistreatment and killing of Tutsis.<sup>35</sup> The Indictment contains one brief reference to events which occurred before 1994. Paragraph 19 states: “The joint criminal enterprise, of which Ephrem Setako was a member and a key participant, was conceived and designed before January 1994 and continued until at least July 1994.”

38. The Prosecution does not refer to any of these events as a basis of conviction for any of the six counts.<sup>36</sup> Therefore, both the Indictment as well as the Prosecution Closing Brief reflect that this evidence is only intended as part of the background of the case related to Setako’s participation in the joint criminal enterprise. Generally, in this context, such evidence would be admissible even though it preceded the Tribunal’s temporal jurisdiction and each individual event was not pleaded in detail the Indictment.

39. However, the Chamber considers that the specific circumstances of this case are different. The Indictment which was confirmed on 22 March 2004 does not plead that the joint criminal enterprise pre-dated 1994.<sup>37</sup> The Prosecution sought to amend this indictment on 15 June 2007 by adding the count of conspiracy to commit genocide.<sup>38</sup> This charge was supported by a number of allegations between 1990 and 1 January 1994, including the events mentioned in the Prosecution Closing Brief.<sup>39</sup>

40. In its Decision of 18 September 2007, the Chamber stated that these proposed amendments “greatly expand the case”.<sup>40</sup> It also decided that allowing them at that stage of the proceedings “would certainly lead to an unfair tactical advantage”.<sup>41</sup> Consequently, it did not permit the Prosecution to add the new count of conspiracy and its supporting factual allegations. It specifically held that allowing the proposed amendments would necessitate

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<sup>35</sup> Prosecution Closing Brief paras. 27-55, 62-63.

<sup>36</sup> *Id.* paras. 161, 164, 167, 170, 173.

<sup>37</sup> Indictment confirmed on 22 March 2004 para. 3 (“During the period covered by this indictment, Colonel Ephrem Setako participated in a joint criminal enterprise”). This period can only be understood as from 1 January 1994 since there is no mention of any events preceding this date other than in connection with Setako’s personal biographical details.

<sup>38</sup> Prosecutor’s Motion for Leave to Amend Indictment, 15 June 2007, para. 10. The Prosecution also sought leave to add a count of direct and public incitement to commit genocide.

<sup>39</sup> Proposed Amended Indictment of 15 June 2007 paras. 28-45.

<sup>40</sup> Decision on the Prosecution’s Request to Amend the Indictment (TC), 18 September 2007, para. 8.

<sup>41</sup> *Id.* para. 11. The Chamber’s conclusion that allowing these amendments would lead to an unfair tactical advantage was based on the assumption that the trial would commence at the end of 2007 or in early 2008. The trial ultimately began several months later in August 2008. However, the Chamber’s original concerns apply with equal force since this change in trial date resulted from the replacement of Setako’s Lead Counsel in November 2007.

further investigations and “unnecessarily prolong the Accused’s pre-trial [and] trial detention”.<sup>42</sup>

41. It follows from this Decision that the pre-1994 allegations, which the Chamber refused to add to the Indictment, or those of a similar character should not properly form part of this case. The prejudice to Setako outweighs its probative value as background. Accordingly, the Chamber will not consider this evidence in its factual or legal deliberations.

### 2.2.3 Supplying of Weapons at Ruhehe Hill, January 1994

42. In support of the counts of genocide and complicity in genocide, the Prosecution refers in its Closing Brief to an incident in January 1994 in which Setako allegedly delivered weapons to a military position at Ruhehe hill in Ruhengeri prefecture.<sup>43</sup> This event is not specifically pleaded in the Indictment.<sup>44</sup> The distribution, however, is mentioned in the Pre-Trial Brief and the summary of Witness SMA’s anticipated testimony annexed to it.<sup>45</sup> In some circumstances, this might be sufficient to cure the defect in the Indictment. However, the allegation in the Pre-Trial Brief has almost the exact wording of a proposed amendment to the Indictment which the Chamber had already denied.<sup>46</sup> Therefore, the Chamber will disregard this evidence.

### 2.2.4 Killing of Tutsi Boy near *Institut supérieur d’agriculture et de l’élevage*, 7 April

43. The Prosecution refers in its Closing Brief to an incident in which Setako allegedly ordered soldiers in the Byangabo trading centre to kill an unknown young Tutsi boy captured by them at the *Institut supérieur d’agriculture et de l’élevage*. The Prosecution submits that this event supports the counts of genocide, complicity in genocide and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.<sup>47</sup> It is not specifically pleaded in the Indictment. However, it is mentioned in the summary of Witness SAW’s anticipated testimony annexed to the Pre-Trial Brief.<sup>48</sup>

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<sup>42</sup> *Id.* para. 12.

<sup>43</sup> Prosecution Closing Brief paras. 64, 161.

<sup>44</sup> The Prosecution submitted in its closing arguments that the weapons distribution at Ruhehe hill was covered by the general allegation in paragraph 28 of the Indictment, which was then cured by the Pre-Trial Brief. It also argued that the redacted statements of Witness SMA provided ample notice about the charges facing Setako. T. 5 November 2009 pp. 30-31. The Chamber notes that the general language in the paragraph concerning Setako’s role in the provision of weapons is plainly introductory to the more specific allegations pleaded in the Indictment. See Indictment para. 28 (“Ephrem Setako’s intention to destroy the Tutsi population ... was manifested in many ways, including his ... provision of weapons ... *as described herein*.”; emphasis added). See also the discussion of this language in connection with the meeting at the Hotel Kiyovu (I.2.2.11).

<sup>45</sup> Prosecution Pre-Trial Brief para. 134, Annex A p. 3.

<sup>46</sup> Paragraph 43 of the Proposed Amended Indictment of 15 June 2007 reads: “Sometime in January 1994, Lt. Colonel Ephrem Setako in keeping with his promise to supply weapons to the militiamen, delivered ammunitions to the military position located at the Ruhehe hills and instructed the soldiers that the ammunitions were for the use of the *Amahindure* during night patrols. The *Interahamwe/Amhindure* and local civilian population used these weapons in the killing of Tutsi and their accomplices between 7 April and 15 July 1994.” See also Decision on the Prosecution’s Request to Amend the Indictment (TC), 18 September 2007, para. 12 (“The Chamber does not permit the Prosecution to add the proposed new counts of conspiracy to commit genocide (paragraphs 28-45) ...”).

<sup>47</sup> Prosecution Closing Brief paras. 81, 150, 153, 161, 170. See also T. 5 November 2009 p. 14.

<sup>48</sup> Prosecution Pre-Trial Brief, Annex A p. 11.

44. In the Chamber's view, this is insufficient to cure the defect. The allegation was specifically pleaded in paragraph 20.3 of the March 2004 Indictment.<sup>49</sup> On 18 September 2007, the Chamber granted the Prosecution's request to remove this particular allegation because it was not in a position to prove it.<sup>50</sup> The Chamber will therefore disregard this evidence.

### 2.2.5 Killing of Pastor Semasabike and His Wife, 8 April

45. The Prosecution also refers to an incident on 8 April 1994 in which Setako ordered militiamen to kill Pastor Semasabike and his Tutsi wife at their home in Nkuli commune near the Rwankeri Adventist mission. The Closing Brief indicates that this event supports the counts of genocide, complicity in genocide and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.<sup>51</sup> The incident is not specifically pleaded in the Indictment. However, there is a reference to it in the summary of Witness SAM's anticipated testimony in the annex to the Pre-Trial Brief.<sup>52</sup>

46. The Chamber recalls that this allegation was initially included in paragraph 20.5 of the March 2004 Indictment in support of the charge of murder as a crime against humanity. The Prosecution subsequently withdrew this paragraph when it sought leave to amend the Indictment on 15 June 2007.<sup>53</sup> The Defence objected on this basis to the presentation of this evidence during Witness SAM's testimony.<sup>54</sup> During its closing arguments, the Prosecution conceded that it was not seeking a conviction on this basis.<sup>55</sup> In these circumstances, the Chamber will disregard this evidence.

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<sup>49</sup> Indictment confirmed on 22 March 2004 para. 20.3 ("On or about the 7 April 1994, about midday in Busogo Secteur, near the ISAE area in Mukingo Commune, Colonel Ephrem Setako caused the death of a young male Tutsi by ordering the local Hutu population gathered near by 'to kill the young male Tutsi and throw him in the dustbin' whereupon the local Hutu population acting upon the orders and in the presence of Colonel Ephrem Setako killed the young male Tutsi by stoning him to death.").

<sup>50</sup> Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007, p. 5. See also Prosecutor's Motion for Leave to Amend Indictment, 15 June 2007, para. 19 ("It became apparent from trial preparation and ongoing investigations that the prosecution would not be in a position to prove all the allegations set forth in the current Indictment for various reasons, including the facts that two important witnesses have died and others proved uncooperative. The Prosecution therefore requests leave to withdraw the proposed evidence relating to paragraphs 16, 19 to 19.5 and 20.3 in the current Indictment.").

<sup>51</sup> Prosecution Closing Brief paras. 92, 161, 170. Paragraph 92 of the Brief appears to place this event in Mukingo commune. Witness SAM, however, placed it in Nkuli commune. T. 11 September 2008 p. 63.

<sup>52</sup> Prosecution Pre-Trial Brief, Annex A p. 13.

<sup>53</sup> T. 6 November 2009 p. 7 (quoted below). Unlike other paragraphs, it did not specifically highlight its intention to withdraw paragraph 20.5 from the Indictment confirmed on 22 March 2004. See Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007, para. 2, p. 5. The Proposed Amended Indictment of 15 June 2007 simply did not contain this allegation.

<sup>54</sup> T. 11 September 2008 pp. 38-41.

<sup>55</sup> T. 6 November 2009 pp. 7-8 (Ms. Okali: ... We concede that this evidence is not in the indictment, nor in the pre-trial brief, but the evidence is in the summary of [SAM]. The evidence is simply outlined in the brief to describe the nature of the crimes against – rather, war crimes that took place in Ruhengeri *prefecture* ... We are relying on it to support the allegation under 61 for war crimes. We removed it from the old indictment under murder, but did not include it in the amended indictment, but this is just to demonstrate the widespread nature of the war crime. If you look at the pleadings under murder, we did not include it. We included it under genocide – genocide and war crime simply to demonstrate the widespread – although we don't need to demonstrate the widespread – no – widespread has already been taken judicial notice of. But it's simply to establish the fact that in Mukingo, there was a widespread nature of the – of war crimes – of serious harm to Tutsi. Mr. President: Not seeking conviction on the basis of Semasabike individually. Ms. Okali: No, Your Honour.").

## 2.2.6 Burning of Tutsi Girl, 8 April

47. In its Closing Brief, the Prosecution refers to an incident on 8 April 1994 in which Setako and Augustin Bizimungu ordered militiamen to burn to death a young girl at her home in Nkuli commune near the Rwankeri Adventist mission. This event supports the counts of genocide, complicity in genocide, murder as a crime against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.<sup>56</sup>

48. Paragraph 51 of the Indictment states that, on the morning of 7 April, Setako ordered “a known male adult” to burn a Tutsi girl to death at the Rwankeri School of Adventists in Mukingo commune.<sup>57</sup> This is also the date and location set forth in the Pre-Trial Brief.<sup>58</sup> The Defence argues that this allegation is defective in relation to the evidence presented at trial because Witness SAM testified that the event occurred on a different date.<sup>59</sup> The Chamber observes that there is also a variance in the location of the crime between the Indictment and the evidence. According to Witness SAM, the crime occurred at a house near the Adventist school, not at it.<sup>60</sup> Furthermore, the Prosecution acknowledged that it happened in Nkuli commune rather than neighbouring Mukingo.<sup>61</sup>

49. In some cases, variances between the evidence and the allegation as set forth in the Indictment and Pre-Trial Brief might be considered harmless.<sup>62</sup> However, the Chamber considers that they are significant and prejudicial in the context of this case. First, the date mentioned in paragraph 51 of the Indictment is specific – “[t]hereafter, in the same morning of 7 April” – and is not open to approximations in the same vein as other formulations such as “on or about”. Furthermore, the date and location of the crime as pleaded in the Indictment suggest that it was part of the broader attack against Tutsis in Mukingo commune on 7 April (II.3.1).<sup>63</sup> There is no reference to any massacres in either Mukingo commune or Nkuli commune on 8 April. The only incident charged against Setako on 8 April is the killing of Rachel, which purportedly occurred at his home in Nkuli commune (II.3.4). Consequently, Setako’s defence in relation to the burning of the Tutsi girl would have been largely focussed on the attack in Mukingo commune on 7 April.

50. In any case, Witness SAM’s account of this incident is uncorroborated. The Chamber has determined elsewhere that there is a need to view his evidence with caution in light of general concerns with his credibility (II.3.1). It has also declined to accept other specific aspects of his testimony against Setako (II.3.1 and 3.5). The witness has yet to mention his

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<sup>56</sup> Prosecution Closing Brief paras. 93, 149, 161, 164, 170, p. 69.

<sup>57</sup> Indictment para. 51 (“Thereafter, in the same morning of 7 April, at the *Rwankeri* School of Adventists, in *Mukingo* Commune, Ephrem Setako caused the death of a young Tutsi girl by ordering a known male adult, to pour petrol upon the Tutsi girl and set her alight, which orders were carried out resulting in the death of the young Tutsi girl in the presence of Ephrem Setako.”).

<sup>58</sup> Prosecution Pre-Trial Brief para. 183, Annex A pp. 13-14.

<sup>59</sup> Defence Closing Brief paras. 307-309.

<sup>60</sup> T. 11 September 2008 p. 66.

<sup>61</sup> T. 6 November 2009 p. 8 (“In the brief, it’s clearly stated that the killing took place in Nkuli *commune*, although it’s under Mukingo *commune*, but it’s clearly to demonstrate the consistency of SAM’s evidence and nothing else, but the crime still remains the same.”).

<sup>62</sup> See, for instance, *Rutaganda* Appeal Judgement paras. 304-306.

<sup>63</sup> In this respect, paragraph 51 of the Indictment should be read in context with paragraphs 29-34, and 49-50, which refer to the meeting at the home of Joseph Nzirorera’s mother in Byangabo trading centre and the subsequent attack on 7 April in neighbouring Rwankeri *cellule*.

involvement in this killing in his Rwandan judicial proceedings.<sup>64</sup> Accordingly, even if the Chamber were satisfied that the Indictment was not defective, it still would not accept his testimony on this killing in the absence of sufficient corroboration.

### 2.2.7 Distribution of Arms at Sopecya Roadblock, 10 April

51. In its closing arguments, the Prosecution submitted that the evidence of Witness SON established that Setako distributed weapons to militiamen manning the roadblock near the Sopecya petrol station in the Rugenge sector of Kigali.<sup>65</sup> It did not indicate to which charge this event related. Notably, there is no reference to it in the Prosecution Closing Brief even though other aspects of the witness's testimony are mentioned.<sup>66</sup>

52. In its Pre-Trial Brief, the Prosecution contends that this incident supports paragraph 8 of the Indictment, which alleges generally that Setako was the unofficial liaison officer between the Ministry of Defence and the *Interahamwe* in Kigali for the distribution of weapons.<sup>67</sup> The Chamber recalls, however, that the Prosecution specifically pleaded the alleged weapons distribution at the Sopecya petrol station in its Proposed Amended Indictment of 15 June 2007.<sup>68</sup> The Chamber denied the Prosecution's request to add this particular allegation, among others, because it would delay the scheduling and conduct of the proceedings and prolong Setako's pre-trial and trial detention.<sup>69</sup> In these circumstances, fairness requires that the Chamber disregard this evidence.<sup>70</sup>

### 2.2.8 Distribution of Arms at Amgar Garage, End of April

53. The Prosecution points to evidence from Witness SHA that Setako met with Robert Kajuga and Georges Rutaganda, national *Interahamwe* officials, at the end of April 1994 at the Amgar garage in Kigali and delivered weapons. According to the Closing Brief, this event supports the counts of genocide, complicity in genocide and violence to life as a serious violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto.<sup>71</sup>

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<sup>64</sup> T. 12 September 2008 p. 25 (“Q. Did you confess to the burning of the young girl you testified about with petrol yesterday? A. I still have time before me. You cannot tell me what I should do. When the time comes, I can make confessions or explain how it all happened.”).

<sup>65</sup> T. 5 November 2009 p. 24.

<sup>66</sup> Prosecution Closing Brief paras. 117 (looting), 130, 149 (*Péage* roadblock).

<sup>67</sup> Prosecution Pre-Trial Brief para. 159 (a).

<sup>68</sup> Proposed Amended Indictment of 15 June 2007 para. 57 (“On or about 10 April 1994, Lt-Colonel Ephrem Setako in keeping with his supervisory role at roadblocks in Kigali-ville distributed arms to the *Interahamwe* manning a roadblock located at Sopecya petrol station in Kiyovu.”).

<sup>69</sup> Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007, para. 12.

<sup>70</sup> In the same vein, the Chamber disregards Witness SON's account of Setako touring roadblocks in the Rugenge sector after visiting Angeline Mukandituye's house to determine if she had received weapons. T. 24 September 2008 pp. 60, 65-67. The Chamber refused to allow the Prosecution to add a paragraph 60 of the Proposed Amended Indictment of 15 June 2007, which encompasses these allegations (“In the month of April 1994, Lt-Colonel Setako directly and publicly incited, instigated and supervised several roadblocks in Kigali-ville and at each roadblock, he instigated and encouraged the *Interahamwe* and soldiers manning it to continue killing the Tutsi”). See Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007, para. 12. Furthermore, the Prosecution has made no reference to this incident in either its Closing Brief or oral argument.

<sup>71</sup> Prosecution Closing Brief paras. 132-133, 161, 170.



54. The Defence has challenged the notice provided by the Indictment for this incident.<sup>72</sup> In response, the Prosecution pointed in its oral submissions to paragraph 28 of the Indictment, which alleges generally that Setako's genocidal intent was displayed, in part, by his provision of weapons "as described herein".<sup>73</sup> This paragraph, however, is simply introductory language to the specific allegations pleaded in the Indictment (I.2.2.11), none of which discusses Setako's alleged role in the provision of weapons in the city.

55. The Prosecution also refers to paragraph 159 (d) of its Pre-Trial Brief, which identifies this alleged distribution as one of the ways that Setako acted as the unofficial liaison officer between the Ministry of Defence and the *Interahamwe* in Kigali.<sup>74</sup> Paragraph 8 of the Indictment alleges this role, and it contains the only reference to Setako's delivery of weapons in Kigali.

56. In the Chamber's view, the scope of paragraph 8 must be properly understood in the context of the Prosecution's efforts to amend the Indictment. It is recalled that the March 2004 Indictment did not have any allegations pertaining to the distribution of weapons in Kigali.<sup>75</sup> The Proposed Amended Indictment of 15 June 2007 sought to introduce a general allegation about Setako's role in distributing weapons to the *Interahamwe* of Kigali, particularly those in Rugenge sector. The Chamber notes that this is where the Amgar garage was located.<sup>76</sup> In its decision, the Chamber determined that this allegation was vague and therefore denied the amendment in view of this and other fair trial concerns.<sup>77</sup> This reasoning must apply with equal force to paragraph 8 of the Indictment. The Chamber therefore will only consider this evidence more generally in connection with establishing Setako's alleged relationship with the *Interahamwe* (II.6.1).<sup>78</sup>

### 2.2.9 Looting of European Economic Community Building, End of April

57. Witness SQY testified that, at the end of April 1994, Setako participated in the looting of the European Economic Community building in the Kiyovu area of Kigali.<sup>79</sup> The Prosecution did not refer to this incident in its Closing Brief. Before trial, the Defence challenged the notice provided for the allegation. This is renewed in its Closing Brief.<sup>80</sup> In its

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<sup>72</sup> Defence Closing Brief para. 461.

<sup>73</sup> T. 5 November 2009 p. 30.

<sup>74</sup> *Id.* See also Prosecution Pre-Trial Brief para. 159 (d): "Towards the end of April, the Accused delivered weapons to *Interahamwe* which were stored at *Amgar* garage located in *Gitega* belonging to Georges Rutaganda." There is also a reference to the meeting and distribution in the summary of Witness SHA's anticipated evidence contained in the Pre-Trial Brief Annex A p. 8.

<sup>75</sup> Paragraph 6 (a) of the Indictment confirmed on 22 March 2004 alleges that one of the ways in which Setako participated in the joint criminal enterprise was by "distributing arms". This paragraph is general and contains references to his acts in both Ruhengeri prefecture and Kigali. It is noted, however, that there are several other specific references to Setako distributing weapons in Ruhengeri prefecture in this initial indictment, but none in Kigali.

<sup>76</sup> See Witness KEP, T. 15 May 2009 p. 35; Defence Exhibit 131 (personal identification sheet).

<sup>77</sup> Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007, para. 12 (discussing paragraph 56, among others, of the Proposed Amended Indictment).

<sup>78</sup> Witness SHA's testimony about the delivery of weapons at Amgar Garage is uncorroborated. Elsewhere (II.6.1), the Chamber has questioned his ability to identify Setako. Even if notice of this event was sufficient, the Chamber would not rely on the witness's testimony absent sufficient corroboration.

<sup>79</sup> T. 17 February 2009 pp. 6-13.

<sup>80</sup> Defence Closing Brief para. 472; Urgent Motion *In Limine* for Exclusion of Evidence Irrelevant or Falling Outside the Scope of the Indictment, 25 August 2008, paras. 32, 35-36.

oral submissions, the Prosecution briefly addressed the attack. It stated that the incident was alleged in paragraph 66 of the Indictment with further details provided in paragraph 217 of the Pre-Trial Brief as well as the disclosure of Witness SQY's statements to Tribunal investigators.<sup>81</sup>

58. Paragraph 66 of the Indictment alleges that, between 1 January and 17 July 1994, militiamen and soldiers directed attacks at the property of civilians in Kigali on the orders, instigation or encouragement of Setako.<sup>82</sup> This allegation supports the count of pillage. In the Chamber's view, based on this paragraph alone, Setako would not have had sufficient notice of his alleged role in personally participating in an attack at the end of April at the European Economic Community building in Kiyovu. Paragraph 217 of the Pre-Trial Brief provides no greater specificity as it is a nearly verbatim recitation of paragraph 66 of the Indictment.

59. Additional detail is provided in the summary of Witness SQY's anticipated testimony annexed to the Pre-Trial Brief.<sup>83</sup> In addition, paragraph 159 (g) of the Pre-Trial Brief also recounts the event.<sup>84</sup> In the Chamber's view, the Pre-Trial Brief provides conflicting information as to the Prosecution's intentions concerning this event. In particular, the *chapeau* of paragraph 159 of the Pre-Trial Brief states that this attack is part of Setako's alleged role as the unofficial liaison officer between the Ministry of Defence and the *Interahamwe* in Kigali. Paragraph 8 of the Indictment relates this function only to the distribution of weapons. This allegation is also not charged as a crime. In addition, unlike references to other attacks throughout the Pre-Trial Brief, the section on pillage does not incorporate paragraph 159 (g) to support the charge.<sup>85</sup>

60. Furthermore, the Prosecution was in possession of the information about Setako's purported role in this incident as early as 18 February 2007.<sup>86</sup> This was four months before it sought to amend the Indictment in order to make the charges "more clear and precise".<sup>87</sup> Consequently, it could have provided more specific notice in the Indictment. The fact that the Prosecution did not propose this allegation as a possible amendment to the Indictment,

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<sup>81</sup> T. 5 November 2009 p. 30.

<sup>82</sup> Indictment para. 66 ("Between 1 January and 17 July 1994, on the orders, instigation or encouragement of Ephrem Setako various attacks by the militiamen and soldiers were directed at the property of the civilian population in Kigali-Ville and Ruhengeri *préfectures* resulting in the looting and destruction of many personal and public properties in Kigali-Ville *préfecture* particularly at Kiyovu *cellule*, Gitega and Rugenge *secteurs*, and Ruhengeri *préfecture* particularly at Mukingo, Nkuli and Kigombe communes.").

<sup>83</sup> Prosecution Pre-Trial Brief, Annex A p. 9 ("SQY will testify that he saw Setako on four occasions: firstly, Setako and others were present during the attack at [European Economic Community] by soldiers and *Interahamwe* which occurred on or about the third week after President Habyarimana's death; He will say that Setako encouraged the [*sic*] to kill the guard and loot the communication equipment in the building."). The summary refers to four different events and does not list any corresponding paragraphs of the Indictment to which they support. Instead, it mentions only generally the crimes of genocide, complicity in genocide and murder, torture and pillage as war crimes.

<sup>84</sup> Prosecution Pre-Trial Brief para. 159 (g) ("Towards the end of April, around 9 a.m. and 12 noon, [European Economic Community] building located within the neighborhood of the Accused's residence [at] *kiyovu* was attacked by *Interahamwe* and soldiers in the presence of the Accused. The attackers killed a soldier guarding the building and looted the communication equipment in the building and left with the Accused on foot. The Accused did nothing to stop them from looting the equipment [or] killing the guard.").

<sup>85</sup> Prosecution Pre-Trial Brief para. 219 ("The Prosecution adopts and incorporates for the purposes of Count 6, all facts as described and detailed in paragraphs 139, 141, 143, 144, 146, 147, 150, 151, 152, 156, 192 to 196 of this brief.").

<sup>86</sup> Defence Exhibit 77 (statement of 18 February 2007).

<sup>87</sup> Prosecutor's Motion for Leave to Amend Indictment, 15 June 2007, para. 2.

referred to it in the body of its Pre-Trial Brief only in support of a background allegation, and did not point to this evidence in its Closing Brief leaves the impression that this event is not a substantive part of its case. The brief mention of this incident in support of the count of pillage during closing arguments does not allay these concerns.<sup>88</sup> Accordingly, the Chamber considers that the defect has not been cured by clear and consistent information.<sup>89</sup>

#### 2.2.10 Attack on Jeannine's House, End of April

61. The Prosecution refers in its Closing Brief to an event at the end April 1994 in which Setako participated in an attack at Jeannine's house in Kigali. He was present while *Interahamwe* killed three girls. Setako also participated in the looting of the compound by stealing a personal computer. This allegation is supported only by the testimony of Witness SQY. The Prosecution submits that this event supports the counts of genocide, complicity in genocide and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.<sup>90</sup>

62. Before trial, the Defence challenged the notice provided for this allegation, which it renewed in its Closing Brief.<sup>91</sup> The incident is not mentioned in the Indictment. Consequently, there is a defect in relation to this evidence. The Pre-Trial Brief does provide additional detail of the event in support of the counts of genocide, complicity in genocide, violence to life and pillage.<sup>92</sup> In some circumstances, this might suffice to cure this defect. The Chamber, however, is not convinced that it would be fair to do so in this instance.

63. The Pre-Trial Brief does not simply provide greater detail to a more general paragraph in the Indictment. Instead, it adds an entirely new allegation of Setako's personal participation in an attack in Kigali, which should have been included in the Prosecution's request to amend the Indictment.<sup>93</sup> Notably, it had this information as early as 18 February 2007, four months

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<sup>88</sup> The Prosecution argued, in its response to the Defence pre-trial motion to preclude this evidence, that the Pre-Trial Brief cured any defect with respect to this allegation. Prosecutor's Response to Accused Ephrem Setako's Urgent Motion *In Limine* for Exclusion of Evidence Irrelevant or Falling Outside the Scope of the Indictment, 3 September 2008, para. 16.

<sup>89</sup> In any case, even if the defect were cured, the Chamber has raised concerns about Witness SQY's ability to identify Setako (I.6.3). Consequently, his evidence is not reliable in the absence of sufficient corroboration.

<sup>90</sup> Prosecution Closing Brief paras. 134-136, 161, 170.

<sup>91</sup> Defence Closing Brief para. 394; Urgent Motion *In Limine* for Exclusion of Evidence Irrelevant or Falling Outside the Scope of the Indictment, 25 August 2008, paras. 33, 35-36.

<sup>92</sup> Prosecution Pre-Trial Brief paras. 152 ("Sometime in April 1994, the Accused was present during an attack on a house belonging to a Tutsi lady known as Jeannine located at the neighborhood of the Accused's residence in *Kiyovu* and he ordered the *Interahamwe* to kill three (3) girls found in the house suspected to be Tutsi and to loot the property in the house. The *Interahamwe* immediately complied with Setako's orders by strangling one and killing the other two girls with clubs in the presence of the Accused. Thereafter, the Accused participated in the looting by making away with a computer laptop while the *Interahamwe* looted the rest of the property in the house."), 160, 212, 219 (incorporating the allegation in support of the crimes of violence to life and pillage), Annex A p. 9 (summary of Witness SQY's anticipated testimony). The Prosecution also claims that paragraph 191 of its Pre-Trial Brief provides additional notice. T. 5 November 2009 p. 29. The Chamber notes that this paragraph relates to alleged extermination occurring between 1 January and July 1994.

<sup>93</sup> The counts of genocide and complicity in genocide list several specific events in Ruhengeri prefecture and Kigali. Setako is not alleged under these counts to have committed any crimes in Kigali in April 1994. There are a number of more general formulations under the counts of violence to life and pillage. The Chamber recalls, however, that this more general language was to be read in context with the other specific paragraphs in the Indictment. See Decision on Defence Motion Concerning Defects in the Indictment (TC), 3 March 2008, paras. 18-19.

before it sought amendment.<sup>94</sup> The incident is similar in nature and gravity to other specific allegations added by the Prosecution at that time, such as the killing of two girls at the *Péage* roadblock (II.6.3).<sup>95</sup>

64. The Chamber recalls that, at the time of the amendments to the Indictment, it was concerned about the Prosecution's attempts to expand the case against Setako and thus allowed only a limited number of new allegations.<sup>96</sup> Many of those relating to Kigali were not confirmed. In this context, it would not be fair to permit the Prosecution to circumvent this process by including a new Kigali-based event in its case on the eve of trial in its Pre-Trial Brief. Accordingly, the Chamber will disregard this evidence.<sup>97</sup>

### 2.2.11 Meeting at the Hotel Kiyovu, Mid-May

65. Witness SQY testified about a meeting held at the Hotel Kiyovu in mid-May 1994 in which Setako, Théoneste Bagosora and Prefect Tharcisse Renzaho exhorted the population to kill Tutsis in the area.<sup>98</sup> Before trial, the Defence challenged the notice provided for this allegation, which it renewed in its Closing Brief.<sup>99</sup> The Prosecution did not refer to this incident in its Closing Brief, but briefly mentioned it during its final oral arguments. Responding to the Defence's objections on grounds of notice, the Prosecution argued that it fell within the contours of paragraph 28 of the Indictment with additional detail provided by paragraph 157 of the Pre-Trial Brief.<sup>100</sup>

66. Paragraph 28 of the Indictment states that Setako's intention to destroy the Tutsi population was shown in many ways, including his incitements at meetings.<sup>101</sup> Although the language of this allegation appears broad, the Chamber notes that it is simply introductory and limited to the specific events subsequently enumerated. This follows from the paragraph's concluding phrase "as described herein", as well as from the history of the amendment of this paragraph.<sup>102</sup> Therefore, contrary to the Prosecution's submissions, it cannot be interpreted as including allegations not already pleaded in the Indictment.

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<sup>94</sup> Defence Exhibit 77 (statement of 18 February 2007).

<sup>95</sup> The Chamber notes that the killings at *Péage* roadblock is also supported by Witness SQY.

<sup>96</sup> Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007, paras. 8-14.

<sup>97</sup> In any case, even if the defect were cured, the Chamber has raised concerns about Witness SQY's ability to identify Setako (II.6.3). Consequently, his evidence is not reliable in the absence of sufficient corroboration.

<sup>98</sup> T. 17 February 2009 pp. 23-29, 38-39; T. 18 February 2009 pp. 16, 20, 26-28.

<sup>99</sup> Defence Closing Brief para. 444; Urgent Motion *In Limine* for Exclusion of Evidence Irrelevant or Falling Outside the Scope of the Indictment, 25 August 2008, paras. 34-36.

<sup>100</sup> T. 5 November 2009 p. 30. There is an earlier reference to the Kiyovu Hotel in the closing arguments, but it appears to relate to the evidence of Stanislas Harelimana concerning a separate incident there in mid-May 1994. *Id.* pp. 23-24.

<sup>101</sup> Indictment para. 28 ("Ephrem Setako's intention to destroy the Tutsi population in whole or in part as a group was manifested in many ways, including his incitements at meetings, indoctrination on Hutu extremist ideology and the definition of the enemy as Tutsi, establishment of militia groups, provision of weapons and setting up of roadblocks *as described herein*"; emphasis added).

<sup>102</sup> The Prosecution did not include any limiting language in this paragraph when it originally sought confirmation. See Indictment Submitted for Confirmation on 16 March 2004 para. 10 ("Colonel Ephrem Setako's intention to destroy in whole or in part the Tutsis as a group was manifested in many ways, including by various statements that he made, orders that he issued, meetings that he presided or attended, and by his public association with, support of, and collaboration with other notorious advocates of the destruction of the Tutsi."). The phrase "as set forth in this indictment" was added to limit the broad scope of this paragraph at the request of the Confirming Judge Sergei Alekseevich Egorov. See Indictment Confirmed on 22 March 2004 para. 10; Decision on Confirmation of an Indictment against Ephrem Setako (TC), 22 March 2004, p. 2 ("Having

67. Therefore, the Pre-Trial Brief does not simply add greater specificity, but rather a new allegation to the counts of genocide and complicity in genocide. In the Chamber's view, the circumstances surrounding the addition of this allegation are similar to those concerning the attack on Jeannine's house, discussed above (I.2.2.10), which is also based on Witness SQY's testimony. For the same reasons, the Chamber will disregard the evidence of this meeting.<sup>103</sup>

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adjourned the review so as to give the Prosecutor the opportunity to modify the indictment"). This phrase has evolved into "as described herein" in the current version of the paragraph.

<sup>103</sup> In any case, even if the defect were cured, the Chamber has raised concerns about Witness SQY's ability to identify Setako (II.6.3). Consequently, his evidence is not reliable in the absence of sufficient corroboration.

### 2.3 Allegations Not Pursued by the Prosecution

68. In its Closing Brief, the Prosecution withdrew the allegations contained in paragraph 62 of the Indictment because it did not present evidence on them.<sup>104</sup> A review of its Brief and oral submissions also reveal that it has not mentioned several other allegations pleaded in the Indictment as well as other events, which have been challenged on notice grounds.

69. Case law has established that it may be also unfair to convict an accused based on allegations which no longer appear to be pursued by the Prosecution.<sup>105</sup> In the *Ntagerura et al.* case, the Appeals Chamber reversed a conviction for superior responsibility based both on pleading concerns as well as the fact that the Prosecution in its post-indictment submissions gave the impression that it was no longer pursuing that form of responsibility.<sup>106</sup>

70. Paragraph 43 of the Indictment alleges that, sometime in May 1994, Ephrem Setako and Major Bivamvagara instigated and encouraged the *Interahamwe* in Rugenge sector to kill about 30 Tutsi refugees in the compound of a Tutsi man called Straton. This was supported by the evidence of Witness SON, a Hutu militiaman who participated in this attack.<sup>107</sup> Paragraph 46 of the Indictment states that, sometime in June, Setako, Théoneste Bagosora and Prefect Tharcisse Renzaho encouraged Tutsis to come out of hiding and then instigated and ordered *Interahamwe* to kill them at an impromptu meeting held outside the Hotel Kiyovu. Witness SAF, a Tutsi who was present during the meeting, testified about this.<sup>108</sup>

71. The Prosecution made no reference to either of these incidents in its Closing Brief. In the Chamber's view, this is significant. These allegations were specifically pleaded in the Indictment. Moreover, the Prosecution's final written submissions appear to contain a comprehensive listing of the events on which it is seeking conviction for a particular count.<sup>109</sup> The Prosecution also did not mention the killings at Straton's compound in its closing arguments. There was only a passing reference to the Hotel Kiyovu incident. This submission was ambiguous and appeared more directed at demonstrating that Defence Witness Stanislas

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<sup>104</sup> Prosecution Closing Brief p. 5.

<sup>105</sup> See *Ntagerura et al.* Appeal Judgement paras. 148-150 ("The facts that may form the basis for a 6(3) conviction are systematically omitted [from the Prosecution Final Trial Brief]. ... In light of the above, the Appeals Chamber considers that the Prosecution failed to pursue the charges ... under Article 6(3) of the Statute. ... The Appeals Chamber considers that for the foregoing reasons, the Trial Chamber could not have entered a finding of guilt under Article 6(3) of the Statute").

<sup>106</sup> *Id.* para. 164 ("Aside from the fact that Imanishimwe was not provided with timely, clear and coherent information about the material facts underpinning the charges that the Prosecution intended to bring against him under Article 6 (3) of the Statute, the Appeals Chamber finds that Imanishimwe was entitled to infer from the post-indictment filings that the Prosecution had decided not to pursue the Gashirabwoba charges based on Article 6 (3) of the Statute."). The Chamber notes that both the pre-trial and closing briefs in that case continued to systematically refer to Article 6 (3) of the Statute consistent with the Indictment. However, the text of these submissions focused on only direct responsibility. *Id.* paras. 146-148.

<sup>107</sup> T. 24 September 2008 pp. 60, 62; T. 25 September 2008 pp. 2, 4-8.

<sup>108</sup> T. 16 February 2009 pp. 7-20, 22-23, 47-56.

<sup>109</sup> Prosecution Closing Brief paras. 161 ("The evidence in support of Count 1 or alternatively Count 2, is outlined in paragraphs 58 to 118 and 119 to 130, 132 and 134 herein"), 164, 167, 170, 173 (using similar formulations for Counts 3 to 6). Paragraph 2 of the Introduction to the Closing Brief incorporates by reference the Pre-Trial Brief. This paragraph is not referenced in support of the counts. The Closing Brief also specifically identifies where it incorporates by reference particular paragraphs from the Pre-Trial Brief. See, for instance Prosecution Closing Brief paras. 159, 163, 166, 169, 172.

Harelimana deviated from his intended testimony.<sup>110</sup> Although the Prosecution expressly withdrew only paragraph 62 of the Indictment, these circumstances leave the strong impression that it is equally not pursuing these events as part of its case.<sup>111</sup> Accordingly, the Chamber will not address them in detail.

72. It suffices to note that the evidence of Witnesses SON and SAF on these events is uncorroborated. Witness SON is an alleged accomplice of Setako (II.6.3). The Chamber views his testimony with caution and will not accept it in the absence of corroboration. With respect to Witness SAF, the Chamber has concerns with his ability to identify Setako. The witness had limited prior knowledge of him before the incident, was at the back of the crowd, and covered his face with a mask out of fear that he would be identified as a Tutsi and killed.<sup>112</sup> He also gave evasive responses to simple questions such as whether he had previously appeared in Gacaca proceedings in Rwanda, which were notably inconsistent with his prior testimony in the *Renzaho* case.<sup>113</sup> These issues alone do not invalidate his testimony. However, they raise questions about the witness's reliability, and the Chamber declines to accept his evidence in the absence of sufficient corroboration.

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<sup>110</sup> T. 5 November 2009 pp. 23-25 (“Your Honour, we would also like to draw your attention to the inconsistency in the evidence of the only witness that testified in rebut of the allegation that a meeting took place at the Kiyovu hotel. ... Your Honour will recall that the Defence called witness Stanislas [Harelimana], and the purpose of his testimony was actually – as indicated in the pre-Defence brief was to establish that it was impossible to see what was happening at the roadblock close to the prosecutor’s office from the surrounding of the Kiyovu hotel. But he departed completely from the purpose of his testimony. However, he stated that someone standing at the roadblock in the vicinity of his office could not see what was happening at the place called *Péage*. His office was quite far from the *Péage* block. Nobody was contending that SQY, who testified about this event – or, SON, who also testified about the event that happened at *Péage* was a problem. However, just to draw your attention – additionally, we’ve already dealt with *Péage* in our brief, but did not mention Stanislas. ... We would like to touch briefly, Your Honour, on the meeting that took place at Kiyovu hotel. As already noted or submitted, Harerimana testified on behalf of the Defence to the effect that no one could see from Kiyovu – the vicinity of Kiyovu – see what was happening in the Kiyovu hotel – *Péage* – the roadblock at *Péage* from the Kiyovu hotel. SAF’s evidence relates to the roadblock close to the Kiyovu hotel and not the roadblock at *Péage*. ...With your leave, Your Honour, we would like to touch on the Defence evidence in that regard. Your Honour, Stanislas [Harelimana] testified and in rebut of this evidence, he’s the only witness that was called, and I’ve already made submission in that regard.”).

<sup>111</sup> The Chamber also observes that, in its Closing Brief, the Prosecution did not mention the delivery of arms to the Sopecya roadblock or the looting of the European Economic Community building. It did, however, refer to both events during closing arguments. There is also insufficient notice for these allegations (I.2.2.7 and 2.2.9). Furthermore, the Chamber notes that paragraph 55 of the Indictment identifies killings at “St Famille, St Paul, [and] *Centre d’Etudes des Langues Africaines (CELA)*”, none of which are discussed in the Prosecution Closing Brief. The Prosecution had alleged that these killings followed the “almost daily” instigation, ordering, and aiding and abetting of the *Interahamwe* of Kigali-Ville prefecture. The language appears intended to comply with paragraph 8 of the Decision on Defence Motion Concerning Defects in the Amended Indictment (TC), 17 June 2008, in which the Chamber instructed the Prosecution that “it must provide a more specific date range [than ‘[b]etween the months of April and July 1994’] for the attacks mentioned in paragraph 55 or remove the allegation.” There is only passing reference to these attacks in the body of the evidence. The Prosecution also did not present any testimony of Setako’s “daily” supervision of them. See also II.6.1.

<sup>112</sup> T. 16 February 2009 pp. 11, 14-16, 23, 51-55.

<sup>113</sup> *Id.* pp. 26-27, 29-31, 33-35, 58-62; Defence Exhibit 75 (*Renzaho*, T. 24 January 2007 pp. 45-47).

## 2.4 Gacaca Material

### *Introduction*

73. The Defence has sought to raise doubt in much of the Prosecution case against Setako through Defence Expert Witness Bert Ingelaere and Rwandan Gacaca documents. It argues that the absence of reference to Setako in Rwandan proceedings, or to particular events with which he is charged, raises questions about the reliability of the Prosecution case.<sup>114</sup>

74. The Prosecution challenges the probative value of Ingelaere's predictions and the Gacaca records provided by the Defence. It argues that the expert's evidence is conjecture, and that the Defence, by only providing some Gacaca documents rather than a comprehensive record, has failed to independently verify Ingelaere's theory. Instead, the Chamber should focus on the sworn testimony provided in the present trial.<sup>115</sup>

### *Gacaca Court*

75. Gacaca is a traditional, community-based conflict resolution institution within Rwanda.<sup>116</sup> Existing prior to the colonial era, its primary aim was to maintain social harmony by bringing disputes to local community leaders. As the Rwandan state became a more powerful and western-style court systems were implemented, this traditional practice of addressing disputes at the community level was also absorbed and regularised by the state. It continued to serve as a local dispute resolution mechanism that would pre-empt quarrelling parties from resorting to the formal court system.<sup>117</sup>

76. After the genocide, Rwanda was faced with a void where its ordinary justice system used to exist. As early as 1995, Gacaca proceedings began to emerge with informal support from the state as a method of addressing property-related crimes committed during the genocide. A United Nations report observed that it was taboo, however, to talk about killings during these proceedings.<sup>118</sup>

77. This changed with the nationwide implementation of Gacaca proceedings in 2005. Numerous meetings were held in Rwanda's 9,013 *cellules* (being the lowest administrative level) in order to comprehensively collect information about the genocide. Initially, the Gacaca system served as a threshold filter to determine the appropriate venue in which suspects would be tried. The most serious offenders – those identified as most responsible and charged with genocide and crimes against humanity – would be tried in ordinary courts, while lesser offenders would be tried in Gacaca proceedings at the sector level or *cellule* levels. In July 2006, the modern Gacaca system began to hear cases. Estimates have shown that from July 2006 to February 2007, approximately 10,000 persons a month had been tried

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<sup>114</sup> Defence Closing Brief paras. 19-28, 170-176, 189-199, 249, 305, 312, 323, 334, 343, 352, 367, 392, 398, 405, 421, 442, 470, 483, 490, 527, 533, 574; T. 5 November 2009 pp. 33-34, 60-61.

<sup>115</sup> Prosecution Closing Brief para. 182.

<sup>116</sup> Gacaca is translated to mean "justice on the grass". See Defence Exhibit 177 (expert report) p. 6.

<sup>117</sup> *Id.* pp. 5-7.

<sup>118</sup> *Id.* pp. 7-9. Gacaca proceedings also occurred in prison. See also T. 24 June 2009 pp. 25-28.



in this system. In 2007, 3,000 courts were added to the 12,103 that already existed in order to dispose of the workload.<sup>119</sup>

*Expert Witness Bert Ingelaere*

78. At the time of his testimony, Bert Ingelaere was an anthropologist and doctoral candidate. His particular expertise as it relates to Rwandan Gacaca proceedings stems from his extensive field research starting in 2005, when he began following the implementation of modern Gacaca trials. Over the course of 10 months, Ingelaere attended 2,063 Gacaca proceedings in Gitarama, Ruhengeri, Kibungo, Kigali-Rural and Kigali prefectures, and interviewed at least 1,300 Rwandans. His research focussed on the history of Gacaca and the performance of this traditional institution in its application to genocide-related crimes in Rwanda. The Chamber accepted him as an expert.<sup>120</sup>

79. The Defence had provided Ingelaere with the Indictment, the Prosecution Pre-Trial Brief, statements to Tribunal investigators of 19 witnesses and potential witnesses, and the transcripts of 18 Prosecution witnesses who appeared before the Chamber. Without having verified Gacaca records relating to the particular events on which these individuals provided information or testimony, Ingelaere determined the probability of whether Setako, or incidents in which he was implicated, “will be”, “will probably be”, “will probably not be” or “will not be” recorded in Gacaca proceedings.<sup>121</sup>

80. Ingelaere stated that, if the allegations against Setako are true, then their quantity, the diversity of areas within Rwanda in which he is implicated and his position as a high-level authority figure in 1994 would lead to the appearance of his name in Gacaca records.<sup>122</sup> Furthermore, incidents where Setako physically perpetrated violence, or where he incited persons to commit crimes and was present while they were carried out, would lead to an increased probability that he would be mentioned in Gacaca records.<sup>123</sup> On the other hand, where Setako may have been present but not connected to an act of violence, where his involvement was in private meetings, or if only a limited number of persons were involved, there is a lower probability of him featuring in Gacaca proceedings.<sup>124</sup> Ingelaere testified about his conclusions in the context of several events mentioned in his expert report.<sup>125</sup>

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<sup>119</sup> Defence Exhibit 177 (expert report) pp. 12-18. Since 2007, the category for the most serious offenders has been narrowed so as to allow sector level Gacaca courts to preside over more cases and ease the burden on the classical court system. *Id.* p. 18.

<sup>120</sup> T. 23 June 2009 pp. 2-4, 6-7, 9; T. 24 June 2009 pp. 1, 4-7, 16-17; Defence Exhibit 175 (curriculum vitae); Defence Exhibit 176 (personal identification sheet). Bert Ingelaere refers to Kigali-Rural with the Kinyarwanda expressive term of Kigali-Ngali. T. 23 June 2009 p. 7; T. 24 June 2009 p. 5.

<sup>121</sup> T. 24 June 2009 pp. 8, 18, 26-28, 38; Defence Exhibit 177 (expert report) pp. 26-27, 29.

<sup>122</sup> T. 24 June 2009 pp. 19-20; Defence Exhibit 177 (expert report) p. 27.

<sup>123</sup> T. 24 June 2009 p. 20; Defence Exhibit 177 (expert report) p. 28 (“In general I would say that a ‘physical act of violence by a high-ranking personality and authority figure such as Colonel Ephrem Setako’ or ‘incitement to violence upon which violent acts follow in the presence of significant number of bystanders by a high-ranking personality and authority figure such as Colonel Ephrem Setako’ will inevitably be recorded in the Gacaca process in Rwanda, as well as ‘acts of physical violence being committed in the presence of [a] significant number of bystanders and in the presence of a high-ranking personality and authority figure such as Colonel Ephrem Setako’.”).

<sup>124</sup> T. 24 June 2009 pp. 20, 37-38.

<sup>125</sup> T. 24 June 2009 pp. 20-23.

*Deliberations*

81. The Chamber recalls that Ingelaere was tasked only with providing the probability of whether Setako or the events in which he was implicated would be contained in Gacaca proceedings. He did not review Gacaca records in order to confirm his conclusions.<sup>126</sup> Instead, the Defence refers to the testimonies of several witnesses, who stated that they did not hear reference to Setako during their Gacaca proceedings or trials they attended.<sup>127</sup> The Defence also tendered Gacaca records and working translations of them, which did not mention Setako or particular events in which he is implicated.<sup>128</sup> The absence of his name or – in some cases – the event in these records demonstrates, according to the Defence, that the Prosecution evidence is unreliable.

82. In the Chamber's view, Ingelaere had thorough knowledge of Gacaca proceedings and his research was interesting. There are, however, certain issues which prevent the Chamber from attaching more than limited weight to this material in assessing Setako's responsibility for the crimes. First, the Gacaca documents tendered into evidence are selective and do not necessarily comprise the totality of available information. Even if they did, several factors inherent in the Gacaca process raise too many questions as to whether Setako would be mentioned even if he had participated in the crimes.

83. Ingelaere identified the proceedings' locale as an important variable that might affect their process and outcome.<sup>129</sup> However, it does not follow from the expert report or testimony that his conclusions considered the specific context of Gacaca proceedings in Ruhengeri or Kigali, where Setako's name would appear.<sup>130</sup> Moreover, he noted that several factors contribute to a relative inability of Gacaca trials to uncover the "truth" or the entire scope of events that they have been set out to adjudicate.<sup>131</sup> For example, his research suggests that

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<sup>126</sup> T. 24 June 2009 pp. 28, 38; Defence Exhibit 177 (expert report) p. 29.

<sup>127</sup> Defence Closing Brief paras. 172-173.

<sup>128</sup> *Id.* para. 176. The Defence tendered Rwandan judicial documents throughout the examination of witnesses during the case. Furthermore, the Chamber allowed the admission of additional documents from parallel proceedings in Rwanda after the close of the evidence phase. See Decision on Defence Motion to Admit Rwandan Judicial Documents (TC), 4 November 2009.

<sup>129</sup> Defence Exhibit 177 (expert report) p. 25 ("The 'truth' is mostly 'forensic' because it is derived from a criminal procedure. It varies according to locality since it surfaces through the dynamics of local constellations idiosyncratically subverting and interpreting the truth-generating procedures."). See also *id.* p. 16 ("It is in an urban environment that the Gacaca process encounters the most problems regarding its most basic operational functioning. Migration, urban anonymity and individuality undermine the prerequisites of the Gacaca process – shared knowledge about the past and the fact of daily living together.").

<sup>130</sup> T. 24 June 2009 pp. 19-20, 31, 34; Defence Exhibit 177 (expert report) p. 27. In particular, the Prosecution confronted Bert Ingelaere with the proposition that the population in Mukingo and Nkuli communes was largely Hutu, which, based on Ingelaere's observations, might have reduced the possibility that information concerning Setako would appear in Gacaca proceedings. T. 24 June 2009 pp. 33-34. Ingelaere conceded that he was not familiar with the community. T. 24 June 2009 p. 34.

<sup>131</sup> Defence Exhibit 177 (expert report) pp. 24 ("At the same time, the Gacaca courts, with their retributive powers are too decentralized. They operate in the social constellation of local communities all of which are characterized by their particular demographic make-up, power structure and existing conflicts. This creates the possibility for people to forge alliances or the need to follow a certain strategy in the practice of 'accusing' or 'conspiring in silence', not necessarily reflecting the procedure envisioned. This is linked first and foremost to the capacities and capabilities of individuals. The power of authority, money or the gun allows some to influence the proceedings. But it is also a result of the power of sheer numbers, the (ethnic) composition of the collective. When survivors are few and isolated they tend to keep quiet in order to be (physically or socially) eliminated from the community or their testimonies are partially ignored. ..."), 25 ("[The truth] varies according

many incarcerated individuals are perceived as only giving partial or incomplete confessions.<sup>132</sup> The Chamber is aware that, in spite of these considerations, Ingelaere maintained that his predictions were accurate.<sup>133</sup>

84. The Chamber also notes that the Defence contention that both Setako and some of his alleged crimes were not mentioned in Gacaca proceedings stands in contrast to other evidence. For example, the Prosecution tendered a report on Gacaca proceedings held in Ruhengeri prison in 1999, where Setako was identified as an “accused living abroad”.<sup>134</sup> The Defence also used a confession during cross-examination which offers details about the attack on the Ruhengeri Court of Appeal (II.3.5).<sup>135</sup> This raises questions about its assertion that this attack did not occur because it was never mentioned in Gacaca.<sup>136</sup>

85. Consequently, the omission of Setako’s name in a Gacaca proceeding does not itself raise doubt that he participated in a crime. That said, the Chamber has previously recognised the importance of Rwandan judicial records in connection with the credibility assessment of witnesses.<sup>137</sup> For instance, they may be valuable when used during the examination of a witness. Judicial records from domestic proceedings about the same crime as charged against an accused before the Tribunal may also provide relevant context. Consequently, the Chamber has generally considered both the expert evidence of Ingelaere together with the relevant material submitted by the Defence when making its factual findings.

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to locality since it surfaces through the dynamic of local constellations idiosyncratically subverting and interpreting the truth-generating procedures. The ‘truth’, furthermore, has a high degree of instrumentality as it is sought through confrontation along group based (mostly ethnic) lines, not deliberation or dialogue. It has a certain degree of arbitrariness resulting from the principle of ‘confession and denunciation without verification’. As a result the ‘truth’ is ‘partial’ in the sense of ‘incomplete’ and ‘deformed’, but also ‘one-sided’ and ‘one-dimensional’, lacking a broadly based contextual anchoring.”)

<sup>132</sup> *Id.* pp. 13 (“Although a significant number of detainees have made ‘total’ confessions, there is a general perception that these testimonies are only partial, admitting minor crimes, and blaming some people for complicity – mostly those already deceased or ‘disappeared’ after the genocide – while keeping silent on involvement of others.”), 20 (“In general, the perception is that these released prisoners only made partial confessions to get out of prison, admitting minor crimes, and blaming some people for complicity – mostly those already deceased or ‘disappeared’ after the genocide – while keeping silent on involvement of others.”). See also Prosecution Exhibit 80 (*Changing Lenses and Contextualizing the Rwandan (Post-) Genocide*, by Bert Ingelaere, published in *L’Afrique des Grands Lacs*, 2005-2006) p. 411 (“... Hutu might keep silent on things not known to the wider community through (extended) family or group coercion, or just as a hidden protest to the entire [Gacaca] process they do not consider as belonging to them.”).

<sup>133</sup> T. 24 June 2009 pp. 19-20, 31, 34; Defence Exhibit 177 (expert report) p. 27.

<sup>134</sup> Prosecution Exhibit 79B (letter to the Prosecutor General, 22 November 1999).

<sup>135</sup> Defence Exhibit 41 (confession of Witness SAM to the Ruhengeri Public Prosecutor) p. 2. See also Defence Exhibit 262B (testimony of Abdourukalim Nzaboniompaye, in which he confesses to attacking the Ruhengeri Court of Appeal on 8 April 1994) p. 2.

<sup>136</sup> Defence Closing Brief para. 367.

<sup>137</sup> See *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68 (TC), 4 October 2004, para. 9; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7.

### 3. EPHREM SETAKO

86. Ephrem Setako was born on 5 May 1949 in Nkuli commune, Ruhengeri prefecture.<sup>138</sup> He is married and has six children.<sup>139</sup> Setako began his career as a military officer and jurist when, at the age of 22, he entered the *Ecole d'officiers de Kigali*. In 1973, he graduated with the rank of sub lieutenant.<sup>140</sup> He was selected to attend the faculty of law at the National University of Rwanda.<sup>141</sup> In 1976, Setako was promoted to lieutenant, and he obtained a bachelor's degree in law in 1977. Following his graduation, he began working with the Ministry of Defence in Kigali.<sup>142</sup>

87. In 1979, Setako was appointed captain and taught at the military school as a visiting lecturer in law, which he continued to do until 1981.<sup>143</sup> From 1981 until October 1990, he served as Deputy Judge on the state security court.<sup>144</sup> Setako was promoted to major in 1982, with his formal appointment to this rank coming in 1986. One year later, he was transferred from the Ministry of Defence to the Ministry of the Interior, where he worked as the director of the communal police.<sup>145</sup>

88. Setako left the Ministry of the Interior in 1990, and was chosen as one of five persons to represent Rwanda in the Neutral Military Observers Group of the Organisation of African Unity (NMOG).<sup>146</sup> He was a member of the Rwandan delegation when the N'sele Accord was signed on 29 March 1991.<sup>147</sup> When NMOG stopped functioning in June 1991, he returned to the Ministry of Defence and worked in its division of legal affairs. Before the end of the year, Setako was appointed to the rank of lieutenant colonel.<sup>148</sup> In 1992, he served as a member of the Rwandan delegation to the Permanent Commission on Security created by the Economic Community of the Great Lakes Region.<sup>149</sup>

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<sup>138</sup> T. 25 June 2009 p. 27; Defence Exhibit 179 (personal identification sheet).

<sup>139</sup> T. 22 June 2009 pp. 20, 26; T. 24 June 2009 p. 48; Defence Exhibit 167 (list of Emma Solange Akajeneza's siblings).

<sup>140</sup> T. 22 June 2009 pp. 5-6, 8; T. 25 June 2009 pp. 9-10; Prosecution Exhibit 84 (list of 14 officers graduating from the *Ecole d'officiers de Kigali* in 1973). This school would later be renamed the *Ecole supérieure militaire*. T. 22 June 2009 p. 7 (French).

<sup>141</sup> T. 22 June 2009 p. 5; T. 25 June 2009 pp. 10-11, 14.

<sup>142</sup> T. 22 June 2009 pp. 6, 8; T. 25 June 2009 p. 16.

<sup>143</sup> T. 22 June 2009 pp. 6, 8; T. 26 June 2009 p. 51.

<sup>144</sup> T. 25 June 2009 p. 36; Prosecution Exhibit 96 (letter from Setako requesting political asylum in the Netherlands) p. 1.

<sup>145</sup> T. 22 June 2009 pp. 7-9.

<sup>146</sup> The Neutral Military Observers Group of the Organisation of African Unity is commonly referred to in the transcripts by its French abbreviation, GOMN (*Groupe d'Observateurs Militaires Neutres*). There were two missions. The first, according to Setako, operated from mid-October 1990 until the end of 1991, and comprised delegations from Rwanda, the RPF, Burundi, Zaire and Uganda. T. 22 June 2009 pp. 9-11. As for the second mission, he stated that it existed from July 1992 until November 1993, and was composed of representatives from Rwanda, the RPF, Nigeria, Zimbabwe, Mali and Senegal. T. 22 June 2009 pp. 11-13, 16-17; T. 25 June 2009 pp. 25, 69.

<sup>147</sup> T. 22 June 2009 pp. 9-10; T. 25 June 2009 pp. 21, 26; T. 26 June 2009 p. 25; Defence Exhibit 170 (list of Rwandan representatives to the first mission of the Neutral Military Observers Group of the Organisation of African Unity).

<sup>148</sup> T. 22 June 2009 pp. 10-11; T. 25 June 2009 p. 22; T. 26 June 2009 p. 6.

<sup>149</sup> T. 25 June 2009 p. 27; Prosecution Closing Brief para. 11.

89. When NMOG was revived at the Arusha Accords negotiations in July 1992, Setako joined the Rwandan delegation to that group.<sup>150</sup> In July 1993, he was named commander of NMOG's Nkumba sector. The RPF objected to this assignment, and Setako was instead appointed as the humanitarian officer for that sector. In October 1993, following the signing of the Arusha Accords, Setako returned to the Rwandan delegation and, as the most senior officer, became its head.<sup>151</sup> After the United Nations Assistance Mission for Rwanda (UNAMIR) replaced the group on 1 November 1993, he returned to the Ministry of Defence to lead its division of legal affairs.<sup>152</sup>

90. From 30 May until around the third week of June 1994, Setako participated in the UNAMIR-supervised ceasefire negotiations between the Rwandan interim government and the RPF. On 18 June, the two sides reached an agreement that allowed displaced persons to relocate across the military front.<sup>153</sup> Setako left Rwanda in July 1994. He was arrested in the Netherlands on 25 February 2004.<sup>154</sup>

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<sup>150</sup> T. 22 June 2009 pp. 11-12; T. 25 June 2009 pp. 21-22.

<sup>151</sup> T. 22 June 2009 pp. 12-13, 16; T. 25 June 2009 pp. 21, 23-26; T. 26 June 2009 p. 50; Defence Exhibit 182 (letter from the Minister of Defence informing the Minister of Foreign Affairs and Cooperation that Setako would head the GOMN II delegation as of 1 October 1993).

<sup>152</sup> T. 22 June 2009 pp. 16-17; T. 25 June 2009 pp. 25, 44, 69; T. 26 June 2009 pp. 49-50; Defence Exhibit 184 (list of officers in the Ministry of Defence in March 1994) p. 2. As the head of the legal affairs division, Setako provided legal advice to the Minister of Defence on draft laws and newly created commissions. He also advised the war council and military court on its jurisdiction. T. 22 June 2009 p. 17.

<sup>153</sup> T. 22 June 2009 pp. 38-39, 41; T. 24 June 2009 pp. 42-46; T. 25 June 2009 pp. 26-27, 44; T. 26 June 2009 p. 27; Defence Exhibit 171 (minutes of ceasefire negotiations of 17 June 1994) p. 1; Defence Exhibit 178 (minutes of ceasefire negotiations of 30 May, 2 June, 11 June, 13 June and 14 June 1994) pp. 1, 6, 16, 19, 21.

<sup>154</sup> T. 24 June 2009 p. 47; Defence Closing Brief para. 29.

## CHAPTER II: FACTUAL FINDINGS

### 1. INTRODUCTION

91. In 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, which underpin its charges of genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto. The Chamber briefly summarises here the main features of the Prosecution and Defence cases before considering in detail the evidence event by event.

#### *The Prosecution Case*

92. According to the Prosecution, after the death of President Habyarimana on 6 April 1994, a group of prominent national and local personalities met at the home of Joseph Nzirorera's mother in Mukingo commune, Ruhengeri prefecture in the early morning hours the following day (II.3.1). These men included Setako; Joseph Nzirorera, secretary-general of the MRND party; Augustin Bizimungu, then commander of the Ruhengeri operational sector; Casimir Bizimungu, Minister of Health; Esdras Baheza, a trader at Byangabo trading centre and an *Interahamwe* leader; Jean Baptiste Nyabusore, director of the *Institut supérieur d'agriculture et de l'élevage*; Jonathan Bambonye, chairman of the CDR party at the communal level; Jean Damascène Niyoyita, chairman of the MRND party at the communal level; Dominique Gatsimbanyi, *bourgmestre* of Nkuli commune; Assiel Ndisetse, the *conseiller* of Busogo sector; and Emmanuel Harerimana, *bourgmestre* of Mukingo commune.

93. Their purpose was allegedly to plan and put in place the extermination of Tutsis, which they had also discussed at several earlier gatherings in the preceding months. After one of those meetings in February, Setako ordered a communal policeman to kill a Tutsi named Bernard Bajyagahe (II.2). The perpetrators of the killings from 7 April were to be compensated by property looted from the victims. After the close of the meeting, roadblocks were reinforced, and militiamen began gathering at the nearby Byangabo trading centre. Augustin Bizimungu delivered weapons to the Mukingo commune office, which were then given to *conseillers* and militia leaders for distribution to members of the population (II.3.1).

94. At the trading centre, Kajelijeli purportedly told the gathered crowd to begin their "work". In full view of those assembled, an *Interahamwe* leader beat a Tutsi named Rukara to death with an axe and dumped him in a ditch. The assailants proceeded to the nearby Rwankeri *cellule* and the Busogo parish and killed Tutsis, burned their homes and looted their property. Area soldiers reinforced the attack. Augustin Bizimungu, Kajelijeli and local officials oversaw the burying of the hundreds of corpses the next day (II.3.1).

95. It is further alleged that, after the meeting at the home of Nzirorera's mother, Setako travelled to another meeting held between 8.00 and 9.00 a.m. at the home of Rukabu in Nkuli commune. There, he urged the gathered militiamen to kill the local Tutsis, which they did throughout Rugeshi *cellule* (II.3.2). During the course of the attacks, he stood by as militiamen killed two Tutsis named Ziragwira and Ibambasi at a roadblock (II.3.3). The next morning, Setako shot a Tutsi woman named Rachel in the head at his Nkuli commune home (II.3.4).

96. On 11 April, Setako purportedly initiated the military training and arming of militiamen at the Mukingo commune office. He called on them to kill Tutsis throughout the prefecture. On 14 April, members of this force participated in an attack at the Ruhengeri

Court of Appeal. According to the Prosecution, Setako and Augustin Bizimungu were present at the start of the attack and returned at its conclusion to congratulate the assailants (II.3.5).

97. On 25 April, Setako is alleged to have addressed a group of militiamen at Mukamira camp in Ruhengeri prefecture. He urged them to set up roadblocks and kill any Tutsis remaining at the camp. Following this, Tutsis arrested at a roadblock and in the camp were killed. Setako returned to Mukamira camp on 11 May with nine or 10 Tutsis who were then killed there on his instructions (II.4).

98. In mid-May, Setako attended the installation ceremony of Juvénal Kajelijeli as *bourgmestre* of Mukingo commune along with other prominent individuals such as Nzirorera and Casimir Bizimungu. Setako purportedly congratulated the many militiamen in attendance on the killings of Tutsis (II.5).

99. It is the Prosecution case that in Kigali, Setako acted as the unofficial liaison officer to the prefecture's *Interahamwe*. In that capacity, he supplied them with weapons, including at the end of April to Georges Rutaganda at the Amgar garage (II.6.1). Setako was also responsible for looting throughout the city (II.6.2). In addition to his advisory and logistical role, in mid-May, Setako ordered the killing of two Tutsi girls he delivered to killers at the *Péage* roadblock in Kiyovu (II.6.3).

#### *The Defence Case*

100. The Defence submits that the evidence of Setako's involvement in these events lacks credibility. It presented evidence of an alibi that Setako was not in Ruhengeri prefecture when the killings unfolded there (II.3.6). He was in Kigali from 6 to 12 April 1994, and on that date he travelled to Zaire as part of the first official mission to discuss the situation in Rwanda with President Mobutu. He returned to Rwanda only on 21 April. Consequently, he could not have been involved in the killings which occurred in Ruhengeri prefecture during that period.

101. According to the Defence, Setako remained in Kigali when he returned to Rwanda, performing his duties at the Ministry of Defence. These included investigations in April and May of whether senior army commanders had collaborated with the RPF. In June, he participated in ceasefire negotiations with the RPF. As a jurist within the Ministry, he had no control over weapons or militiamen (II.6.1). The Defence also contends that the killings of Bernard Bajyagaha (II.2), Ziragwira and Ibambasi (II.3.3), Rachel (II.3.4) and the two girls at the *Péage* roadblock (II.6.3), were in fact perpetrated by others at different times and places. Other events, including the killings at Mukamira camp (II.4) and the installation ceremony of Kajelijeli (II.5), likely did not occur at all.

## 2. KILLING OF BERNARD BAJYAGAHE, RUHENGERI PREFECTURE, FEBRUARY 1994

### *Introduction*

102. The Indictment alleges that, sometime in February 1994, after a regular meeting held at the residence of Joseph Nzirorera's mother, Setako ordered a communal policeman to kill a Tutsi man named Bernard Bajyagahe. The Prosecution refers to Witness SAA.<sup>155</sup>

103. The Defence disputes Witness SAA's credibility and points to Witnesses MAP and MCP. It further submits that, even if proved, the killing was not part of the widespread and systematic attack which occurred after 6 April 1994.<sup>156</sup>

### *Evidence*

#### Prosecution Witness SAA

104. Witness SAA, a Hutu, was a policeman in Mukingo commune in 1994. On the last Saturday of the month from January to March 1994, the witness attended meetings at the home of Joseph Nzirorera in Mukingo commune with Setako, Nzirorera, Augustin Bizimungu, Casimir Bizimungu, Esdras Baheza, Jean Baptiste Nyabusore, Jonathan Bambonye, Jean Damascène Niyoyita, Dominique Gatsimbanyi, Assiel Ndisetse, Juvénal Kajelijeli and *Bourgmestre* Emmanuel Harerimana. The group discussed security matters, including night patrols, tracking down the "*Inkotanyi*", and the elimination of Tutsis if the RPF were to resume hostilities. The meetings normally began at 8.00 p.m. and lasted until around midnight.<sup>157</sup>

105. After the meeting at the end of February 1994, Setako walked with the witness towards the Mukingo commune office where they saw a Tutsi named Bajyagahe, hailing from Musumba sector in Nkuli commune. He was living at a camp for displaced persons at the *Institut supérieur d'agriculture et de l'élevage*. Setako told the witness: "That one is going to tell on everything you have done ... You have to clear all that dirt." Setako remained on the road while the witness took Bajyagahe behind the commune office and shot him. Setako then continued on to Ruhengeri town.<sup>158</sup>

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<sup>155</sup> Indictment para. 48; Prosecution Closing Brief paras. 58-60, 161, 164, 170; T. 5 November 2009 pp. 28-29.

<sup>156</sup> Defence Closing Brief paras. 137, 145, 165-166, 195, 230-231, 233-236, 243, 299-306, 539-546, 602, 605; T. 5 November 2009 pp. 41, 61. In paragraphs 195 and 305 of its Closing Brief, the Defence refers to the expert report of Bert Ingelaere as it relates to this allegation. This evidence is discussed in greater detail elsewhere (I.2.4).

<sup>157</sup> T. 25 August 2008 pp. 57, 65; T. 26 August 2008 pp. 8-11; T. 27 August 2008 pp. 25, 27, 35-36, 44, 67-68, 74; T. 28 August 2008 pp. 59-60; Prosecution Exhibit 1 (personal identification sheet). At the time of his testimony, Witness SAA was sentenced to life imprisonment on 16 July 2008 by a Gacaca court in Busugo sector based on charges of participating in *Amahindure* training, setting up roadblocks, distributing weapons, personally killing two persons and selling looted property of Tutsis. On 30 October 2008, following his evidence in this case, his sentence was reduced on appeal to 20 years of imprisonment. T. 25 August 2008 pp. 46-47, 50; T. 27 August 2008 pp. 17-18; Defence Exhibit 2 (judgment of 16 July 2008); Prosecution Exhibit 98 (judgment of 30 October 2008).

<sup>158</sup> T. 26 August 2008 pp. 27-28; T. 27 August 2008 pp. 44-45, 60-61, 65; T. 28 August 2008 p. 68.



### Defence Witness MAP

106. Witness MAP, a Hutu, was staying at the home of Joseph Nzirorera's mother in 1994. Between January and April 1994, Nzirorera did not visit his mother. During this period, she also did not observe any of the following persons at the home: Setako, Augustin Bizimungu, Casimir Bizimungu, Juvénal Kajelijeli, Esdras Baheza, Jean Baptiste Nyabusore, Assiel Ndisetse, Jonathan Bambonye, Jean Damascène Niyoyita and Dominique Gatsimbanyi.<sup>159</sup>

### Defence Witness MCP

107. Witness MCP, a Hutu, was affiliated with a Gacaca court in Rwanda at the time of his testimony. At the beginning of 1991, two local officials escorted Bernard Bajyagahe, a Tutsi, away from his home in Shingiro sector, while the witness was tending cows close by. Bajyagahe had been the witness's primary school teacher. Later that day, individuals from the nearby market told the witness that Bajyagahe had been killed and pointed out his grave in a sand quarry. The witness later followed the Gacaca proceedings about the killing, and Setako was not implicated in the murder. The witness acknowledged that Bernard and Bajyagahe were common names, but he stated that he did not know any other Bernard Bajyagahe in Mukingo commune.<sup>160</sup>

### *Deliberations*

108. Witness SAA provided a first-hand account of attending several regular monthly meetings with Setako between January and March 1994 at the home of Joseph Nzirorera. After one of them, in February, he allegedly killed a Tutsi named "Bajyagahe" on Setako's orders. He was the only witness to implicate Setako in this killing or in the meetings at Nzirorera's home. The Chamber recalls the need generally to view the evidence of this witness with caution (II.3.1).

109. There are a number of differences between the witness's testimony about the killing of Bajyagahe, his prior statements and other evidence, in particular with respect to the identity of the victim and the year of the incident. During his examination-in-chief, the witness identified the victim as Bernard Bajyagahe from Shingiro sector and placed the killing at the end of February 1994.<sup>161</sup>

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<sup>159</sup> T. 21 May 2009 pp. 47, 49, 56-59; Defence Exhibit 148 (personal identification sheet).

<sup>160</sup> T. 5 May 2009 pp. 23-28, 30, 33, 37-38, 40, 42, 46-47; Defence Exhibit 108 (personal identification sheet); Defence Exhibit 109 (name of victim).

<sup>161</sup> T. 26 August 2008 p. 27 ("Q. Witness, do you know a certain Bernard Bajyagahe ... ? A. I know him. Q. Who is he? A. He is a Tutsi. Q. From where, his place of origin, if you know? A. He hailed from Shingiro *secteur* in Mukingo *commune*. Q. Is he still alive? A. No, he died. Q. ...[W]hen did he die? ... A. Late April (*sic*), early March. It was at the end of one of the rallies which were held – or, one of the meetings that were held on the last Saturday of the month in Nzirorera's residence. When we got to the Mukingo *communal* office, Setako told me, 'That one is going to tell on everything you have done.' ... he told me that, 'You have to clear all that dirt.' So I went towards that person and I killed him. Mr. President: There is a difference between the two versions. I will now read out what I think you said. Please confirm whether this is correct or say that it is not correct. 'Il est décédé entre la fin février et le début mars.' The witness: That is correct. 1994.").

110. The Defence confronted the witness with two of his prior statements to Tribunal investigators from April 1999 and September 2002, in which he listed a number of victims of killings in 1991. The April 1999 statement mentions a person named “Bernard”, and the September 2002 statement includes an individual named “Bajagahe”.<sup>162</sup> The witness confirmed that these names in fact referred to Bernard Bajyagahe, but that he had mistakenly indicated that he was killed in 1991.<sup>163</sup> The Defence then referred to a report by a Belgian human rights organisation containing a number of victims of killings in 1991, including Bernard Bajyagahe.<sup>164</sup> The witness disputed the veracity of the report.<sup>165</sup> He then explained, contrary to what he had previously stated, that the individuals listed as “Bernard” and “Bajyagahe” in his April 1999 and September 2002 statements, respectively, were not identical but two different persons. While he agreed that the person named “Bernard” mentioned in his April 1999 statement hailed from Shingiro sector, the individual, whom he killed in February 1994, did not have the first name “Bernard” and was from Musumba sector. The witness concluded this explanation by noting that he had not testified that Bernard Bajyagahe came from Shingiro sector.<sup>166</sup>

111. The witness was next confronted with his testimony given in January 2004 against Casimir Bizimungu in the *Bizimungu et al.* trial, in which he listed a number of individuals who were arrested and killed in 1991, including “Bernard”. He was asked whether or not this was a reference to Bernard Bajyagahe. Referring to the Belgian human rights report put to him earlier in cross-examination, the witness stated that the last name of the person he referred to in that trial as “Bernard” might also be Bajyagahe.<sup>167</sup>

112. The Defence then referred the witness to his testimony one year later – in February 2005 – against Augustin Bizimungu in the *Ndindiliyimana et al.* trial, where he provided a nearly identical list of individuals arrested and killed in 1991, as given in the *Bizimungu et al.* case. However, in the *Ndindiliyimana et al.* trial, he gave the name “Bajagahe” instead of

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<sup>162</sup> Defence Exhibit 1B (statement of 21 April 1999) p. 3 (listing others killed in 1991, including Bukumba, Gasahane, Kaderevu, Rudatinya, Kabango, Kabanga, Ngango, Segahwege, Nshutinzima, Gihzoza and Baheza); Defence Exhibit 4A (statement of 24 September 2002) p. 3 (same).

<sup>163</sup> T. 27 August 2008 p. 45 (“Mr. President: But this Bajyagahe who may have been killed in 1994, is that the same individual as mentioned in the 1999 statement and the ... 2002 statement? The witness: Yes, it is the same individual. But I was mistaken on the year of his death. He was killed in 1994. I included him among the accomplices killed in 1991, but, in actual fact, he was killed in 1994.”).

<sup>164</sup> *Id.*; Defence Exhibit 188 (Report of the Committee for the Respect of Human Rights and Democracy in Rwanda from December 1991) p. 1. The Prosecution disputed the authenticity of the report during Witness SAA’s testimony. The Chamber noted the objection, but allowed questions to be put to the witness based on it. The report was not initially entered as an exhibit. T. 27 August 2008 pp. 49-51; T. 28 August 2008 pp. 55-57. The Chamber later admitted the report as an exhibit on 15 October 2009 after the Defence provided additional information on its provenance. See Decision on Defence Request to Admit a Document (TC), 15 October 2009, paras. 5-7.

<sup>165</sup> T. 27 August 2008 p. 45.

<sup>166</sup> *Id.* pp. 58, 59 (“Q. Witness, we are drawing your attention just to statements you made in 1999 and later on in 2002. So, you’re telling this Tribunal that the Bernard you identified in 1999 is not the Bernard Bajyagahe that you previously testified to who was killed in 1994. Is that correct? A. I have no Bernard Bajyagahe on my list. I just have a name, Bernard. But, you are trying to make the two different people a single person. It is possible that these may be two people bearing the same name, but it could also be that these are two different people.”), 60.

<sup>167</sup> *Id.* pp. 62-64; Defence Exhibit 11A (*Bizimungu et al.*, T. 20 January 2004 p. 3, listing others killed after a meeting in 1991, including Bukumba, Gasahane, Kaderevu, Rudatinya, Kabango, Kabanga, Ngango, Ndayambaje, Karyango and Mashage).

Bernard. The witness denied that he stated in that trial that Bajyagahe was killed in 1991. He then maintained his testimony that “Bernard” and “Bajyagahe” were two different persons.<sup>168</sup>

113. Finally, the Chamber notes that the witness stated that his conviction included the murder of “Bajyagahe”. However, his guilty plea of 10 September 2002 mentions only the killing of “Bernard” from Shingiro sector in 1991. The witness again denied that this was the same person as Bajyagahe.<sup>169</sup>

114. In the Chamber’s view, Witness SAA did not adequately explain the discrepancies between his testimony in this trial, his statements of April 1999 and September 2002, as well as his evidence in the two previous cases. As noted above, Witness SAA first identified the person whom he killed in February 1994 as Bernard Bajyagahe from Shingiro. This description is entirely consistent with the allegation in the Indictment and the witness’s October 2002 statement to Tribunal investigators.<sup>170</sup>

115. It is problematic that, when confronted with evidence that Bernard Bajyagahe was killed in 1991, the witness would disavow the details of his initial testimony, change the personal details of the victim killed in February 1994, and erroneously imply that he had not previously identified him as such. The Chamber cannot exclude that more than one person named Bernard Bajyagahe was killed in 1991 and 1994. Nonetheless, the evidence of Witness MCP concerning Bernard Bajyagahe’s death in 1991, although partly hearsay, lends some credence to the possibility that he was killed before 1994. Witness SAA’s different versions about this killing lack clarity and consistency, and his explanations raise questions about his credibility.<sup>171</sup>

116. In sum, the Chamber does not accept as credible Witness SAA’s uncorroborated evidence on these events.<sup>172</sup> Accordingly, the Prosecution has not proved beyond reasonable doubt that Setako played a role in the death of Bernard Bajyagahe, as alleged in the Indictment.

117. Furthermore, the inconsistency between Witness SAA’s testimony as to where the meeting occurred (Nzirorera’s home) and the location pleaded in the Indictment (home of

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<sup>168</sup> T. 27 August 2008 pp. 64-66; Defence Exhibit 12A (*Ndindiliyimana et al.*, T. 15 February 2005 p. 24, listing others killed after a meeting in 1991, including Bukumba, Gasahane, Kaderevu, Rudatinya, Kabango, Kabanga, Ngango, Ndayambaje, Karyango and Mashage).

<sup>169</sup> T. 25 August 2008 p. 50; T. 28 August 2008 p. 27; Defence Exhibit 13B (confession and guilty plea of 10 September 2002) pp. 2-4.

<sup>170</sup> Indictment para. 48; Defence Exhibit 5A (statement of 16 October 2002) p. 5.

<sup>171</sup> There are also notable inconsistencies in Witness SAA’s testimony and prior statements about whether the meetings occurred at the home of Joseph Nzirorera’s mother or Nzirorera’s own home. He initially stated that they were at Nzirorera’s mother’s home. This corresponds with his statement to Tribunal investigators from March 2003 and is in conformity with the Prosecution’s case as articulated in the Indictment. T. 25 August 2008 p. 65; Defence Exhibit 6B (statement of 17 March 2003) p. 6. Subsequently, he stated that the meetings took place at Nzirorera’s own home, which is consistent with his statement of September 2002. T. 27 August 2008 pp. 68-69; Defence Exhibit 4A (statement of 24 September 2002) p. 4. The witness explained that he never said that the meetings occurred at the home of Nzirorera’s mother and that the investigators made a mistake. T. 27 August 2008 p. 74.

<sup>172</sup> The Chamber has identified similar problems with other parts of Witness SAA’s testimony, namely the meeting at the home of Joseph Nzirorera’s mother (II.3.1); the attack on Ruhengeri Court of Appeal (II.3.5); and the installation of Juvénal Kajelijeli as *bourgmestre* (II.5).

Nzitorera's mother) also raises a question of proper notice.<sup>173</sup> To illustrate the possible prejudice resulting from this, the Chamber observes that the Defence evidence from Witness MAP refuting these meetings related to the location pleaded in the Indictment rather than the place ultimately affirmed by the witness.

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<sup>173</sup> The evidence does not establish the location of Nzitorera's home in relation to that of his mother. It appears, however, that the Isimbi building was owned by Joseph Nzitorera and located in the nearby Byangabo trading centre. Some of the witnesses alleged that it was used by the *Interahamwe*. See, for instance, Witness SAA, T. 26 August 2008 p. 8; Witness SQG, T. 1 September 2008 pp. 29, 44-45; Witness SAP, T. 3 September 2008 pp. 21-22; Witness SAQ, T. 9 September 2008 p. 22; Witness SMA, T. 9 September 2008 pp. 60-61; T. 10 September 2008 pp. 6-7; Witness SAM, T. 11 September 2008 pp. 17, 21, 29, 32; T. 12 September 2008 pp. 34, 40; Witness MAT, T. 7 May 2009 p. 20; Witness MCM, T. 7 May 2009 p. 69; Witness MCR, T. 15 June 2009 p. 5. Witness SMA stated that Joseph Nzitorera would often go to the Isimbi building when he visited his mother in Mukingo commune. T. 10 September 2008 p. 7. However, Witness MAT said that Nzitorera's residence was not within Byangabo area. T. 20 May 2009 p. 20.

### 3. EVENTS IN RUHENGERI PREFECTURE, 6-21 APRIL 1994

#### 3.1 Meeting at the Home of Joseph Nzirorera's Mother and Subsequent Attacks, Mukingo Commune, 7 April

##### *Introduction*

118. The Indictment alleges that, on the morning of 7 April 1994, Setako attended a meeting at the home of Joseph Nzirorera's mother in Mukingo commune along with his co-perpetrators, including Colonel Augustin Bizimungu, Joseph Nzirorera, Jean Baptiste Nyabusore, Esdras Baheza, Jonathan Bambonye, Jean Damascène Niyoyita, Dominique Gatsimbanyi and Juvénal Kajelijeli, where they agreed to implement a plan to exterminate Tutsis in the commune. As a result of this meeting, area roadblocks were reinforced to prevent Tutsis from escaping, in particular at the Mukingo communal office, Byangabo trading centre and Busogo parish, and weapons were provided by Bizimungu to *Interahamwe* to facilitate the killing of Tutsis. The Prosecution relies primarily on Witnesses SAA, SAM and SMA.<sup>174</sup>

119. Shortly after the meeting, Kajelijeli, Baheza and Bambonye allegedly addressed militiamen at the Byangabo trading centre and ordered them to start killing Tutsis. Immediately, the assailants killed a Tutsi man named Rukara at the centre in full glare of the population and later captured and killed his brother Lucien. Groups of *Interahamwe*, Hutu members of the population, and soldiers then attacked and killed Tutsis throughout the commune at places including the Busogo parish and the home of Rudatinya in Rwankeri *cellule*. On 8 April 1994, Kajelijeli and Augustin Bizimungu ordered local authorities and the population to bury the dead in mass graves. Throughout the attacks, Tutsi property was looted or destroyed. The Prosecution refers to Witnesses SAA, SAM, SMA, SAQ, SQG, SAW and SAP.<sup>175</sup>

120. The Defence submits that the Prosecution evidence lacks credibility. It does not prove that a meeting was held between 6 and 7 April 1994 at the home of the mother of Joseph Nzirorera, or that Setako participated in it. At the time, Setako was in Kigali (II.3.6.1). The Defence does not specifically address the subsequent killings which followed the alleged meeting. Reference is made to Witnesses MAP, MAT, MCM and MCR.<sup>176</sup>

##### *Evidence*

##### Prosecution Witness SAA

121. Witness SAA, a Hutu, was a policeman in Mukingo commune. Around 9.30 p.m. on 6 April 1994, he was guarding the Mukingo commune office when he heard news of the death of President Habyarimana on RTLM. At about 10.00 p.m., Joseph Nzirorera called and

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<sup>174</sup> Indictment paras. 29-30; Prosecution Closing Brief paras. 65-72, 161, 170; T. 5 November 2009 pp. 3-4, 6, 11-15, 25; T. 6 November 2009 pp. 1-3, 6-7.

<sup>175</sup> Indictment paras. 31-35, 66-68; Prosecution Closing Brief paras. 73-80, 82-86, 96-97, 107-110, 113-115, 161, 164, 167, 170, 173.

<sup>176</sup> Defence Closing Brief paras. 59, 107, 137, 145, 151, 165-166, 172, 230-231, 233-241, 243-244, 283-298, 586, 603, 605, 612, 623, 626; T. 5 November 2009 pp. 35, 37-40; T. 6 November 2009 p. 9.

informed the witness about a meeting to be held at the home of Nzirorera's mother in Byangabo and to bring along *Bourgmestre* Harerimana.<sup>177</sup>

122. The meeting began around 2.00 a.m. on 7 April. It was attended by Setako, who was one of the first to arrive, as well as Nzirorera, Harerimana, Colonel Augustin Bizimungu, Casimir Bizimungu, Jean Baptiste Nyabusore, Esdras Baheza, Jonathan Bambonye, Jean Damascène Niyoyita, Dominique Gatsimbanyi, Assiel Ndisetse and Lazare Ndangiza. *Interahamwe* waited outside in the courtyard. Setako delivered the first speech welcoming everyone to the meeting before giving the floor to Nzirorera. The group decided to begin killing Tutsis later that morning. They also discussed distributing weapons and setting up roadblocks. Colonel Bizimungu took notes at the meeting since, as the local military commander, he was responsible for implementing its decisions.<sup>178</sup>

123. The meeting ended between 4.00 and 4.30 a.m., and the participants departed. Witness SAA left before Setako and returned to the Mukingo commune office, where he designated civilians to man its roadblock. Around 7.30 a.m., Augustin Bizimungu delivered weapons from Mukamira camp to the witness at the commune office. The witness distributed these guns to the commune's *conseillers*, who in turn gave them to civilians from their sectors. He also provided weapons to *Interahamwe* leaders, beginning with Juvénal Kajelijeli and Esdras Baheza.<sup>179</sup>

124. Soon thereafter, the killings began. Gunshots and explosions could be heard throughout the commune. *Interahamwe*, who had previously received military training, systematically killed Tutsis and destroyed their homes. Roadblocks were also used to intercept and kill Tutsis. The witness killed one person that night at the barrier in front of the commune office. Others were killed there by his subordinates. Tutsi property was looted, and subsequently sold to compensate the *Interahamwe* for participating in the killings. The witness was a member of the committee which coordinated this.<sup>180</sup>

125. Around 7.00 a.m. on 8 April, Kajelijeli and Baheza came to the commune office and asked *Bourgmestre* Harerimana for individuals to help bury the dead. The witness assisted in this effort at Busogo parish. When he arrived, Kajelijeli and Augustin Bizimungu were already there organising the burial of 400 to 500 dead Tutsis in three mass graves. This lasted until 2.00 p.m.<sup>181</sup>

### Prosecution Witness SAM

126. Witness SAM, a Hutu, was a member of the *Interahamwe* in 1994. He worked in the vicinity of the home of Joseph Nzirorera's mother and, at 8.00 p.m. on 6 April, he saw Setako

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<sup>177</sup> T. 25 August 2008 p. 57; T. 26 August 2008 pp. 11-12, 18; T. 27 August 2008 pp. 25, 27, 29-30; T. 28 August 2008 p. 17; Prosecution Exhibit 1 (personal identification sheet). At the time of his testimony, Witness SAA had been sentenced to life imprisonment in July 2008 by a Gacaca court in Busogo sector, based on charges of participating in *Amahindure* training, setting up roadblocks, distributing weapons, personally killing two persons and selling looted property of Tutsis. On 30 October 2008, following his evidence in the present case, his sentence was reduced on appeal to 20 years' imprisonment. T. 25 August 2008 pp. 46-47, 50; T. 27 August 2008 pp. 17-18; Defence Exhibit 2 (judgment of 16 July 2008); Prosecution Exhibit 98 (judgment of 30 October 2008).

<sup>178</sup> T. 26 August 2008 pp. 8, 11-14; T. 27 August 2008 pp. 69, 71-73; T. 28 August 2008 pp. 4, 17, 65.

<sup>179</sup> T. 26 August 2008 pp. 14-16; T. 27 August 2008 p. 40.

<sup>180</sup> T. 26 August 2008 pp. 17-21.

<sup>181</sup> *Id.* pp. 18-19; T. 27 August 2008 p. 40; T. 28 August 2008 p. 60.

and Juvénal Kajelijeli arrive there together. Other *Interahamwe* were also nearby the house. At some point, Kajelijeli departed, as did the witness, but Setako remained. The witness returned to the house drunk around 1.00 a.m. He saw cars moving about and *Interahamwe* everywhere. A number of authorities, such as Setako and Casimir Bizimungu, were in the house, and Setako appeared to be playing the role of a master of ceremonies, welcoming individuals as they arrived. After making these observations, the witness left again to sleep at a nearby building where many *Interahamwe* stayed.<sup>182</sup>

127. Between 4.00 and 6.00 a.m., Joseph Nzirorera's mother summoned the witness to her home, told him that President Habyarimana had been killed, and asked him to gather young men at the house. After doing so, the witness and his fellow *Interahamwe* went to the Byangabo trading centre around 7.30 or 8.00 a.m., where they saw Kajelijeli arrive in a red Toyota. Kajelijeli gathered the militiamen and asked why they had not begun their work. On hearing this, some of the *Interahamwe* immediately stoned a Tutsi named Rukara at the centre, and Michel Niyigaba, an *Interahamwe* leader, finished him off with an axe.<sup>183</sup>

128. Kajelijeli distributed weapons, and the *Interahamwe* proceeded towards Rwankeri *cellule* in Busogo sector, where 30 to 35 Tutsi families lived. At the house of Dominique Gatsimbanyi, the witness saw the dead body of Rukara's brother Lucien. He then went to Rwinzovu sector to kill a Tutsi named Rukoro with a studded club before returning to Rwankeri where his fellow assailants were killing other Tutsis and burning houses. The militiamen were trying to disperse a crowd of Tutsis in order to kill them more easily.<sup>184</sup>

129. During this attack, Kajelijeli's brother, Joseph Ntamugabumwe, came to Rwankeri and told the militiamen that a number of Tutsi refugees had gathered at the Busogo parish. The assailants formed two groups, with one heading toward the church and the other going towards the parish's health centre. The witness and another assailant, named Mwana Baheza, chased a Tutsi named Gateyiteyi who came out of hiding when Ntamugabumwe fired a shot in the air. After Baheza killed the fleeing refugee, the witness returned to the parish where the other assailants had already killed the Tutsis and had started looting. The witness explained that the assailants looted on the instruction of their local officials who then used the goods and property to compensate them.<sup>185</sup>

#### Prosecution Witness SMA

130. Witness SMA, a Hutu, lived near the Byangabo trading centre in Rwankeri *cellule* in Busogo sector. Around 7.00 a.m. on the morning of 7 April 1994, while at the centre, he noticed a large number of *Interahamwe* discussing the death of President Habyarimana. About an hour later, five vehicles passed through the trading centre from the direction of the home of Joseph Nzirorera's mother. Setako was seated in the front of the first vehicle in the convoy. Esdras Baheza, Jean Baptiste Nyabusore, Major Bizabarimana and Augustin

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<sup>182</sup> T. 11 September 2008 pp. 33, 44, 46, 48-50; T. 12 September 2008 pp. 3, 41-42; Prosecution Exhibit 19 (personal identification sheet). At the time of his testimony, Witness SAM was detained in Ruhengeri prison based on his sentences of 15 and 20 years of imprisonment, respectively, by the Gacaca courts in Rwinzovu and Musumba *cellules*, after pleading guilty to charges of launching attacks in Musumba, burning down houses and looting. He was still involved in other ongoing trials. T. 11 September 2008 pp. 15-16; T. 12 September 2008 p. 12.

<sup>183</sup> T. 11 September 2008 pp. 31, 49-50, 52-54, 62; T. 12 September 2008 pp. 42-43.

<sup>184</sup> T. 11 September 2008 pp. 54-58, 67.

<sup>185</sup> *Id.* pp. 58-61; T. 12 September 2008 pp. 2, 6; T. 16 September 2008 pp. 14, 16.

Bizimungu were in the other vehicles. After passing the witness, Setako stopped briefly at the centre and spoke with some of the individuals gathered there, before proceeding towards Mukamira.<sup>186</sup>

131. About 10 to 15 minutes after Setako left, Kajelijeli arrived at the Byangabo trading centre. He appeared to be looking for a student called Dominique and Michel Niyigaba, *Interahamwe* leaders at the communal and sector levels, respectively. Sergeant Dusabimana, Joseph Nzirorera's younger brother, also arrived in uniform searching for experienced *Interahamwe*. He distributed three guns to a relative named Noël, one to Musafiri and one to another person. Esdras Baheza's sons brought additional firearms from their father's house. After Kajelijeli spoke with Dominique and Niyigaba, the *Interahamwe* gathered around him near his bar. At that point the witness went briefly home to attend to a personal matter, but could still hear the crowd clapping. On returning, Kajelijeli had left, but the witness saw Niyigaba, armed with an axe, and Musafiri, who was carrying a nail-studded club, capture a Tutsi named Rukara. The two beat Rukara to death and threw him in a ditch.<sup>187</sup>

132. After the death of Rukara, the *Interahamwe* left the Byangabo trading centre to kill Tutsis in the neighbouring areas. The witness heard gunshots and explosions. About 15 to 20 minutes later, a Daihatsu and a Mitsubishi vehicle filled with soldiers, armed with guns and carrying fuel canisters, arrived from Mukamira camp. The soldiers spoke briefly with Joseph Ntamugabumwe, who was a militiaman and Kajelijeli's younger brother. From a distance of about four and a half metres away, the witness heard Ntamugabumwe tell the soldiers that Tutsis had sought refuge at the Busogo parish. The soldiers departed, and the witness later heard a tirade of gunfire from the direction of the parish. Returning *Interahamwe* said that the soldiers were killing Tutsis at the parish as well as burning down their houses. Around 2.00 p.m., the witness saw Setako in a jeep with civilian plates, returning from the direction of Mukamira camp and heading towards Ruhengeri town. Later that day, the witness observed *Interahamwe* returning to the trading centre with looted goods.<sup>188</sup>

133. At about 5.00 p.m., the witness walked to the Busogo parish to see if a family member living in the area was still alive. The parish was strewn with corpses. On 8 April, *Bourgmestre* Harerimana visited the sites of the killings and asked members of the population to bury the dead. The witness assisted in the burial of bodies in the Rwankeri area, including those of the family of Abel Muhinda and a small child of Rudatinya.<sup>189</sup>

#### Prosecution Witness SAQ

134. Witness SAQ, a Tutsi with a Hutu identity card, lived in Mukingo commune. Around 7.00 a.m. on 7 April 1994, he heard *Interahamwe* at the Byangabo trading centre discussing the death of President Habyarimana. He did not notice Setako, Joseph Nzirorera, Augustin Bizimungu or Casimir Bizimungu in the vicinity of Nzirorera's mother's house, but also could not exclude the possibility that they were there. Around 8.00 a.m., from about 30

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<sup>186</sup> T. 10 September 2008 pp. 11-14, 20-21, 39, 56, 59; T. 11 September 2008 p. 11; Prosecution Exhibit 17 (personal identification sheet); Prosecution Exhibit 18 (Witness SMA's hand-drawn map of his residence and the surrounding area, with annotations).

<sup>187</sup> T. 9 September 2008 p. 54; T. 10 September 2008 pp. 13-17, 21, 53, 57, 61; T. 11 September 2008 pp. 5, 9. Witness SMA had never attended a meeting of the *Interahamwe*, but explained that Dominique's role in that organisation was common knowledge. T. 10 September 2008 pp. 36-37.

<sup>188</sup> T. 10 September 2008 pp. 11, 17-21, 23-24, 54, 60; T. 11 September 2008 p. 5.

<sup>189</sup> T. 10 September 2008 pp. 19-23.



metres away, he heard Juvénal Kajelijeli tell more than 20 *Interahamwe*: “The head of state has died, go put on your uniforms and go start work.” The militiamen who were not properly attired or armed returned home. After Kajelijeli’s address, Michel Niyigaba, an *Interahamwe* leader, killed a Tutsi called Rukara at the centre with an axe. The witness then became afraid and left the area.<sup>190</sup>

135. While walking in the direction of the home of Rudatinya in Rwankeri *cellule*, the witness was overtaken by a red Toyota Hilux. At Rudatinya’s home, where many Tutsi had sought refuge, he saw Kajelijeli alight from the vehicle and remind the *Interahamwe* there to do their work. He watched militiamen kill two women, and the witness then quickly headed home. Around 4.00 p.m., he saw vehicles carrying *Interahamwe* heading toward the Musumba area where there were a number of Bagogwe Tutsis. From 8 April, the witness went into hiding. He left the commune on 18 April and only returned in August 1994 when he found his home looted and destroyed.<sup>191</sup>

136. The witness confirmed that there were roadblocks in front of the Mukingo commune office, the *Institut supérieur d’agriculture et de l’élevage* in Busogo, and in other parts of the commune. The barriers were manned from 8 March 1993 after an RPF incursion until that force took control of the area in July 1994.<sup>192</sup>

#### Prosecution Witness SQG

137. Witness SQG, a Hutu, was a member of the *Interahamwe* in 1994. Around 6.30 a.m. on 7 April, he joined around 60 to 70 other *Interahamwe* at the Byangabo trading centre. Juvénal Kajelijeli asked the crowd to “get to work”. Lieutenant Mburuburengero, Jonathan Bambonye, the CDR chairman, and Chief Warrant Officer Karorero accompanied Kajelijeli and made similar remarks. After the speeches, Michel Niyigaba, an *Interahamwe* leader at the sector level, attacked a Tutsi named Rukara with an axe and dumped his dead body into a ditch.<sup>193</sup>

138. The witness and other *Interahamwe* then proceeded to kill Tutsis in Rwankeri *cellule* and at the Busogo parish. They were joined by gendarmes from Ruhengeri prefecture as well as soldiers from the Bigogwe and Mukamira camps. At the home of Sebitenderi, a Tutsi named Lucien was shot. The assailants killed around 100 Tutsis in the Rwankeri area, burned their homes with fuel supplied by Esdras Baheza, and looted their goods. Then they proceeded to kill Tutsi refugees, who had locked themselves in the Busogo parish, in an

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<sup>190</sup> T. 8 September 2008 pp. 28, 36, 51-53; T. 9 September 2008 pp. 2-3, 17-18, 20-26, 28-30, 32, 43-44; Prosecution Exhibit 14 (personal identification sheet).

<sup>191</sup> T. 8 September 2008 pp. 53, 56-60; T. 9 September 2008 pp. 33-36, 38, 45.

<sup>192</sup> T. 8 September 2008 pp. 35-38.

<sup>193</sup> T. 1 September 2008 pp. 10, 41-47; T. 2 September 2008 pp. 32-33, 73; Prosecution Exhibit 5 (personal identification sheet). Witness SQG was detained at the time of his testimony. T. 1 September 2008 p. 10. In October 2002, he pleaded guilty to participating in the killing of Tutsis and was released from prison in January 2003. T. 1 September 2008 pp. 11-13, 15, 18-19; Prosecution Exhibit 6 (confession of 30 October 2002). At some point in the following three months, he made a second confession. T. 1 September 2008 pp. 16-19; Prosecution Exhibit 7 (undated confession). The witness appeared before a Gacaca court in 2005 on the basis of his initial plea, and received a sentence of 12 years of imprisonment. T. 1 September 2008 p. 23. Subsequently, in November 2006, the witness was sentenced to 30 years of imprisonment by a Gacaca court in Busogo sector for killing two persons and looting property. T. 1 September 2008 pp. 10-13, 23-24. He did not plead guilty to these charges and testified that he maintains his innocence. T. 1 September 2008 pp. 11, 13; T. 2 September 2008 pp. 8-10.

attack which lasted between 40 and 50 minutes. The witness later heard that assailants looted property from the victims' homes.<sup>194</sup>

139. Following the attack on the Busogo parish, the witness and 40 to 50 other *Interahamwe* returned to the Byangabo trading centre. There, Kajelijeli and Baheza gave them vehicles to travel to Musumba sector in Nkuli commune to assist in the killing of Tutsis who had barricaded themselves in houses. The assailants departed in vehicles, but, since they only reached the area at nightfall, they decided to return.<sup>195</sup>

#### Prosecution Witness SAW

140. Witness SAW, a Hutu, was a member of the *Interahamwe* who lived in the vicinity of the Byangabo trading centre. Around 7.00 a.m. on the morning of 7 April 1994, he gathered at the centre along with other *Interahamwe* and members of the population after learning of the death of President Habyarimana. He did not see any military vehicles or individuals such as Setako, Joseph Nzirorera, Augustin Bizimungu or Casimir Bizimungu near the home of Nzirorera's mother. However, he observed two *Interahamwe*, Musafari and Michel Niyigaba, kill a Tutsi named Rukara with stones and an axe. Following this, an Adventist called Chongi began to cry, and the witness helped him home for fear that the *Interahamwe* would kill him. When the witness returned, the *Interahamwe* had left to kill Tutsis in the surrounding area.<sup>196</sup>

#### Prosecution Witness SAP

141. Witness SAP, a Hutu, was a farmer living in Busogo sector. Around 7.00 a.m. on 7 April 1994, he heard shouting and gunfire near his home. The *Interahamwe* killed two of his Tutsi neighbours and were chasing a third. As the witness left his home to inform his sector *conseiller*, he observed an *Interahamwe* called Michel Niyigaba hack a Tutsi named Rukara to death with an axe at the Byangabo trading centre. This incident took place in the presence of Juvénal Kajelijeli, *Conseiller* Assiel Ndisetse and Esdras Baheza. When he saw this, the witness proceeded to the Mukingo commune office. *Bourgmestre* Harerimana said that he lacked resources to stop the killings, but stated that he would inform the gendarmerie. Later that day, Kajelijeli thanked the *Interahamwe* in the trading centre for killing the Tutsis in surrounding areas.<sup>197</sup>

142. On 8 April, *Bourgmestre* Harerimana asked the local population to assist in burying those killed the previous day. The witness assisted in the burials and recalled in particular burying the burned body of a Tutsi named Joyce. Members of the 34 Tutsi families living in the area were killed, their homes burned and property looted. The commune later put their land up for sale through a committee involving the deputy *bourgmestre*, sector *conseiller* as

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<sup>194</sup> T. 1 September 2008 pp. 11, 45-47, 50-54, 56, 58-61; T. 2 September 2008 pp. 24, 60, 62.

<sup>195</sup> T. 1 September 2008 pp. 45-46, 61-62; T. 2 September 2008 p. 27.

<sup>196</sup> T. 4 September 2008 pp. 48-52; T. 8 September 2008 p. 12; Prosecution Exhibit 13 (personal identification sheet). At the time of his testimony, Witness SAW had been detained in Ruhengeri prison since 1999, awaiting trial. He had not yet confessed to any crime, but was prepared to acknowledge being a member of the *Interahamwe*. T. 4 September 2008 pp. 45-46, 50.

<sup>197</sup> T. 3 September 2008 pp. 3, 16-18; T. 4 September 2008 pp. 19-21, 23, 25, 30; Prosecution Exhibit 12 (personal identification sheet). At the time of his testimony, Witness SAP was serving a 30-year sentence in Ruhengeri prison for participating in the genocide, having been convicted by a Gacaca court in his home sector. He contested his involvement in the killings and had appealed his conviction. T. 3 September 2008 pp. 3-7, 31, 35-36, 61; T. 4 September 2008 p. 31.

well as other officials. He added that roadblocks manned by communal police, *Interahamwe* and soldiers were established at the commune office and in Busogo sector near his home. At these checkpoints, identity cards were checked and those without them were handed over to the prosecutor's office or the gendarmerie.<sup>198</sup>

### Setako

143. Setako remained in Kigali on the night of 6 April 1994 (II.3.6.1). He was having dinner with friends when President Habyarimana's plane was attacked and then proceeded to the Ministry of Defence and army headquarters. He returned home in the early hours of 7 April and went to work at the Ministry as usual later that morning.

### Defence Witness MAP

144. Witness MAP, a Hutu, was at the home of Joseph Nzirorera's mother near the Byangabo trading centre on the night of 6 April 1994. No meeting was held there that night.<sup>199</sup>

### Defence Witness MAT

145. Witness MAT, a Hutu, spent the night of 6 April 1994 near the Byangabo bar and *Institut supérieur d'agriculture et de l'élevage*, where he had a clear view of the home of the mother of Joseph Nzirorera. Around 6.30 a.m. on 7 April, he walked to the Byangabo trading centre and did not observe any vehicles or activities at that house. Arriving at the centre, he saw the dead body of a Tutsi named Rukara surrounded by members of the population, including Michel Niyigaba and Assiel Ndisetse, the local *conseiller*. *Interahamwe* began to assemble, saying that they were going to kill Tutsis. Ndisetse told the crowd not to harm the Tutsis. The witness did not see any traffic or authorities, such as Setako, Nzirorera, Augustin Bizimungu and Casimir Bizimungu. Around 8.00 a.m., the witness departed as the crowd went in the direction of the home of Rukara's brother Lucien, who was later killed.<sup>200</sup>

### Defence Witness MCM

146. Witness MCM, a Hutu, lived in the vicinity of the Byangabo trading centre near the home of Joseph Nzirorera's mother. Around 6.00 a.m. on 7 April 1994, the witness saw Michel Niyigaba kill a Tutsi named Rukara with a small axe at the centre. *Conseiller* Assiel Ndisetse tried to prevent the killing, but Niyigaba mocked him and chased him from the area. A group of assailants then left and headed towards Busogo and Rwankeri around 8.00 a.m. The witness did not see any officials such as Setako, Nzirorera and Augustin Bizimungu while he was at the trading centre. He later heard that the militiamen killed Rukara's brother Lucien.<sup>201</sup>

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<sup>198</sup> T. 3 September 2008 pp. 18-21, 23-24, 29, 51-52, 58, 62-66, 68-69; T. 4 September 2008 pp. 24, 28.

<sup>199</sup> T. 21 May 2009 pp. 49, 59; Defence Exhibit 148 (personal identification sheet).

<sup>200</sup> T. 6 May 2009 pp. 60-61, 65-70; T. 7 May 2009 pp. 2-7, 14-17, 30-32; Defence Exhibit 116 (personal identification sheet).

<sup>201</sup> T. 7 May 2009 pp. 38-39, 41-45, 68-69, 75, 77; Defence Exhibit 118 (personal identification sheet).

### Defence Witness MCR

147. Witness MCR, a Hutu, lived near the home of Joseph Nzirorera's mother. Around 6.00 a.m. on 7 April 1994, the witness awoke to the news of the death of President Habyarimana over the radio. He did not observe any activity at the house of Nzirorera's mother. Around 8.00 a.m., he went to see his *conseiller*, Assiel Ndisetse, who asked him to seek assistance from the commune office because the *Interahamwe* had just killed a Tutsi man called Rukara. At the commune office, the witness informed the brigadier of the communal police that Tutsis were being killed, who in turn said that he would inform the *bourgmestre*. The witness returned home at 10.00 a.m., and from then until 3.00 p.m. he heard gunfire and explosions coming from the direction of the Busogo parish. Between 8.00 and 3.00 p.m. on 8 April, he and other members of the population participated in the burial of the dead on the instructions of his *conseiller* and the *bourgmestre*. In particular, the witness saw the corpses of Rukara and his brother Lucien at the Byangabo trading centre. Approximately 300 Tutsis were killed in Rwankeri and Busogo, including at Rudatinya's house.<sup>202</sup>

### *Deliberations*

148. A number of undisputed facts follows from the fundamental features of the Prosecution and Defence evidence. On the morning of 7 April 1994, militiamen gathered at the Byangabo trading centre, near the home of Joseph Nzirorera's mother, in Busogo sector, Mukingo commune. Michel Niyigaba, a local *Interahamwe* leader, killed a Tutsi named Rukara with an axe in full view of the crowd and dumped his body in a ditch. The assailants then killed many Tutsis in the neighbouring Rwankeri *cellule*, burned their homes and looted their property. The militiamen also killed the Tutsi refugees at the Busogo parish. On the morning of 8 April, local authorities instructed members of the population to bury the hundreds of corpses from these attacks.

149. The differences in the evidence concern the involvement of particular authorities and prominent persons as well as the military in these attacks. The Defence contests that this attack was preceded by a meeting at the home of Nzirorera's mother in the early morning hours of 7 April, attended by Setako and other important individuals, which initiated the killings. Beyond disputing the existence of this meeting and the general credibility of the Prosecution witnesses, the Defence's final oral and written submissions do not address the involvement of other key members of the alleged joint criminal enterprise during the course of the killings, such as Juvénal Kajelijeli and Augustin Bizimungu. The main question for the Chamber is whether Setako participated in the alleged meeting at the home of Nzirorera's mother. The answer is dispositive of whether Setako can be held responsible for the subsequent crimes.

150. In support of Setako's participation in the meeting of 7 April, the Prosecution relies principally on the evidence of Witness SAA. He provided a first-hand account of both the participants and purpose of the meeting. Witness SAM placed Setako at the home of Nzirorera's mother on the evening of 6 April, and Witness SMA purportedly observed him coming from the house the next morning.

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<sup>202</sup> T. 15 June 2009 pp. 2, 5-13, 42-44, 46; Defence Exhibit 161 (personal identification sheet).

151. The Defence challenged the credibility of Witness SAA, disputing both his general truthfulness and highlighting specific inconsistencies related to the meeting. He is a key witness on a number of events. This meeting, however, is the most direct evidence of Setako's participation in the joint criminal enterprise, alleged in the Indictment. Therefore, although broadly applicable to other events, the Chamber sets out in detail here its consideration of the witness's general credibility, before turning to issues related to his specific evidence about the meeting.

152. Witness SAA was convicted and imprisoned at the time of his testimony for his role in the genocide. He has given nine statements to Tribunal investigators from April 1999 to March 2008 that concern various accused.<sup>203</sup> Before testifying in the case against Setako, he appeared as a Prosecution witness before the Tribunal in the trials of *Kajelijeli*, *Bizimungu et al.* and *Ndindiliyimana et al.*<sup>204</sup> Several statements and documents concerning his Gacaca proceedings in Rwanda also form part of the record.<sup>205</sup>

153. The procedural history of the witness's case in Rwanda is relevant to his general credibility. He was detained on charges related to the genocide in December 1996, confessed and submitted a guilty plea in both August and September 2002. Both documents related to his participation at a meeting on 25 January 1991.<sup>206</sup> The witness appeared before a Gacaca court in Busogo sector on 20 July 2005 and confessed to providing *Interahamwe* training, setting up roadblocks and the killings at them, having participated in meetings preparing the genocide, personally killing two persons and selling looted property of Tutsis. There was no judgment at that time. However, the court changed his classification from a category 2 to a category 1 offender, which made him eligible for the death penalty.<sup>207</sup>

154. On 20 December 2006, the witness appeared before a Gacaca court in Gataraga sector on the same charges as mentioned. It ordered his release after imposing a sentence of 15 years of imprisonment with the last five converted to community service.<sup>208</sup> In connection with this proceeding, he wrote a letter to the Gacaca judges in September 2006 in which he

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<sup>203</sup> T. 27 August 2008 p. 2; Defence Exhibit 1 (statement of 21 April 1999); Defence Exhibit 3 (statement of 26 June 2000); Defence Exhibit 4 (statement of 24 September 2002); Defence Exhibit 5 (statement of 16 October 2002); Defence Exhibit 6 (statement of 17 March 2003); Defence Exhibit 7 (statement of 16 April 2003); Defence Exhibit 8 (statement of 15 July 2003); Defence Exhibit 9 (statement of 23 September 2003); Defence Exhibit 10 (statement of 28 March 2008).

<sup>204</sup> T. 27 August 2008 p. 2. Witness SAA has previously provided testimony against Juvénal Kajelijeli, Casimir Bizimungu, Jérôme Bicamumpaka and Augustin Bizimungu.

<sup>205</sup> Prosecution Exhibit 2 (confession and guilty plea of 12 August 2002); Prosecution Exhibit 3 (judgment of 20 December 2006); Prosecution Exhibit 4 (letter of 4 September 2006); Prosecution Exhibit 98 (judgment of 30 October 2008); Defence Exhibit 2 (judgment of 16 July 2008); Defence Exhibit 13B (confession and guilty plea of 10 September 2002); Defence Exhibit 238A (accused sheet of 12 February 2003); Defence Exhibit 239 (judgment of 30 October 2008).

<sup>206</sup> T. 25 August 2008 pp. 29, 31, 33; Prosecution Exhibit 2 (confession and guilty plea of 12 August 2002) p. 2; Defence Exhibit 13B (confession and guilty plea of 10 September 2002) p. 11.

<sup>207</sup> T. 25 August 2008 pp. 33-35, 46. There is no documentation in evidence supporting Witness SAA's testimony about this 2005 appearance before the Busogo Gacaca court. The death penalty was abolished in Rwanda in 2007 and replaced with life imprisonment. See *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC), 6 June 2008, para. 25.

<sup>208</sup> T. 25 August 2008 pp. 35, 42-43; Prosecution Exhibit 3 (judgment of 20 December 2006).

recanted prior statements and testimony to the effect that Juvénal Kajelijeli played a role in the genocide.<sup>209</sup>

155. According to the witness, he was not released on orders from the Gataraga proceeding because the Gacaca court in Busogo sector objected to that judgment. On 16 July 2008, the Busogo court sentenced him to life imprisonment.<sup>210</sup> In the witness's view, it imposed this severe sentence because it had been manipulated by persons associated with Setako, Nzirorera, Kajelijeli and Augustin Bizimungu that were present at his trial.<sup>211</sup> The witness also insisted that Setako's Lead Counsel was present, wearing a hat that covered his face.<sup>212</sup>

156. In the Chamber's view, several aspects warrant further examination. First, Witness SAA is an alleged accomplice of Setako, and he was serving a life sentence for crimes committed in Rwanda at the time of his testimony. In his view, this severe sentence resulted from the manipulation of Setako and others in the Rwandan judicial process. The potential, therefore, exists that the witness's testimony may be influenced by a desire to positively impact his circumstances in Rwanda or to shift blame to Setako either to minimize his own involvement or based on the belief that Setako was behind his increased sentence. The sentence was subsequently reduced on appeal to 20 years after his testimony in the present case.<sup>213</sup>

157. A review of his trial and appeal judgments from July and October 2008, respectively, offers no substantiation either for the proposition that Setako influenced his earlier verdict or that it was reduced based on the witness's cooperation with the Prosecution in this case.<sup>214</sup> Moreover, as a general matter, both the Chamber and the Prosecution have already accepted that Setako's Lead Counsel did not attend Witness SAA's trial before the Gacaca court in Busogo.<sup>215</sup>

158. Second, Witness SAA has implicated Kajelijeli in criminal conduct in his Rwandan confession and guilty plea from August and September 2002, nearly every one of his nine statements to Tribunal investigators from April 1999 to March 2008 and before the Tribunal in a number of cases. It is notable, therefore, that the witness asserted in a letter of September 2006 before a Gacaca court that Kajelijeli was not involved in any crimes during the relevant events. This letter made no mention of Setako. When this letter was put to the witness in the present case, he stated that he had been promised by Kajelijeli's brother that, if he made such a statement, he would be freed by the Gataraga court. Before the Chamber, he disavowed that recantation as untrue and explained that he made it only so that he could be released.<sup>216</sup> He

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<sup>209</sup> T. 25 August 2008 pp. 47-48; Prosecution Exhibit 4 (letter of 4 September 2006).

<sup>210</sup> T. 25 August 2008 pp. 46-47, 50; Defence Exhibit 2 (judgment of 16 July 2008).

<sup>211</sup> T. 25 August 2008 p. 47.

<sup>212</sup> T. 28 August 2008 p. 28. Witness SAA also stated that Joseph Nzirorera's counsel was present at his trial. T. 25 August 2008 p. 47.

<sup>213</sup> Prosecution Exhibit 98 (judgment of 30 October 2008).

<sup>214</sup> Defence Exhibit 2 (judgment of 16 July 2008). The relevant excerpt of this judgment in Kinyarwanda was interpreted in court. See T. 27 August 2008 pp. 17-18 ("Also, after having exercised its discretion, finds that the Accused entered a guilty plea, but that it is entirely unfounded because he only partially confessed, the Court sentences the Accused to life imprisonment ... "); Prosecution Exhibit 98 (judgment of 30 October 2008). His sentence was reduced to 20 years of imprisonment, which is still higher than the sentence imposed by the jurisdiction in Gataraga sector.

<sup>215</sup> T. 28 August 2008 pp. 29-30; Decision on Defence Motion to Vary Its Witness List (TC), 25 May 2009, para. 15.

<sup>216</sup> T. 25 August 2008 pp. 48-50; T. 28 August 2008 pp. 31-32.

made it only to gain leniency before the Gataranga court at the urging of Kajelijeli's brother. He did, in fact, receive leniency until the Busogo jurisdiction objected.

159. In view of this explanation, the Chamber is not convinced that the September 2006 letter alone in any way invalidates the substance of his statements and testimony against Kajelijeli, who is an alleged co-perpetrator of Setako. It may have been influenced by a desire to obtain release at any cost. This situation reinforces the susceptibility of the witness to pressure and influence based on his personal circumstances.

160. Although these general concerns indicate a need to scrutinise Witness SAA's evidence closely, they do not alone suggest that the substance of his testimony against Setako is unreliable. The Chamber will now turn to its assessment of his account of the meeting at the home of Nzirorera's mother on 7 April.

161. There are differences between Witness SAA's testimony about the meeting of 7 April and Setako's participation in it and his first five statements to Tribunal investigators. The witness offered several reasons for not mentioning Setako or the meeting of 7 April in his earlier statements. Specifically, he had not been asked about particular individuals, had not yet confessed or pleaded guilty in Rwanda to offences connected to some of them, and wanted to shield himself from criminal responsibility.<sup>217</sup> The Chamber will examine each of the statements to determine whether these explanations are reasonable.

162. The witness's first three statements to Tribunal investigators from April 1999, June 2000 and September 2002 mention neither Setako nor the meeting held at the home of Nzirorera's mother.<sup>218</sup> The absence of any reference to Setako may reasonably have resulted from the investigators' focus on Kajelijeli, Nzirorera and Augustin Bizimungu. However, it is significant that these statements do not mention the meeting of 7 April 1994, even though, according to the witness's testimony, it was central to the ensuing killings. As the witness indicated, this likely results from his desire to shield himself from criminal liability. This impulse, however, does raise questions about his credibility.

163. Witness SAA's fourth statement to Tribunal investigators from October 2002 concerns Setako.<sup>219</sup> Like the first three statements, it does not refer to the meeting of 7 April, which initiated the killings. This is notable because the statement places Setako at regular Saturday meetings from January to April 1994, where the extermination of Tutsis was discussed.<sup>220</sup> It is not easy to understand why the 7 April meeting is not mentioned in this statement. In the Chamber's view, it cannot be reasonably justified as an attempt by the witness to distance himself from the crimes since he acknowledged murdering a Tutsi on Setako's orders after participating in a purported planning meeting in February 1994.

164. The meeting of 7 April surfaces for the first time in the witness's fifth statement, given some five months after the previous statement, in March 2003. Setako is not mentioned as one of the participants. The statement is primarily about Jérôme Bicamumpaka and

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<sup>217</sup> T. 27 August 2008 pp. 3, 13-14, 23, 40.

<sup>218</sup> Defence Exhibit 1 (statement of 21 April 1999); Defence Exhibit 3 (statement of 26 June 2000); Defence Exhibit 4 (statement of 24 September 2002).

<sup>219</sup> Defence Exhibit 5 (statement of 16 October 2002).

<sup>220</sup> The Chamber notes that the fourth statement mentions meetings at Joseph Nzirorera's house between January and April 1994, the killing of Bernard Bajyagahe in February, and Setako ordering on 11 April the killing of all Tutsis in Ruhengeri prefecture.

Casimir Bizimungu.<sup>221</sup> This may explain why the witness would not mention Setako's participation in the event. That said, Setako is included in the context of other meetings mentioned in the statement.<sup>222</sup> The witness's testimony also ascribes a prominent role to him giving the opening speech. Consequently, his explanations for this omission are not entirely convincing. Descriptions of the meeting of 7 April consistent with the witness's testimony can be found in his sixth, seventh and eighth statements to Tribunal investigators from April, July and September 2003. For example, each one indicates that Setako was present, and his statement from April 2003 notes that Setako presided over the meeting and that Augustin Bizimungu acted as its secretary.<sup>223</sup>

165. In the Chamber's view, these differences alone do not warrant the rejection of Witness SAA's account of the meeting of 7 April even though in some cases they are problematic. However, when considered together with the general concerns noted above related to his status as an accomplice and criminal history in Rwanda, they raise questions about the credibility of this aspect of his testimony.<sup>224</sup> Consequently, the Chamber declines to rely on the specific details of the witness's account of Setako's participation in the meeting in the absence of adequate corroboration.

166. Turning to corroborating evidence, Witness SAM provided a first-hand account of Setako arriving at the home of Nzirorera's mother in the evening of 6 April and of observing him later that night. Like Witness SAA, he provided testimony on more than one event. Therefore, the Chamber will first address the more generally applicable issues surrounding his credibility before turning to his specific evidence about this event.

167. At the time of his testimony, Witness SAM was serving a sentence for participating in the attacks following the meeting of 7 April. He is thus an alleged accomplice of Setako. These circumstances may have influenced his testimony in order to positively impact his situation in Rwanda or to shift blame to Setako. Another concern is that the witness gave a detailed account about Setako's Lead Counsel visiting him in prison about two months prior to his testimony and asking him to change his statements and to testify for the Defence.<sup>225</sup> According to the witness, he rejected the offer because "[he] was a man of truth",<sup>226</sup> The Chamber accepted that Setako's Lead Counsel did not speak with the witness.<sup>227</sup> These matters reflect the need to approach the witness's evidence with caution.

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<sup>221</sup> The description of the meeting of 7 April 1994 in the fifth statement also varies from Witness SAA's testimony. The statement suggests that Juvénal Kajelijeli, Joseph Nzirorera, Casimir Bizimungu and Augustin Bizimungu addressed a group of militiamen around 10.00 p.m. on 6 April. According to the witness's testimony, Kajelijeli was not present, and the meeting was a more private gathering of prominent persons and local authorities held around 2.00 a.m. on 7 April. The *Interahamwe* remained outside.

<sup>222</sup> It is noted that the fifth statement mentions Setako participating in a meeting in March at Joseph Nzirorera's house and meetings and the home of Nzirorera's mother from January 1994. Defence Exhibit 6B (statement of 17 March 2003) pp. 5-6.

<sup>223</sup> Defence Exhibit 7A (statement of 16 April 2003) pp. 3-4; Defence Exhibit 8A (statement of 15 July 2003) p. 4; Defence Exhibit 9B (statement of 23 September 2003) p. 3.

<sup>224</sup> The Chamber has identified similar problems with other parts of Witness SAA's testimony, namely the killing of Bernard Bajyagahe (II.2); the attack on Ruhengeri Court of Appeal (II.3.5); and the installation of Juvénal Kajelijeli as *bourgmestre* (II.5).

<sup>225</sup> T. 11 September 2008 p. 47; T. 12 September 2008 pp. 9-12; T. 16 September 2008 pp. 21-23.

<sup>226</sup> T. 12 September 2008 p. 12.

<sup>227</sup> Decision on Defence Motion to Vary Its Witness List (TC), 25 May 2009, para. 15 ("The Chamber notes that the evidence of these four witnesses does not relate to allegations against Setako but to the credibility of certain aspects of the testimony of the two Prosecution witnesses concerning the Defence team. Their assertions have



168. As set forth above, Witness SAM testified that he saw Setako and Kajelijeli arrive at the home of Nzirorera's mother around 8.00 p.m. on 6 April. The witness and Kajelijeli then separately left the area, and the witness returned inebriated around 1.00 a.m. in the early morning of 7 April. He stayed at the house briefly, but just long enough to see Setako attending a meeting with a number of other persons. The witness, however, did not closely follow what was transpiring. Nzirorera's mother summoned him early the next morning and asked him to assemble others. Kajelijeli then distributed weapons at the Byangabo trading centre and initiated the killings in the area.

169. The witness's first statement from September 2002 primarily focuses on Kajelijeli and Augustin Bizimungu. It mentions other accused, including Nzirorera and Casimir Bizimungu, but not Setako. The statement indicates that, around 1.00 a.m. on 7 April, the witness, who was working nearby, spoke with Nzirorera's mother. She confirmed the death of President Habyarimana. After speaking with someone on the telephone, she told the witness to organise his friends and await instructions. An hour later, Augustin Bizimungu, Kajelijeli and others then told the *Interahamwe* that Bizimungu had spoken with Nzirorera over the phone and that they had decided to eliminate all the Tutsis.<sup>228</sup>

170. Witness SAM's second statement to Tribunal investigators from November 2002 focuses on Setako. Although given less than two months after the first statement, it provides a different version of the relevant events. According to the statement, Setako was at the home of Nzirorera's mother in the company of Kajelijeli around 8.00 p.m. on the night of 6 April. Setako then told 80 *Interahamwe* gathered there that he and Kajelijeli had agreed to provide them with weapons from a nearby military installation. After this, at around 1.00 a.m., the witness heard the news of the death of President.<sup>229</sup>

171. The key differences between Witness SAM's testimony about the night of 6 to 7 April and his first statement include the omission of Setako and Augustin Bizimungu's early morning address to the *Interahamwe*.<sup>230</sup> The first statement also conveys the impression that the killings on 7 April were initiated, not by a meeting held at the house that night, but by a phone call from Nzirorera to Bizimungu. The second statement varies from the witness's testimony in that Setako and Kajelijeli addressed the *Interahamwe* in the evening of 6 April.

172. Witness SAM was cross-examined on the omission of Setako in the first statement. Even though this could have reasonably been explained by the statement's focus on Kajelijeli and Augustin Bizimungu, he stated that it resulted from a fear for his personal and family's safety since he had been threatened with death by a member of Setako's family. After the

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been rejected by Lead Counsel, who is an officer of the court. Under these circumstances, the Chamber finds no need for evidence from these Defence witnesses. A propensity to lie about these matters will not necessarily lead to a rejection of the entire testimony of these Prosecution witnesses. It will be for the Chamber to assess their credibility at the end of the trial, in light of all available evidence.”), citing T. 12 September 2008 pp. 10-11.

<sup>228</sup> Defence Exhibit 39A (statement of 26 September 2002) pp. 4-5.

<sup>229</sup> Defence Exhibit 40A (statement of 13 November 2002) p. 4.

<sup>230</sup> The Chamber also notes that, according to Witness SAM's statement, he was on duty working in the area. This formed the basis of his being summoned to the house of Nzirorera's mother. In his testimony, however, at the relevant time, he had already finished work and was summoned from a drunken sleep. This difference might be explained by an initial desire to bolster the reliability of this aspect of his account with Tribunal investigators. The Chamber does not consider it to be a material discrepancy.

Tribunal investigators assured him of the statement's confidentiality and his safety, he was able to mention Setako two months later in his second statement.<sup>231</sup>

173. In certain circumstances, a witness's legitimate security concerns could justify withholding information from investigators. There are several reasons, however, to suspect that this is not the case here. As a general matter, witness statements taken by Tribunal investigators are kept confidential and redacted until adequate protection measures are in place.<sup>232</sup> It is difficult to imagine that this was not conveyed to Witness SAM until the second statement was taken. The Chamber further observes that the witness's security concerns did not prevent him from mentioning other prominent individuals in his first statement, such as Kajelijeli and Nzirorera, whom the witness equally claimed could not be accused for fear of retaliation.<sup>233</sup> Consequently, the Chamber does not find convincing the witness's explanation for the discrepancy between his testimony and his first statement.

174. The questions raised by this omission are only reinforced by the discrepancies between the two statements as well as his testimony. For example, the second statement indicates that Setako and Kajelijeli addressed the crowd of *Interahamwe* on the night of 6 April. This conflicts with the witness's account at trial of him and Kajelijeli leaving the house at that time as well as his first statement according to which nothing happened until after 1.00 a.m. The Chamber has accorded these differences less weight since Witness SAM was not cross-examined on them. However, in light of the totality of concerns, the Chamber does not consider Witness SAM's testimony about Setako's participation in the meeting credible.<sup>234</sup> It therefore does not provide adequate corroboration for Witness SAA's account.

175. Turning next to Witness SMA's evidence, he observed Setako leaving the home of Nzirorera's mother around 7.00 a.m. on 7 April as part of a convoy of vehicles. Setako stopped briefly at the Byangabo trading centre before continuing in the direction of Mukamira camp. The witness did not participate in the killings, and many of the main features of his evidence appear credible. There are, however, differences between his testimony and his early statements to Rwandan authorities and Tribunal investigators that require consideration.

176. As a general matter, Witness SMA admitted to lying to Rwandan authorities in a sworn statement from January 1999 about the events of 7 April at the Byangabo trading centre.<sup>235</sup> In the statement, he provided a false account of the actions of one of his relatives, who was implicated in the killings, with respect to the possession of a weapon. Initially, he

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<sup>231</sup> T. 16 September 2008 pp. 5-6, 8-10.

<sup>232</sup> See *Simba* Trial Judgement para. 195 ("The witness's security concerns are perhaps understandable in connection with his public statements to Rwandan authorities. However, these concerns are not equally applicable to statements given to Tribunal investigators, which are routinely placed under seal with all identifying information redacted until shortly before trial.").

<sup>233</sup> T. 16 September 2008 pp. 6, 9-10.

<sup>234</sup> The Chamber has identified similar problems with other parts of Witness SAM's testimony in connection with the attack on Ruhengeri Court of Appeal (II.3.5). After closing arguments, the Defence filed a request to vary witness protection measures so that it could meet with Witness SAM. In support, it attached a letter from the witness to the Tribunal, provided by Lead Counsel for Joseph Nzirorera, indicating that he wished to recant his testimony against Setako and other accused. See Extremely Urgent Setako Defence Motion for Authorization to Contact a Protected Witness and Related Orders, 10 December 2009. In the Chamber's view, the motion is moot in light of its findings on the witness's credibility.

<sup>235</sup> T. 10 September 2008 p. 55; T. 11 September 2008 pp. 4-5; Defence Exhibit 38 (*pro justitia* statement of 26 January 1999).

denied saying anything about this until confronted with his prior statement.<sup>236</sup> He then justified it as an attempt to protect his family member.<sup>237</sup> He also gave a misleading account of the death of Rukara, which indicates that he attempted to intervene to save him. He initially denied any memory of giving the statement. Finally, he explained that those interviewing him were Rukara's relatives and that he had wanted to avoid any possibility of being implicated in his death.<sup>238</sup>

177. The Chamber is not convinced that these issues greatly impact his overall credibility. That said, he initially feigned any recollection of providing the statement before giving a detailed explanation of the circumstances surrounding it. He also made the false statements in a sworn document. In the Chamber's view, these differences are not directly material to Setako's role in the events. The witness's explanations for intentionally providing wrong information to Rwandan authorities are understandable.

178. Turning to Witness SMA's statements to Tribunal investigators, the Chamber notes that his first statement from June 2000 does not mention Setako or the convoy of vehicles leaving the home of Nzirorera's mother in connection with what happened at the Byangabo trading centre on the morning of 7 April.<sup>239</sup> His second statement from November 2003 offers only additional details about Nzirorera and focuses on events ending in January 1994.<sup>240</sup> The reference to Setako passing briefly through Byangabo trading centre on 7 April appears for the first time in his third statement of May 2004.<sup>241</sup> Witness SMA explained the omission of Setako in his earlier statements by saying that they focused solely on the activities of Kajelijeli and Nzirorera.<sup>242</sup> The Chamber considers this explanation reasonable.<sup>243</sup>

179. There is, however, a notable difference between Witness SMA's account of the convoy and the other evidence. He alone among the 10 Prosecution and Defence witnesses in the vicinity of the Byangabo trading centre that morning observed a convoy of prominent

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<sup>236</sup> T. 10 September 2008 pp. 54 ("Q. Didn't you also say that your relative ... refused to give his weapon up that he was holding in his house? A. I never said any such thing. You are putting words in my mouth, words that I did not say, Counsel."), 55.

<sup>237</sup> *Id.* p. 55 ("It is true that I made such a statement at the Ruhengeri prosecutor's office, but I would like to explain to the Chamber what prompted me to make such a statement. As you have said, [the individual] is a kinsman ... if I said that [he] refused to hand over his weapon to be used in the massacres of Tutsi, it was a lie. I did not want people to understand that his weapon had been used in killing Tutsi. So those are lies that I deliberately made; however, I acknowledge that I was the one who made the statement to the Ruhengeri prosecutor's office."); T. 11 September 2008 p. 5.

<sup>238</sup> T. 10 September 2008 pp. 56, 58; T. 11 September 2008 p. 5.

<sup>239</sup> Defence Exhibit 34 (statement of 26 June 2000).

<sup>240</sup> Defence Exhibit 35 (statement of 20 November 2003).

<sup>241</sup> Defence Exhibit 36A (statement of 24 May 2004) pp. 3-4.

<sup>242</sup> T. 10 September 2008 pp. 44-45; T. 11 September 2008 p. 6.

<sup>243</sup> The Chamber notes that the first statement from June 2000 contains a brief reference to Augustin Bizimungu preventing an attack launched by Juvénal Kajelijeli. Defence Exhibit 34B (statement of 26 June 2000) p. 4, which reads in pertinent part: "Kajelijeli and Michel Niyigaba dispatched the *Interahamwe* to Nyakinama campus to kill Tutsi and Hutu professors from the south. When Lt. Colonel Bizimungu heard this, he ordered the soldiers on guard duty at the campus to shoot the *Interahamwe* if they attacked the professors. The *Interahamwe* abandoned their extermination plan."). The Defence, therefore, raised the question as to why the witness then did not equally mention Setako and other prominent military and government authorities leaving the home of Joseph Nzirorera's mother. T. 10 September 2008 pp. 44-46. In view of the passing reference to Bizimungu, as the witness indicated, the Chamber is not persuaded that the first statement was intended to be an all-encompassing statement.

personalities leaving the home of Nzirorera's mother and saw Setako stop briefly to speak with some of those assembled there.

180. Defence Witnesses MAP, MAT and MCR specifically denied that there was any activity at the home of Nzirorera's mother or that any vehicles departed from it on the morning of 7 April. The Chamber notes the personal ties that Witness MAP had with the Nzirorera family as well as Witness MCR's admission that he had previously lied during Gacaca proceedings.<sup>244</sup> Their evidence, however, finds support from Prosecution Witnesses SAW and SAQ, who also did not see any officials leaving the house that morning, although they did not exclude the possibility. Witnesses SQG and SAP testified generally about the events at the trading centre but did not mention the convoy or Setako's presence there.

181. In addition, the Chamber notes that Witness SMA's account also differs from the evidence it is intended to corroborate. Witness SAM, who was allegedly summoned by Nzirorera's mother to the house before 7.00 a.m., indicated that there were no officials at the residence. Furthermore, Witness SAA stated that Augustin Bizimungu arrived at the commune office around 7.30 a.m. with weapons from Mukamira camp. Although this is not entirely incompatible with Witness SMA seeing him depart the home of Nzirorera's mother around 7.00 a.m., it nonetheless raises some questions.

182. This evidence alone is not dispositive of whether a meeting was held on the night of 6 to 7 April, in light of credibility concerns, the possibility that officials left earlier, varying vantage points as well as the chaotic circumstances prevailing at the Byangabo trading centre that morning. The existence of a convoy of high-ranking officers and other prominent persons travelling through the trading centre and Setako stopping briefly to speak with some of those present remains a significant occurrence. In this context, it is surprising that only one of 10 witnesses in the area observed it. In the Chamber's view, this raises doubt about whether Witness SMA saw Setako around 7.00 a.m.

183. The alibi evidence of Setako remaining in Kigali during this period carries only limited weight (II.3.6.1).

184. In sum, the Chamber acknowledges that the evidence of Setako's participation in a meeting of 7 April at first sight appears corroborated and compelling. The Chamber, however, does not find credible Witness SAA's account of Setako's role in it. The corroborating evidence of Witness SAM is equally problematic. Witness SMA is more credible, but the Chamber has some doubts about his sighting of Setako on the morning of 7 April when weighed together with the totality of the evidence. Although there is a lingering suspicion of Setako's involvement in such a meeting, this is not a substitute for proof beyond reasonable doubt.

185. Accordingly, the Chamber finds that militiamen killed hundreds of Tutsis and looted their property in Rwankeri *cellule* and at the Busogo parish. The Prosecution, however, has not proved beyond reasonable doubt that Setako played a role in initiating these crimes during the meeting of 7 April, as pleaded in the Indictment. In view of these findings, it is not necessary to address the possible role played by the other accused mentioned by the various witnesses, which either have been or will be adjudicated in their own trials.

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<sup>244</sup> Witness MAP, T. 21 May 2009 p. 49; Witness MCR, T. 15 June 2009 pp. 32, 34-41.

### 3.2 Meeting at Rukabu's House, 7 April, and Subsequent Killings

#### *Introduction*

186. The Indictment alleges that, on the morning of 7 April 1994, at a meeting held at Rukabu's house in Nkuli commune, Setako incited *Interahamwe* and civilians to search for and kill Tutsis in their areas. It is submitted that Setako further promised and, in fact, provided more weapons for this purpose. Shortly after the meeting, armed Hutus from Nkuli, along with soldiers, killed Tutsis in Mukamira, Kabera and Gitwa sectors, and looted and destroyed their property. Reference is made to Witnesses SDA and SAL.<sup>245</sup>

187. The Defence disputes the allegations. Setako was in Kigali on 7 April 1994 (II.3.6.1). It relies on Witnesses NDU and NDX.<sup>246</sup>

#### *Evidence*

##### Prosecution Witness SDA

188. On the morning of 7 April 1994, Witness SDA, a Hutu living in Nkuli commune, was directed by Nkinzingabo, a member of the *cellule* committee, to attend a meeting at the residence of a trader called Rukabu in Rugeshi *cellule*, Mukamira sector. The house was in a compound, bordered by a stone wall. Rukabu was Setako's brother and lived near him. The meeting was organised by Setako and Colonel Augustin Bizimungu and started around 8.30 a.m. Over 100 members of the population attended. The witness was about five metres away from Bizimungu, who spoke first. He said that the President's plane had been shot down by the Tutsis, and that all Tutsis in Mukamira should be killed, evoking the metaphor of a cactus that had been pulled out by all of its roots so that it could no longer germinate.<sup>247</sup>

189. Setako then told those present to find and kill all the Tutsis in the area and destroy their houses. The meeting lasted for about 20 minutes. Setako and Bizimungu left together at about 9.00 a.m. in a green military jeep, but the witness did not notice in which direction they went.<sup>248</sup>

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<sup>245</sup> Indictment paras. 36-37, 63-64, 66-68; Prosecution Closing Brief paras. 87-89, 91, 161, 167, 170; T. 5 November 2009 pp. 14, 22-23. The Chamber also summarises the pertinent evidence of Witness SAG here.

<sup>246</sup> Defence Closing Brief paras. 145-146, 151, 165-166, 195, 325-335; T. 5 November 2009 pp. 44-46. The Defence refers to the evidence of Expert Witness Bert Ingelaere, which the Chamber sets forth elsewhere (I.2.4), but takes into account here. The Chamber also considers Witness NDW to have provided relevant testimony.

<sup>247</sup> T. 22 September 2008 pp. 37-40, 43, 75, 78; T. 23 September 2008 pp. 2, 5, 7-8, 14, 25; Prosecution Exhibit 26 (personal identification sheet). Witness SDA has twice confessed and been convicted by Gacaca courts. On 24 March 2005, at the Mukamira sector Court, he pleaded guilty to killing Tutsis, looting, destruction of property and theft of cattle. He was sentenced to eight years and six months of imprisonment. On 10 July 2007, in the Rugeshi *cellule* court, he received three months of imprisonment for lying to the Court. The witness identified Setako in court. T. 22 September 2008 pp. 26-34, 45, 71; Prosecution Exhibit 27 (confession and guilty plea of 14 July 2003); Prosecution Exhibit 27 (undated confession and guilty plea); Prosecution Exhibit 29 (judgment of 24 March 2005); Prosecution Exhibit 30 (judgment of 10 July 2007). Witness SDA claimed that Augustin Bizimungu said: "If you have to go and cultivate in an area where there is a cactus plant [*igusora* in Kinyarwanda], you must uproot it, take out all the roots so that that plant can no longer germinate." T. 22 September 2008 p. 39.

<sup>248</sup> T. 22 September 2008 pp. 38-40, 43, 78-79; T. 23 September 2008 pp. 1, 5.

190. Based on the orders received at the meeting, the witness and over 100 others armed with guns, machetes, clubs and spears, including soldiers with rifles, began to kill Tutsis in Rugeshi *cellule*. Among the attackers were Rukabu, Serukato, and Jean de Dieu Harerimana. Within one hour, about 300 persons were killed, some in front of the house of a certain Mahaya. Among the victims was the family of Kayumbu, who lived next to Rukabu. The witness participated in the killings of several persons, including the wife and children of Gashunguru, a woman called Nyiragwimo and another named Nyiramariza. Nyiragwimo and Nyiramariza were related to a Tutsi woman named Rachel, who was subsequently killed by Setako on 8 April (II.3.4). The witness and others also looted and destroyed property in light of the orders they had received. In particular, they killed a cow that belonged to Kayumba.<sup>249</sup>

#### Prosecution Witness SAL

191. Witness SAL, a Tutsi student, lived in Rugeshi *cellule*, not far away from the house of Rukabu, a Hutu trader. On 7 April 1994, sometime after 7.30 a.m., he was at home with members of his family when he saw Hutus with clubs and machetes entering and leaving Rukabu's house. He could not look directly into that compound because it was surrounded by a high wall. Around 8.30 a.m., he heard gunshots and saw Tutsis running, prompting the witness to flee into a nearby eucalyptus forest. Between 9.30 and 10.00 a.m., he heard shouts and moved to another location where he observed *Interahamwe* kill two Tutsis, Ziragwira and Ibambasi, at the nearby Sodeparal roadblock as Setako was watching from near a military jeep (II.3.3). Fearing for his safety, he returned home and discovered that his family had left. During Gacaca hearings, the witness learned that his family had been killed on 7 April in the home of his uncle in Rugeshi *cellule*.<sup>250</sup>

#### Prosecution Witness SAG

192. On the morning of 7 April 1994, Witness SAG, a Tutsi, was at home in Mukamira sector, Nkuli commune. Sometime after 6.00 a.m., he saw *Interahamwe* coming from the direction of Mukamira camp passing by his house and going towards Rugeshi *cellule*. They carried firearms, clubs and machetes, and the witness believed that the firearms would have been provided to them by Setako, Lieutenant Hasengineza or Major Bizabarimana at the Mukamira military camp for the purpose of killing the Tutsis. The witness hid in his neighbour's home and saw through a window that some *Interahamwe* had returned to search for him later that day. He fled around 6.30 p.m. and observed that the *Interahamwe* had killed his cows. The witness did not see Setako that day and had not seen him since in early 1992.<sup>251</sup>

#### Setako

193. Setako testified that he was in Kigali on 7 April 1994 (II.3.6.1). He knew that Tutsis were killed in Nkuli and Mukingo communes that day, but he was not present.<sup>252</sup>

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<sup>249</sup> T. 22 September 2008 pp. 41-43, 45, 70; T. 23 September 2008 pp. 3-5, 12, 25-26.

<sup>250</sup> T. 25 September 2008 pp. 51-53, 58-62, 64-68; T. 26 September 2008 pp. 2-3; Prosecution Exhibit 37 (personal identification sheet).

<sup>251</sup> T. 23 February 2009 pp. 12-16; Prosecution Exhibit 48 (personal identification sheet).

<sup>252</sup> T. 25 June 2009 p. 44; T. 26 June 2009 p. 48.

Defence Witness NDU

194. Witness NDU, a Hutu secondary school student, lived in Rubaya *cellule*, Mukamira sector, near Setako's home in Nkuli commune. On the morning of 7 April 1994, the witness stood outside his home from 6.00 a.m. to 10.00 a.m. He had an uninterrupted view of Setako's house, which was empty, and he did not see Setako at all that day. A number of persons, including some armed with clubs, passed by the witness's house that morning, but he did not see any killings in his commune in April 1994.<sup>253</sup>

195. Rukabu's house was approximately 10 minutes' walk via a shortcut, and 20 minutes via the main road, from Setako's house. The witness did not know whether Rukabu lived there in April 1994, but heard that he had a store in Mukamira sector as well as a business in Gisenyi.<sup>254</sup>

Defence Witness NDX

196. Witness NDX, a Hutu tea plantation employee, lived in Rugeshi *cellule* about 15 minutes' walk from Setako's house in Nkuli commune. He had known Setako since 1970. The witness had also known Rukabu, a Hutu trader with a shop in the Mukamira business centre, until he moved to Gisenyi in January 1993. Rukabu's residence remained unoccupied between January 1993 and April 1994. The witness could not see that house from his own, which also was a 15-minute walk away. However, he stated that he knew what was happening there on a daily basis due to his position within the commune. In addition, when an incident took place in the *cellule*, someone would beat a drum to announce it to everyone.<sup>255</sup>

197. Around 8.30 a.m. on 7 April 1994, the Mukamira sector *conseiller*, Athanase Kabutura, came to the witness's house along with more than 20 others, including unemployed persons and *Interahamwe*. Some had firearms, while others had clubs and machetes. The witness believed that their firearms had come from the Mukamira military camp and had been distributed by the *conseiller*. Kabutura said that Habyarimana was dead, that the group had come from the Mukamira centre, and that they were going to kill Tutsis. According to the witness, the group had not come from Rukabu's home. If a meeting had been held there, the *conseiller* would have summoned him to attend it. The *conseiller* never mentioned Setako or Augustin Bizimungu.<sup>256</sup>

198. As soon as the assailants left the witness's house, they fired on Tutsis living a short distance from him in Rugeshi *cellule*. Others moved to Mutovu where the Mukamira camp was. The witness heard gunshots that day. He assumed that Tutsis were being killed because the President had died, but did not see it or participate in those killings.<sup>257</sup>

Defence Witness NDW

199. Witness NDW, a Hutu farmer, lived in Nkuli commune. She knew Rukabu, a trader, whose house in Nkuli commune was a 15 minutes' walk from her home. In 1993, Rukabu

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<sup>253</sup> T. 27 May 2009 pp. 15-16, 19-22, 30-31, 39, 62-63; Defence Exhibit 157 (personal identification sheet).

<sup>254</sup> T. 27 May 2009 pp. 35-36.

<sup>255</sup> T. 25 May 2009 pp. 26-29, 41, 43, 50; Defence Exhibit 150 (personal identification sheet).

<sup>256</sup> T. 25 May 2009 pp. 29, 35-37, 46, 50.

<sup>257</sup> *Id.* pp. 30, 35, 39.

moved to Gisenyi with his family to set up a shop and was not living in his home in Nkuli in April 1994. On 7 April, the witness stood outside her house from 9.00 until 11.00 a.m. and saw four persons being killed (II.3.4). Her husband, who is now deceased, participated in the looting of several properties that day.<sup>258</sup>

### *Deliberations*

200. There does not appear to be any dispute that killings occurred on 7 April 1994 in Nkuli commune. The critical issue for the Chamber is whether Setako was involved. Prosecution Witness SDA was the only person to testify that Setako, with Augustin Bizimungu, incited *Interahamwe* and others to kill Tutsis from the area and destroy their homes during a meeting at Rukabu's home in Rugeshi *cellule* between 8.30 and 9.00 a.m. on 7 April. The Chamber recalls that the witness is an alleged accomplice of Setako. He was sentenced, in March 2005, to eight-and-a-half years of imprisonment for genocide-related crimes that included killings and looting on 7 April 1994. Consequently, his evidence will be viewed with caution.

201. It is instructive to review aspects of Witness SDA's criminal proceedings in Rwanda when assessing his credibility. He gave conflicting accounts and confessions before Rwandan investigators and judicial authorities regarding crimes that occurred in Nkuli commune on 7 April 1994 and his participation in them. On 21 July 1995, the witness confessed to participating in the killing of a woman called Nyiragumiriza on 7 April 1994 and reaffirmed this admission at the Ruhengeri police brigade on 2 August 1995.<sup>259</sup> Three weeks later – on 23 August 1995 – he retracted his confession in a *pro justitia* interview with a Rwandan prosecutor.<sup>260</sup> He continued to deny his involvement in the killings on 7 April in a statement taken on September 1999 and maintained his innocence before a Rwandan court in December 2000.<sup>261</sup> Finally, in July 2003, the witness sent a letter to the Rwandan prosecutor's office, reaffirming his participation in the killing of Nyiragumiriza. He expanded the confession to include his participation in the killing of other persons on 7 April 1994.<sup>262</sup>

202. The witness explained that after initially admitting to his participation in the 7 April killing of Nyiragumiriza in 21 July and 2 August 1995, he retracted it before the Prosecutor's office on 23 August 1995 based on threats received from inmates and out of fear for his safety and that of his family.<sup>263</sup> In his 23 August 1995 statement, however, the witness

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<sup>258</sup> T. 22 May 2009 pp. 30-33; T. 25 May 2009 pp. 7, 11, 16; Defence Exhibit 149 (personal identification sheet). Witness NDW did not go to Rukabu's house on the morning of 7 April 1994. She testified that she knew that Rukabu had moved to Gisenyi because he was her neighbour.

<sup>259</sup> T. 22 September 2008 pp. 45-46, 49; Defence Exhibit 58 (handwritten transcription of interview of 21 July 1995, spelling the name as "Nyiragumiliza"). The date of 2 September 1995 on both the English and French versions is erroneously translated and should read as 21 July 1995. T. 22 September 2008 pp. 45-47. Defence Exhibit 59C (interview of 2 August 1995 with criminal investigation officer of Nkuli canton court). In the interview, Witness SDA stated only that he stood by while two other attackers hit Nyiragumiriza with machetes and thought about how he could save her, but did nothing. He stated that the authorities "forced us to commit the genocide".

<sup>260</sup> Prosecution Exhibit 60 (*pro justitia* statement of 23 August 1995).

<sup>261</sup> T. 22 September 2008 pp. 51-52; Defence Exhibit 61 (interview of 29 September 1999 before Council Chamber Judge); Defence Exhibit 62 (order by Rwandan court of 18 December 2000 for continued provisional detention).

<sup>262</sup> T. 22 September 2008 pp. 27, 49, 57-58; Prosecution Exhibit 27 (confession and guilty plea of 14 July 2003).

<sup>263</sup> T. 22 September 2008 pp. 49, 68.



testified that his prior confessions were elicited because he had been beaten.<sup>264</sup> Similarly, while testifying during the *Ndindiliyimana et al.* trial in 2005, he described being beaten in 1995 by “soldiers and ... the inspector of judicial police” and affirmed that he said this was why had previously confessed.<sup>265</sup> However, in the present trial, the witness denied that he had been beaten and that he had confessed because of it.<sup>266</sup> He later indicated that he had been beaten by co-detainees, but that the purpose was not to get him to confess.<sup>267</sup>

203. While the witness’s explanation that he had retracted his confession out of fear is understandable, it nonetheless raises concerns that external pressures may continue to influence his testimony in this trial. Moreover, his shifting explanations for why he initially confessed and then retracted it create doubts about his reliability in general. Furthermore, the witness was convicted in July 2007 by the Gacaca court in Rugeshi *cellule* for providing false testimonies in the trials of various accused.<sup>268</sup> While these issues do not necessarily undermine the substance of his testimony in this case, the Chamber considers that his evidence must be viewed with particular caution.

204. Turning to the merits of Witness SDA’s testimony, the Chamber notes that when he confessed to the 7 April 1994 killings in July 2003, he did not refer to the alleged meeting at Rukabu’s home or to Setako.<sup>269</sup> Upon first glance, this appears significant as the confession contains a narrative of the events that preceded the killings. The witness explained that he omitted that information out of fear of Setako’s family members, many of whom lived in his area.<sup>270</sup>

205. The Chamber notes that in Witness SDA’s 2 August 1995 confession about the killing on 7 April, he stated that authorities “forced us to commit the genocide”.<sup>271</sup> An undated letter “to prosecute General Bizimungu” bearing the witness’s fingerprint indicates that, on 7 April 1994, Bizimungu and Setako “passed an order to search for all Tutsis wherever they could be

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<sup>264</sup> Prosecution Exhibit 60B (*pro justitia* statement of 23 August 1995) p. 1.

<sup>265</sup> Defence Exhibit 65 (*Ndindiliyimana et al.*, T. 8 June 2005 p. 32).

<sup>266</sup> T. 22 September 2008 pp. 52 (“Q. Witness, when were you beaten? A. I’ve never been beaten.”), 53 (“Mr. President: Mr. Witness, were you at any point in time beaten? Is it true, what was said in the Bizimungu case? ... The witness: I have never been beaten.”).

<sup>267</sup> T. 22 September 2008 pp. 54-57.

<sup>268</sup> T. 22 September 2008 pp. 32-34, 71-72; Prosecution Exhibit 30 (transcript and Rugeshi *cellule* Gacaca judgment of 10 July 2007). When initially questioned about this conviction, Witness SDA explained that it resulted from his failure to compensate victims for the lootings for which he previously had been held responsible. T. 22 September 2008 pp. 32, 71. Only after further questioning did the witness acknowledge that his conviction involved providing false testimony. However, he again indicated that his penalty was related to his failure to repay victims. *Id.* pp. 33-34, 71-72. As noted by Defence counsel, the only infraction referred to as the basis for the witness’s conviction is that he knowingly providing false testimonies in various trials on various dates. Prosecution Exhibit 30B (transcript and Rugeshi *cellule* Gacaca judgment of 10 July 2007) pp. 3-4. When asked to comment on this, the witness failed to provide a meaningful response. T. 22 September 2008 p. 72.

<sup>269</sup> Prosecution Exhibit 27C (confession letter of 14 July 2003 to Rwandan prosecutor) p. 1. See also Defence Exhibit 63 (undated transcript of guilty plea, office of the Ruhengeri public prosecutor) and T. 22 September 2008 p. 58 (noting that after he confessed in July 2003, Witness SDA provided additional information to the Ruhengeri prosecutor’s office containing information about victims and co-perpetrators).

<sup>270</sup> T. 22 September 2008 p. 70; T. 23 September 2008 pp. 6-7.

<sup>271</sup> Defence Exhibit 59C (record of interview to Rwandan judicial investigation officer of 2 August 1995) p. 1.

... killed".<sup>272</sup> Furthermore, the witness's April 2004 statement to Tribunal investigators is generally consistent with his testimony.<sup>273</sup> Under the circumstances, the omission of the meeting or Setako's involvement in it in the witness's July 2003 confession does not appear material.

206. The witness testified that, at the time that his group arrived at Rukabu's house for the 7 April meeting, Setako and Bizimungu were already there. However, in the *Ndindiliyimana et al.* trial and in his April 2004 statement, he asserted that Setako and Bizimungu arrived after him.<sup>274</sup> The witness indicated that this was of no consequence.<sup>275</sup> In the Chamber's view, the difference is understandable. There has been a significant lapse of time between the 1994 events and his testimonies in the *Ndindiliyimana et al.* proceeding (2005) and this trial (2008), which may explain the discrepancy. In any event, it appears immaterial. However, the Chamber still views the witness with caution and will not accept his evidence absent adequate corroboration.

207. As circumstantial support for Witness SDA's evidence, Witness SAL saw armed Hutus entering and exiting Rukabu's home on 7 April, around the same time Witness SDA testified that the meeting occurred. Moreover, Witness SAL observed Setako near the Sodeparal roadblock (near to Rukabu's home) around 9.30 to 10.00 a.m., watching as *Interahamwe* killed two Tutsis there. Both witnesses saw Setako in the presence of a military jeep. Furthermore, Witness SAG saw armed *Interahamwe* walking in the direction of Rugeshi *cellule* that morning.

208. The Chamber is of the view that the testimonies of the other two Prosecution witnesses, even if accepted, are too indirect to corroborate Witness SDA's account. Witness SAL did not see into Rukabu's home or identify Setako as among those who had entered or left it. Moreover, and as discussed in greater detail elsewhere, the Chamber has reservations about Witness SAL's evidence about Setako's presence that morning at the Sodeparal roadblock (II.3.3). Witness SAG did not see Setako that day and had not seen him since early 1992.

209. Differences also emerge between Witness SDA's testimony and other evidence. For example, Witness SDA stated that Rukabu took part in the 7 April killings, whereas Witness SAL asserted that Rukabu had died before 1994. Defence Witnesses NDW and NDX said that he had moved to Gisenyi.<sup>276</sup> Moreover, Witness NDX, a convicted killer,<sup>277</sup> testified that those who approached him to participate in the attacks of 7 April indicated that they had come from Mukamira centre. There was no mention of Setako or a meeting at Rukabu's house.

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<sup>272</sup> Prosecution Exhibit 28 (testimony to prosecute General Bizimungu). This document is signed by the prison director and was presumably written prior to Witness SDA's release from Ruhengeri prison on 25 March 2005. T. 22 September 2008 pp. 28-30.

<sup>273</sup> Prosecution Exhibit 32A (statement of 22 April 2004) pp. 3-4.

<sup>274</sup> Defence Exhibit 65 (*Ndindiliyimana et al.*, T. 8 June 2005 p. 23); Prosecution Exhibit 32A (statement of 22 April 2004) p. 3.

<sup>275</sup> T. 22 September 2008 p. 78.

<sup>276</sup> Witness SDA, T. 23 September 2008 p. 3; Prosecution Exhibit 27C (confession letter of 14 July 2003 to Rwandan prosecutor) p. 1. Witness SAL, T. 25 September 2008 p. 53. Witness NDW, T. 22 May 2009 pp. 32-33; T. 25 May 2009 p. 16. Witness NDX, T. 25 May 2009 pp. 28-29.

<sup>277</sup> Witness NDX pleaded guilty and was convicted for his role in killings. T. 25 May 2009 pp. 30-31.

210. The Chamber considers that the Defence evidence is of limited probative value. However, doubts remain about Witness SDA's testimony. The accounts of Witnesses SAL and SAG are insufficient to support it in establishing facts beyond reasonable doubt. Consequently, the Chamber does not find that Setako attended a meeting at Rukabu's home in Rugeshi *cellule* on 7 April 1994, wherein he instigated numerous persons to kill Tutsis and destroy their homes. The Chamber also finds the evidence insufficient to establish that Setako provided arms to persons who participated in attacks that day or that he was linked to the looting.

### 3.3 Killing of Ziragwira and Ibambasi, Nkuli Commune, 7 April

#### *Introduction*

211. The Indictment alleges that, on the morning of 7 April 1994, Setako instigated and encouraged *Interahamwe* to kill two Tutsi men called Ziragwira and Ibambasi, who had been arrested at the Sodeparal roadblock near his residence in Nkuli commune. Reference is made to Witnesses SAL, SDA and SAT.<sup>278</sup>

212. The Defence disputes the allegation and relies on Witnesses NDU, NBA, NDK, NDN and NDQ. It also refers to evidence that Setako was in Kigali on 7 April, and that Ziragwira and Ibambasi were killed elsewhere.<sup>279</sup>

#### *Evidence*

##### Prosecution Witness SAL

213. Witness SAL, a Tutsi student, lived near Setako's house in Nkuli commune. Around 8.30 a.m. on 7 April 1994, he saw armed Hutus walking in and out of Rukabu's house in Rugeshi *cellule* and subsequently heard gunshots. Fearing for his safety, he fled into a eucalyptus forest owned by Sodeparal. The company had a roadblock near its office and about 30 metres from Setako's home.<sup>280</sup>

214. Between 9.30 and 10.00 a.m., he heard cries for help and moved to approximately 25 metres from the Sodeparal roadblock, with an unobstructed view of it. There he saw Ziragwira, a farmer who lived in Kinyababa *cellule*, and Ibambasi, Mutware's son and a cattle herder who lived in Kagano *cellule*, being "killed with machete blows" at that barrier. Among the attackers were Abel Rwababisha (a farmer), Nkinzingabo (a member of the Rugeshi *cellule* committee), Boniface Semariza (a farmer), and Semikizi (a member of the Musumba *cellule* committee). Setako, dressed in military uniform, was also present, standing next to a military jeep and about 26 metres from the checkpoint on the road that led to his home. He did not intervene. The witness did not stay for long but testified that Ziragwira and Ibambasi were killed at the barrier.<sup>281</sup>

##### Prosecution Witnesses SDA and SAT

215. Witness SDA, a Hutu, saw Setako on 7 April 1994 in Rugeshi *cellule* from 8.30 to 9.00 a.m., addressing a meeting at Rukabu's house (II.3.2). On the same date, at around 12.30 p.m., Witness SAT, a Hutu, saw Setako at the Nkuli commune office, talking with

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<sup>278</sup> Indictment para. 52 (referring to "Bambasi"); Prosecution Closing Brief paras. 90-91 ("Ibambasi").

<sup>279</sup> Defence Closing Brief paras. 89-91, 145-145, 151, 165-166, 181-183, 195, 314-324 ("Ibambasi"); T. 5 November 2009 pp. 43-44. The Chamber will use "Ibambasi". The evidence of Expert Witness Bert Ingelaere, on which the Defence also relies, is discussed elsewhere (I.2.4), but taken into account here.

<sup>280</sup> T. 25 September 2008 pp. 50-51, 56-62; Prosecution Exhibit 37 (personal identification sheet). Sodeparal manufactured shoes. T. 25 September 2008 p. 56. The Prosecution also adduced evidence relating to the establishment of this roadblock in 1991. For the reasons set forth elsewhere (I.2.2.2), the Chamber will neither summarise nor consider this evidence here.

<sup>281</sup> T. 25 September 2008 pp. 60-65; T. 26 September 2008 pp. 2-4, 6, 12-13, 16-18.

Dominique Gatsimbanyi, the *bourgmestre* of Nkuli commune. The witness passed them on his way to a meeting of *Interahamwe* at the house of Kajelijeli's second wife.<sup>282</sup>

### Setako

216. Setako testified that he was not at the Sodeparal roadblock on 7 April 1994. On that day, he was in Kigali (II.3.6.1). He further stated that Ziragwira and Ibambasi were killed in their houses, and he referred to a Defence witness, who saw Ibambasi's corpse on 11 April.<sup>283</sup>

### Defence Witness NDU

217. Witness NDU, a Hutu student in 1994, had known Setako since he was young. From his house in Rubaya *cellule*, Gitwa sector, the witness could see Setako's residence, less than 100 metres away, and the Sodeparal roadblock. The barrier was made of green and white metal and located on a road leading to Sodeparal offices, about five metres from the tarmac road leading to Gisenyi. The roadblock was about approximately 80 metres from Setako's home. It had been established by the office director prior to 6 April 1994 with the aim of securing the premises and was manned by its civilian employees.<sup>284</sup>

218. On the morning of 7 April 1994, the witness stood in front of his house between 6.00 and 10.00 a.m. He could see the roadblock clearly. It was manned by civilians, including Nkenzabo and Migabo, armed with clubs and sticks, and gendarmes. The witness did not observe Setako at the checkpoint, and no one was killed there that morning. According to the witness, Setako was not at his house, which was empty during the month of April.<sup>285</sup>

219. Ibambasi, who was around 26 years old, was a neighbour and tended Mbaraga's cattle. Witness NDU did not see Ibambasi in April, but the witness's mother, who had attended the Gacaca trials, told him that Ibambasi was killed in Kagano, his home *cellule*. The witness also knew Ziragwira, who was an elderly man. He had heard that Ziragwira had been killed in his village, Kinyababa, together with his family, by attackers from Gitwa sector.<sup>286</sup>

### Defence Witness NDK

220. Witness NDK, a Hutu farmer, lived near Setako in Nkuli commune. Ibambasi, who was 18 years old in 1994 and the son of Mutware, was employed by Mbaraga, and the witness worked closely with Ibambasi. From 6 April, Ibambasi hid at the witness's home.

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<sup>282</sup> Witness SDA, T. 22 September 2008 pp. 37-38; T. 23 September 2008 pp. 1-2; Prosecution Exhibit 26 (personal identification sheet). Witness SAT, T. 18 September 2008 pp. 76-77; T. 19 September 2008 pp. 18-20; Prosecution Exhibit 22 (personal identification sheet). Witnesses SDA and SAT had been sentenced to imprisonment by Rwandan courts (see II.3.2 and II.4, respectively).

<sup>283</sup> T. 26 June 2009 pp. 41, 48.

<sup>284</sup> T. 27 May 2009 pp. 15-17, 19-20, 26, 28, 30-32, 35, 40-42, 44, 63; Defence Exhibit 157 (personal identification sheet).

<sup>285</sup> T. 27 May 2009 pp. 20-23, 30-32, 39, 42, 62-63. Witness NDU named three Sodeparal employees at the roadblock: Ndarifite, Sebuhinja and Rugombiture. On 7 April 1994, Nkenzabo and Migabo stood at the roadblock carrying a club and a stick, respectively. They did not work for Sodeparal and were not controlling the roadblock (in terms of allowing people to go in and out of Sodeparal; that was the task of the civilian guards). *Id.* pp. 31-33, 42.

<sup>286</sup> *Id.* pp. 24-25, 34, 37, 39, 61.

*Interahamwe* from outside the locality knew that Ibambasi was a Tutsi and threatened to search the witness's house, thinking that he was hiding there. When informed of this, Ibambasi decided to return to his own house to avoid them both being killed. He asked the witness to accompany him. On the night of 8 April, they went to the border of Jenda sector, where Ibambasi was from. Ibambasi then continued alone to his house there.<sup>287</sup>

221. During the Gacaca information gathering process in 2002, the witness learned that Ibambasi had arrived safely, but that he was clubbed to death by his neighbours in his home on 11 April. The distance between the Sodeparal roadblock and the area in which Ibambasi was killed was about three hours by foot. Initially, the witness was a suspect, but once he testified in his local Gacaca court, he was exonerated of the charge. In 2005 and 2006, the sons of Sebusasa were tried for the killing in Gacaca proceedings, but they fled before the case was closed. The witness did not attend but heard that they had confessed to killing Ibambasi in his home. Zimulinda, Ibambasi's brother, told the witness that he testified in the proceedings that Ibambasi was killed in Jenda sector.<sup>288</sup>

#### Defence Witness NDQ

222. Witness NDQ, a Hutu farmer from Kagano *cellule*, Jenda sector, Nkuli commune knew Ibambasi, the son of Mutware, well. Ibambasi was a shepherd for Stanislas Mbaraga in 1994. On his way to a church in Kagano on 11 April, between 9.00 and 10.00 a.m., the witness saw from about 15 metres away that Ibambasi had been removed from a house that was under construction by a large group of assailants. Amongst the assailants was Rugenera as well as Bazamanza, the son of Sebusasa. The assailants hit Ibambasi with clubs and led him to the farm of a man named Bagirubwira. Wanting to avoid problems, the witness entered the church. There, a woman named Mukakigeli told him that she had discovered Ibambasi in the house under construction and had pointed this out to Rugenera. They had then called in killers to catch Ibambasi.<sup>289</sup>

223. The witness later heard that Ibambasi had been killed on Bagirubwira's farm and buried him behind Butotagire's house. He was present at the site when Ibambasi's body was exhumed during the 11th anniversary of the genocide. Moreover, he attended the Gacaca trial between 2005 and 2007, where the accused were Mukakigeli, Rugenera, Bazamanza and Efasto Nkuliye, who was the *responsable* of Kagano *cellule*. Mukakigeli never appeared before the Court as she had fled to Zaire. Three were convicted and one acquitted. Setako's name was never mentioned during these hearings.<sup>290</sup>

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<sup>287</sup> T. 5 May 2009 pp. 53-58, 62, 65-67, 69-70; T. 6 May 2009 p. 13; Defence Exhibit 111 (personal identification sheet); Defence Exhibit 112 (name of Ibambasi); Defence Exhibit 113 (names of Ibambasi's parents: Mutware and Nyirarizize). Ibambasi's parents were deceased in 1994.

<sup>288</sup> T. 5 May 2009 pp. 60-62, 66-69; T. 6 May 2009 pp. 3-4, 20.

<sup>289</sup> T. 14 May 2009 pp. 3-4, 11-13, 30, 34, 39-43, 49-50, 52, 54; Defence Exhibit 127 (personal identification sheet). Witness NDQ was accused of murder and looting but was acquitted. T. 14 May 2009 pp. 23, 23, 26-27, 52-53. He knew Cyuya but had never seen his cattle and did not know that Ibambasi had been employed by him. T. 14 May 2009 pp. 36, 52.

<sup>290</sup> T. 14 May 2009 pp. 12-14, 42-44, 49-51, 53; Defence Exhibits 128-129 (Gacaca documents).

### Defence Witness NDN

224. Witness NDN, a Hutu farmer, was a neighbour of Ibambasi's father, Mutware, in Kagano *cellule*, Jenda sector, Nkuli commune. Ibambasi was around 20 years old in 1994 and a cattle herder for Mbaraga, who lived relatively far away in Rubaya *cellule*, Gitwa sector. Around 9.30 a.m. on 11 April, the witness was asked by a young man, Cyprién Rugenera, to assist in burying someone the witness was told had been killed that day. They accompanied 10 others to Nyarwayi village in Kagano *cellule*, where he saw Ibambasi's body near a house under construction on Mahugu's farm. He heard that Ibambasi had been flushed out from Mahugu's farm, chased and killed nearby. The witness and three others buried the body on another farm, under a concrete slab around 150 metres from the house of Sebusasa in Kagano *cellule*.<sup>291</sup>

225. Four persons were accused of Ibambasi's murder in the proceedings before the Gacaca Court in Jenda sector. Bazamanza, who was one of Sebusasa's sons, died before trial. Cyprién Rugenera, another of Sebusasa's sons, and the lady who flushed Ibambasi out of the bush, Mukakigeli, both fled. One of them disappeared before the trial and the other after being convicted. The fourth accused, a *responsable de cellule* named Efasto Nkuliye, was convicted and then acquitted on appeal. Those who had fled were convicted *in absentia*. The trial ended in late 2007 or early 2008.<sup>292</sup>

### Defence Witness NBA

226. Witness NBA, a Tutsi farmer related to Abraham Ziragwira, had sought refuge abroad because of threats before the genocide. Upon returning to Rwanda in August 1994, he discovered that his entire family had been killed. Two eyewitnesses, Appolinaire Biganire and Grégoire Haganirimfura, told him that on the morning of 7 April, they had seen assailants launching an attack on Ziragwira's house where about 86 Tutsis, including members of Ziragwira's family, had gathered. The Tutsis tried to resist, but around 6.00 p.m., the assailants, who had firearms and grenades, overcame and killed them.<sup>293</sup>

227. In a trial before the Ruhengeri Court of First Instance in 1999, Shadrack Sendugu, Augustin Habiyambere, Shadrack Nikobasanze and Migabo were amongst those accused of having killed Ziragwira's family. Habiyambere confessed to leading the attackers who went to Ziragwira's house and killed around 200 persons. Mpozembizi, who was among the accused, was acquitted.<sup>294</sup>

228. In 2003, the Gacaca court began investigating the attack on Ziragwira's home, and the trial commenced in 2005. An attacker named Javan Nungutsubwenge, who had thrown a grenade that injured Ziragwira, pleaded guilty during the proceedings. A woman called Alivera Murereramana testified that Ziragwira had been wounded by a grenade thrown into

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<sup>291</sup> T. 8 May 2009 pp. 3-5, 7-8, 11-12, 14-15, 21, 23-24; T. 11 May 2009 pp. 3, 8, 12-15; Defence Exhibit 122 (personal identification sheet). Witness NDN was convicted of genocide and sentenced to life imprisonment by the Ruhengeri Court of First Instance in June 1999 in the trial of *Nyirinkwaya et al.* and then released on appeal in February 2004. T. 11 May 2009 pp. 6-7, 15. He denied that he was related to Setako. T. 11 May 2009 p. 12.

<sup>292</sup> T. 8 May 2009 pp. 16, 18, 20-21, 25-27, 29-30; T. 11 May 2009 pp. 8.

<sup>293</sup> T. 4 May 2009 pp. 4, 7-9, 12, 14-17, 31, 41, 48-50, 52, 54; T. 5 May 2009 pp. 13, 14; Defence Exhibit 106 (personal identification sheet).

<sup>294</sup> T. 4 May 2009 pp. 17-18, 20-23, 49-52, 59-60; T. 5 May 2009 p. 13; Defence Exhibit 73 (judgment in the case of *Habiyambere et al.*).

his house during the 7 April 1994 attack but survived. She further stated that, on 8 April, a man called Mpozembizi entered Ziragwira's house and killed him by striking him on the head with a brick. Mpozembizi was found guilty by the Gacaca court and sentenced to 30 years of imprisonment. The witness was not aware of any court finding that Ziragwira was killed at Sodeparal, or that Witness SAL had testified about this in any proceedings.<sup>295</sup>

229. In 1995, the witness was present when bodies were exhumed. Ziragwira's body was taken from a latrine about 11 metres from his house and identified by his clothing. This was about one kilometre from the Sodeparal roadblock.<sup>296</sup>

### *Deliberations*

230. The Prosecution relies on the purported first-hand testimony of Witness SAL to establish that Ziragwira and Ibambasi were killed in Setako's presence at the Sodeparal roadblock on the morning of 7 April 1994. It further argues that Witnesses SDA and SAT corroborate his evidence, as they saw him in the area that day. The Defence led evidence that no killings occurred at the Sodeparal roadblock on the morning of 7 April, and that Setako was in Kigali that day (II.3.6.1). Moreover, several witnesses testified that Ziragwira and Ibambasi were killed after 7 April and not at that location.

231. Witness SAL's testimony was detailed and internally consistent. He was able to recognise Setako because he had lived near him and therefore used to see him.<sup>297</sup> Moreover, the Defence concedes that a roadblock existed near the Sodeparal offices, and the witness's ability to see it from the nearby eucalyptus forest has not been challenged.<sup>298</sup> Nonetheless, the Chamber notes that the witness considers Setako responsible for the killing of his father in 1992.<sup>299</sup> This may impact his impartiality, although nothing in his testimony suggests that he altered his evidence because of it. Moreover, the witness observed this event while fleeing for his life. Therefore, the traumatic nature of the events may have affected his observations.

232. The Prosecution argues that Witness SAL's evidence of Setako's presence in the vicinity of the Sodeparal roadblock finds circumstantial corroboration from Witness SDA's testimony that Setako attended a meeting at Rukabu's house earlier that morning. The locations appear to be a short distance from each other in Rugeshi *cellule*.<sup>300</sup> The Chamber recalls its doubts concerning the reliability of Witness SDA's testimony as it concerns Setako's involvement in that meeting (II.3.2). Similarly, Witness SAT's uncorroborated viewing of Setako near the Nkuli commune office around 12.30 p.m. that day fails to offer clear support of Setako's earlier presence near Sodeparal. On the other hand, the Chamber attaches limited weight to his alibi evidence for 7 April (II.3.6.1).

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<sup>295</sup> T. 4 May 2009 pp. 16-17, 19-24, 26, 48, 50-53, 55, 58, 60; T. 5 May 2009 pp. 6, 8.

<sup>296</sup> T. 4 May 2009 pp. 6, 25-27, 68-69; T. 5 May 2009 pp. 7, 12; Defence Exhibit 107 (sketch map).

<sup>297</sup> T. 25 September 2008 pp. 50-51.

<sup>298</sup> See, for example, Witness NDU, T. 27 May 2009 p. 16 ("there was a roadblock at the entrance into Sodeparal"); Witness NDK, T. 6 May 2009 p. 4 (the roadblock "was situated near the Sodeparal offices"). The Chamber notes that, on cross-examination, Witness NDK testified there was a wooded area in Rugeshi *cellule* referred to as Sodeparal, but that it was far from the Sodeparal roadblock. *Id.* p. 5. In re-examination, he said that the roadblock was about 200 metres from the wooded area owned by Sodeparal. *Id.* p. 18.

<sup>299</sup> T. 25 September 2008 pp. 55-57; T. 26 September 2008 p. 2.

<sup>300</sup> See Witness SAL, T. 25 September 2008 pp. 51-52, 57 (locations of Sodeparal roadblock and Rukabu's home); Witness SDA, T. 22 September 2008 p. 37 (Rukabu's home in Rugeshi *cellule*); Witness NDU, T. 27 May 2009 pp. 20, 35-36 (distances between Sodeparal roadblock, Rukabu's home and Setako's house).



233. Defence Witness NDU testified that he had a clear view of the roadblock from 6.00 to 10.00 a.m. on 7 April, and that nothing occurred there. His explanation concerning his position, which would have allowed him to see the barrier, is reasonable. Moreover, the Defence presented evidence that Ziragwira and Ibambasi were killed elsewhere. Considering first the killing of Ziragwira, Witnesses NBA and NDU heard that he had been killed when his home was attacked. Witness NBA was present during Ziragwira's exhumation from the pit latrine neighbouring his home, approximately one kilometre away from the Sodeparal roadblock.

234. The Chamber has no doubt that the Defence witnesses were referring to the same individual as Witness SAL.<sup>301</sup> He identified Ziragwira as a Tutsi farmer from Kinyababa *cellule* with a son named Bernard Kanyampogazi. Witness NBA confirmed that the individual he was testifying about had a son by that name.<sup>302</sup>

235. Documentary evidence tends to corroborate the accounts of Witnesses NBA and NDU that Ziragwira was killed at his home and not at Sodeparal roadblock. A confession in June 1998 from Augustin Habiyambere, a youth organiser in Nkuli commune, indicates that he participated in an attack at Ziragwira's house on 7 April 1994, and that Ziragwira and others died there as a result.<sup>303</sup> The Ruhengeri Court of First Instance appears to have convicted Habiyambere for Ziragwira's death based on this confession.<sup>304</sup> Witness NBA testified that, in subsequent Gacaca proceedings, an assailant acquitted by the Ruhengeri Court of First Instance – Mpozembizi – was accused of and convicted for entering Ziragwira's house on 8 April and killing Ziragwira, who had been injured in the attack the day before.<sup>305</sup>

236. The Chamber acknowledges the frailties in the Defence's hearsay evidence about Ziragwira's death and views it with caution.<sup>306</sup> Witness NDU and NBA did not observe Ziragwira's killing at his home. Habiyambere's confession and the records from the Ruhengeri Court of First Instance indicate that Habiyambere was involved in the killing of Ziragwira during an attack on 7 April, whereas Witness NBA testified that Mpombezi was convicted during subsequent Gacaca proceedings of killing Ziragwira at his home on 8 April. The differences among these hearsay accounts are, in the Chamber's view, of less

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<sup>301</sup> The Prosecution does not argue that Witnesses NBA and NDU referred to a different Ziragwira than Witness SAL.

<sup>302</sup> Witness SAL, T. 25 September 2008 p. 60; T. 26 September 2008 pp. 3-4. Witness NBA, T. 4 May 2009 p. 4.

<sup>303</sup> Defence Exhibit 68B (confession letter of 30 June 1998) p. 3, which reads: "All the above people attacked Ziragwira's house, killing him and his entire family." For Augustin Habiyambere's position in Nkuli commune, see Setako, T. 25 June 2009 p. 52 (youth leader); Witness SLA, T. 16 September 2008 p. 54 ("youth instructor or youth guidance person"); Witness NDU, T. 27 May 2009 pp. 59, 61 ("youth organiser").

<sup>304</sup> Defence Exhibit 73 (judgment in the case of *Habiyambere et al.*) paras. 7, 12, 267, 270-272, 277, 331, 336-337, 339, 366, 370-371. Witness NBA, who followed the proceedings, testified that Habiyambere admitted to leading the attack on Ziragwira's home and did not specify that he killed Ziragwira. T. 4 May 2009 pp. 17-18; T. 5 May 2009 p. 13.

<sup>305</sup> Defence Exhibit 73 (judgment in the case of *Habiyambere et al.*) para. 372, which acquits "Mpozembizi ... of the offences charged".

<sup>306</sup> See *Akayesu* Appeal Judgement paras. 286, 292 (hearsay evidence is admissible, and a Trial Chamber may consider its reliability and probative value in light of all available evidence).

significance. The Defence evidence uniformly reflects that the attack on Ziragwira's house started on 7 April, that he was present and that he was killed there.<sup>307</sup>

237. Before concluding about Ziragwira's death, the Chamber will consider the killing of Ibambasi. It is satisfied that the Defence witnesses testified about the same person as Witness SAL.<sup>308</sup> Witness SAL described him as the Tutsi son of Mutware. He was from Kagano *cellule* and herded cattle for Cyuya. The witness denied that Ibambasi worked for Stanislas Mbaraga, but he did not know Mbaraga.<sup>309</sup> Witnesses NDU and NDN stated that Ibambasi was from Kagano *cellule*, and Witnesses NDK, NDQ and NDN said that Mutware was his father. He was consistently described as a cattle herder and having worked for Mbaraga.

238. According to Witness NDK, Ibambasi hid in his home in Nkuli sector until 8 April, when he accompanied Ibambasi to the border of Jenda sector. On the morning of 11 April, Witness NDQ saw Ibambasi being led away by a mob, including Rugenera and Bazamanza, and heard from a woman named Mukakigeli that she had identified him to the killers. Witness NDN heard that Ibambasi had been killed in Kagano *cellule* and helped bury him on the morning of 11 April. Witnesses NDK and NDN stated that Mukakigeli, Rugenera, Bazamanza and Efasto Nkuliye were being tried in Gacaca proceedings for Ibambasi's death. This testimony finds some support from Rwandan judicial records, according to which Mukakigeli was charged and convicted for her involvement in Ibambasi's killing on 11 April in Kagano *cellule*.<sup>310</sup>

239. In the Chamber's view, the first-hand Defence witness testimonies, which are corroborated by Rwandan judicial documents, raise considerable doubt about Witness SAL's evidence that Ibambasi was killed at the Sodeparal roadblock on the morning of 7 April. This reinforces the Chamber's doubts that Ziragwira was also killed there at the same time.

240. Consequently, the Prosecution has not proved that Ziragwira and Ibambasi were killed in the presence of Setako at the Sodeparal roadblock on 7 April 1994.

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<sup>307</sup> The Chamber also considers that Witness NBA provided further circumstantial support that Zirigwira was killed at his home because he was later exhumed from a nearby latrine. This evidence is inconclusive, as the corpse was identified by its clothing, and because Witness NBA was not with him the day he died.

<sup>308</sup> In its Closing Brief (para. 90), the Prosecution does not argue that the Defence witnesses are referring to a different individual, named Ibambasi, than Witness SAL.

<sup>309</sup> T. 25 September 2008 p. 60; T. 26 September 2008 p. 12.

<sup>310</sup> Defence Exhibits 128-129 (Gacaca documents).

### 3.4 Killing of Rachel, Nkuli Commune, 8 April

#### *Introduction*

241. The Prosecution alleges that, on or about 8 April 1994, Setako shot and killed a Tutsi woman, Rachel, in the compound of his residence in Nkuli commune. Reference is made to Witness SDA.<sup>311</sup> The Defence argues that Setako was in Kigali on the relevant dates (II.3.6.1), and that Rachel was killed in Gisenyi. It refers to Witness NDW.<sup>312</sup>

#### *Evidence*

##### Prosecution Witness SDA

242. Witness SDA, a Hutu, was a neighbour of Setako in Nkuli commune. At around 8.30 a.m. on 7 April 1994, he attended a meeting organised by Setako and Colonel Augustin Bizimungu at the home of Rukabu, where the two officers instructed those present to kill Tutsis (II.3.2). Around 9.00 a.m., Setako and Bizimungu left together in a green military jeep, picking up a Tutsi woman called Rachel – between 40 and 43 years old – about 50 metres from Rukabu’s house. The witness did not know where the jeep went after that. Based on the instructions he received at the meeting, he went on to participate in the killings of Tutsis, including Rachel’s daughter and mother. Rachel’s mother was named Nyiragwimo, and her father was Birenzo.<sup>313</sup>

243. The next morning, the witness and other members of the population learned that Setako was harbouring Rachel at his house. Before 9.00 a.m., a large group, armed with weapons, went there and expressed anger that Setako would order the killing of Tutsis yet provide refuge to them. Setako denied supporting Tutsis, brought Rachel out of the house and shot her in the head, killing her. The incident lasted for about 30 minutes. Rachel’s body was later buried by her neighbours, but the witness did not say where. He denied that Rachel was killed and buried where she lived in Gisenyi in April 1994.<sup>314</sup>

##### Setako

244. Setako testified that he was in Kigali on 7 and 8 April 1994 and was not involved with Rachel’s death (II.3.6.1). She was killed in Bugoyi in Gisenyi prefecture.<sup>315</sup>

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<sup>311</sup> Indictment para. 53; Prosecution Closing Brief paras. 87, 89, 98, 161, 164, 167, 170; T. 5 November 2009 pp. 21-22. Rachel is sometimes referred to as “Racheli” or “Rasheli”.

<sup>312</sup> Defence Closing Brief paras. 177-180, 195, 345-352, 590, 616. The Defence also refers to the evidence of Expert Witness Bert Ingelaere, which is considered here but discussed elsewhere (I.2.4). Furthermore, the Chamber also considers Witness NDU’s testimony to be relevant, and summarises it here.

<sup>313</sup> T. 22 September 2008 pp. 37-41, 43, 45, 70, 75, 78-79; T. 23 September 2008 pp. 1-3, 5-7, 9-10, 25; Prosecution Exhibit 26 (personal identification sheet). Witness SDA had been sentenced to imprisonment by Rwandan courts (II.3.2).

<sup>314</sup> T. 22 September 2008 pp. 43-45; T. 23 September 2008 p. 11.

<sup>315</sup> T. 26 June 2009 pp. 44-45, 48.

Defence Witness NDU

245. Witness NDU, a Hutu, was a secondary school student living in Nkuli commune near Setako's home. On 7 and 8 April 1994, Setako did not go to his house, and its door and shutters were closed. The witness kept Setako's gate key and Setako would have collected it if he had returned.<sup>316</sup>

246. The witness did not know any person by the name of Rachel, but Setako did not shoot anyone in front of his house on the morning of 8 April. Had he done so, the witness would have heard a gunshot and a crowd would have gathered. Setako had last been home approximately a week before the death of President Habyarimana and did not return there until between 8 and 13 July, before going into exile.<sup>317</sup>

Defence Witness NDW

247. Witness NDW, a Hutu farmer, lived in Nkuli commune, not far away from Rachel's father, Silas Birenzwe, and mother, Adela Nyirarwimo. She knew Rachel, who was over 21 years old, married and lived somewhere in Gisenyi prefecture. Rachel, who came to visit her parents every one to three months, had a sister who was also married and lived elsewhere. On 7 April 1994 after 9.00 a.m., the witness saw four members of Rachel's family killed at Birenzwe's house. The victims were Rachel's mother, her mother's two children and Rachel's sister-in-law. Rachel was not amongst them.<sup>318</sup>

248. The witness attended the Gacaca court proceedings in Rugeshi *cellule*. At the beginning of the proceedings, which started in 2003, Rachel's name was mentioned in a list of persons who had been killed outside the *cellule*. During the hearings, a person named Mbitse and others confessed to participating in the killing of four members of Rachel's family on 7 April 1994. Mbitse testified that he had been told that Rachel died in the region where she was married. Others also stated in Gacaca proceedings that Rachel had been killed in Gisenyi. She could not recall the names of the killers, and was not aware of any Gacaca hearings in Gisenyi about Rachel's death.<sup>319</sup>

*Deliberations*

249. The Prosecution presented Witness SDA to demonstrate that Setako killed a woman called Rachel at his Nkuli residence on the morning of 8 April 1994. Witness NDU, on the other hand, testified that no violence occurred at Setako's home that morning, and that Setako was not there. Moreover, Witnesses NDW heard in Rugeshi *cellule* Gacaca proceedings that Rachel was killed elsewhere.

250. Witness SDA is an alleged accomplice of Setako and was sentenced, in March 2005, to eight-and-a-half years of imprisonment prison for genocide-related crimes that included the killings of some of Rachel's family members on 7 April 1994 (II.3.2). Other aspects of his Rwandan judicial dossier also raise questions about his general credibility. In July 2007, he was convicted of providing false testimonies by the Gacaca court in Rugeshi *cellule* and

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<sup>316</sup> T. 27 May 2009 pp. 15-16, 19-22, 30, 39, 62; Defence Exhibit 157 (personal identification sheet).

<sup>317</sup> T. 27 May 2009 pp. 22-24, 30-31.

<sup>318</sup> T. 22 May 2009 pp. 30-36; T. 25 May 2009 p. 15; Defence Exhibit 149 (personal identification sheet).

<sup>319</sup> T. 22 May 2009 pp. 32-35; T. 25 May 2009 pp. 1-4, 15, 17-18.

sentenced to three months of imprisonment (II.3.2). Consequently, the Chamber views his testimony with caution.

251. Turning specifically to Witness SDA's evidence that Setako killed Rachel at his home on 8 April 1994, the Defence confronted him with the fact that this killing was not discussed in his confessions. He responded that when the appropriate time came he provided this information. He also did not discuss this earlier due to security concerns.<sup>320</sup> Given that the witness was not directly involved in the killing of Rachel, the Chamber is not surprised that it did not feature in any of his confessions.

252. Only Witness SDA testified about this event.<sup>321</sup> Other evidence placing Setako in Nkuli commune the day before (II.3.2–3.3) is insufficient to offer circumstantial support for his presence in the area the following day and the purported killing of Rachel. Furthermore, Witness NDU testified that Setako was not at home on 8 April, and that no violence occurred there. The witness did not state why or from where he was able to observe Setako's house, but explained why he was in a position to know, as a general matter, whether Setako was home. The Chamber notes that his testimony contained no significant contradictions or inconsistencies.

253. Witness NDW attended Gacaca court proceedings in Rugeshi *cellule*, during which she heard that Rachel had been killed elsewhere. The Defence provided documentary support for this account. It presented a handwritten, signed and stamped Gacaca record of December 2002, entitled "List of persons who were killed out of their *cellule* during the genocide".<sup>322</sup> The document includes a woman called Rachel Mukarutamu, indicating that she was killed in Gisenyi. She was born in 1952, and the names of her father and mother were Birenzwa and "N. Rwimo", respectively. These details appear to correspond with those that Witness SDA provided about Rachel.

254. Similarly, Rachel's name is not included in a list drawn up in December 2002 that appears to identify persons killed in Rugeshi *cellule*.<sup>323</sup> Furthermore, a document from April 2009 bearing a Gacaca stamp and a signature, entitled "List of persons killed in the *cellule*. Victims of the genocide", lists Rachel Mukarutamu's name. Although the Gacaca *cellule* is not specified, the signature at the bottom was identified as "President of the general assembly in courts, Gisenyi sector".<sup>324</sup>

255. The Chamber accords only limited weight to Setako's alibi that he remained in Kigali during this period (II.3.6.1).

256. Having considered the totality of the evidence, the Chamber has not found it established beyond reasonable doubt that Rachel was killed by Setako on 8 April 1994 at his home in Nkuli commune.

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<sup>320</sup> T. 23 September 2008 pp. 6-7.

<sup>321</sup> The Chamber has questioned the reliability of Witness SDA's evidence elsewhere (II.3.2).

<sup>322</sup> Defence Exhibit 158 (list of persons killed outside of Rugeshi *cellule*, dated 20 December 2002) n. 18; T. 20 May 2008 p. 42.

<sup>323</sup> Defence Exhibit 159 (list of persons killed in Rugeshi *cellule*, dated 13 December 2002).

<sup>324</sup> Defence Exhibit 160 (list of persons killed, dated 28 April 2009); T. 25 May 2009 p. 23.

### 3.5 Attack on Ruhengeri Court of Appeal, 14 April

#### *Introduction*

257. The Indictment alleges that, around 11 April 1994, Setako expanded the membership of the *Amahindure* from 80 to over 600 youths, provided further military training and weapons, and ordered them to go to various parts of Ruhengeri prefecture to kill Tutsis. Consequently, around 14 April, Setako, Augustin Bizimungu, Basile Nsabumugisha, Fabian Maniragaba, Colonel Bivugabagabo, Colonel Ntibitura and other military and civilian authorities ordered these militiamen to attack and kill about 100 to 300 Tutsi refugees at the Ruhengeri Court of Appeal. Setako was present and participated in the attack by telling the *Interahamwe* that the only enemy of the country was the Tutsis who had to be exterminated with no exception. Reference is made to Prosecution Witnesses SAA and SAM.<sup>325</sup>

258. The Defence submits that the Prosecution evidence concerning Setako's role in the expansion of the *Amahindure* militia and the subsequent attack at the Ruhengeri Court of Appeal lacks credibility. Furthermore, it points to alibi evidence suggesting that he was in Kigali at the time of the meeting on 11 April and in Zaire on 14 April during the attack (II.3.6).<sup>326</sup>

#### *Evidence*

##### Prosecution Witness SAA

259. Witness SAA, a Hutu, was a policeman in Mukingo commune. He explained that, by 11 April 1994, the number of *Interahamwe* in the area had increased from about 80 to around 800 persons as groups were formed in each *cellule*. They began calling themselves the *Amahindure*. On that date, they gathered at the Mukingo commune office, and Setako and Juvénal Kajelijeli instructed them to kill Tutsis throughout Ruhengeri prefecture beyond Mukingo and Nkuli communes. After these instructions, unarmed militiamen collected Kalashnikov rifles and grenades from the commune office. From 11 April, the new militia began receiving regular military training there from the witness, a chief warrant officer and reserve officers until they were forced to flee the country.<sup>327</sup>

260. Between 13 and 15 April, the *Interahamwe* launched an attack on the Ruhengeri Court of Appeal, travelling there in vehicles looted during earlier attacks. On the day of the attack, two Daihatsu trucks arrived at the Mukingo commune office, and the militiamen

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<sup>325</sup> Indictment paras. 38-39; Prosecution Closing Brief paras. 99-100. The Chamber notes that Witness SAW also provided relevant testimony.

<sup>326</sup> Defence Closing Brief paras. 137, 145, 151, 165-166, 195, 230-231, 233, 236-237, 243, 353-369, 586, 612, 623, 626; T. 5 November 2009 pp. 46, 61. The Chamber summarises Bert Ingelaere's prediction about Gacaca records elsewhere (I.2.4), but has considered it here.

<sup>327</sup> T. 25 August 2008 p. 57; T. 26 August 2008 pp. 8, 11, 18, 21-23, 27; T. 27 August 2008 pp. 25, 27, 29-30; Prosecution Exhibit 1 (personal identification sheet). At the time of his testimony, Witness SAA was sentenced to life imprisonment on 16 July 2008 by a Gacaca court in Busugo sector based on charges of participating in *Amahindure* training, setting up roadblocks, distributing weapons, personally killing two persons and selling looted property of Tutsis. On 30 October 2008, following his evidence in this case, his sentence was reduced on appeal to 20 years of imprisonment. T. 25 August 2008 pp. 46-47, 50; T. 27 August 2008 pp. 17-18; Defence Exhibit 2 (judgment of 16 July 2008); Prosecution Exhibit 98 (judgment of 30 October 2008). The witness did not specify when the meeting occurred at the commune office.

onboard asked the witness for additional weapons. There were no more firearms at the office so they went to Mukamira camp. The witness saw the vehicle depart for the camp and then pass by again on its way to the Court of Appeal. On their return from the attack, the assailants told the witness that they had exterminated all of the Tutsis there without meeting any resistance.<sup>328</sup>

#### Prosecution Witness SAM

261. Witness SAM, a Hutu, was a member of the *Interahamwe*. Early on the morning of 13 or 14 April 1994, he and other *Interahamwe* were gathered at the Byangabo trading centre. Juvénal Kajelijeli arrived with Prefect Basile Nsabumugisha and Sub-Prefect Dismas Nzanana. Kajelijeli asked the militiamen to reinforce an attack against Tutsis who had sought refuge at the Ruhengeri Court of Appeal. At Ruhengeri town, two groups of *Interahamwe* from Mukingo and Nkuli communes found others from Kigombe commune as well as Setako and Augustin Bizimungu. The witness observed Bizimungu identify the particular building at the Court in which the Tutsis had barricaded themselves. Around 9.00 a.m., the assailants began throwing grenades at the building while Setako and Bizimungu stood nearby. The two then left and returned around 12.30 p.m. to congratulate the assailants on the completed attack.<sup>329</sup>

#### Prosecution Witness SAW

262. Witness SAW, a Hutu, was a member of the *Interahamwe* who lived in the vicinity of the Byangabo trading centre. Around 12 April 1994, he joined around 150 other *Interahamwe* from throughout Mukingo commune at the communal office for training supervised by Chief Warrant Officer Karorero, who had convinced the witness to “train as the others are doing”. The sessions involved combat techniques and weapons handling, using guns from Mukamira camp. After the two-week course concluded, Setako, accompanied by other soldiers, addressed the militiamen, who became known as the *Amahindure* or Virunga Force. He told them that they knew how to fire and did not need any further training. Setako further said that Tutsis had survived and were resisting in Kibuye and Gitarama prefectures, and that the militia needed to reinforce these areas. After the speech, Setako departed. The witness added that, although Setako promised weapons to the militiamen, he never provided them.<sup>330</sup>

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<sup>328</sup> T. 26 August 2008 pp. 22-23.

<sup>329</sup> T. 11 September 2008 pp. 33, 68-72; T. 12 September 2003 p. 3; Prosecution Exhibit 19 (personal identification sheet). At the time of his testimony, Witness SAM was detained in Ruhengeri prison based on his sentences of 15 and 20 years of imprisonment, respectively, by the Gacaca courts in Rwinzovu and Musumba *cellules*, after pleading guilty to charges of launching attacks in Musumba, burning down houses and looting. He was still involved in other ongoing trials. T. 11 September 2008 pp. 15-16; T. 12 September 2008 p. 12. The witness did not provide any details concerning the number of victims in his testimony. However, his statement of September 2002 to Tribunal investigators indicates that there were 60 to 100. Defence Exhibit 39A (statement of 26 September 2002) p. 6.

<sup>330</sup> T. 4 September 2008 pp. 49-50, 56-60; T. 5 September 2008 pp. 37-38; T. 8 September 2008 pp. 10-11, 19-21; Prosecution Exhibit 13 (personal identification sheet). At the time of his testimony, Witness SAW had been detained in Ruhengeri prison since 1999, awaiting trial. He had not yet confessed to any crime, but was prepared to acknowledge being a member of the *Interahamwe*. T. 4 September 2008 pp. 45-46, 50.

## Setako

263. Setako denied that he participated in the training of *Interahamwe* in Mukingo commune. He was in Kigali on 11 April and in Zaire from 12 to 21 April (II.3.6).<sup>331</sup>

## *Deliberations*

264. The Prosecution presented two witnesses to establish Setako's involvement in the attack against the Ruhengeri Court of Appeal around 14 April 1994. Witness SAA testified about the attendance of Setako and Kajelijeli at a large gathering of existing and newly recruited militiamen on 11 April at the Mukingo commune office. At the meeting, Setako called for the killing of Tutsis throughout the prefecture, and the newly expanded *Amahindure* were armed and training began. According to the witness, around 14 April, some of the militiamen left the commune office for the Ruhengeri Court of Appeal, returned later that day and recounted their attack. Witness SAM participated in the attack at the Court of Appeal. Augustin Bizimungu directed the assailants to the appropriate building, and he and Setako watched for a period before returning after the attack's completion to congratulate the assailants. The Chamber recalls the need generally to view the evidence of Witnesses SAA and SAM with caution (II.3.1).

265. Witness SAA was the only witness to implicate Setako in the meeting of 11 April at the Mukingo commune office. The Chamber notes that there are differences between his testimony about this incident and some of his statements to Tribunal investigators. The attack on the Court of Appeal is mentioned in the first statement from April 1999. The statement indicates that the attack was prompted by a telephone call from Joseph Nzirorera to Kajelijeli informing him of the movement of Tutsis from the Busengo sub-prefecture to the court.<sup>332</sup> There is no specific reference to the meeting of 11 April involving Setako and Kajelijeli. However, it does generally allude to the 1994 training at the commune office of 600 *Interahamwe* known as "Kajelijeli and Nzirorera's men".<sup>333</sup>

266. The second statement from June 2000 does not specifically mention the attack on the Court of Appeal. It does, however, discuss the expansion and training of the *Interahamwe* in Mukingo commune from April 1994, as well as make general reference to attacks committed

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<sup>331</sup> T. 26 June 2009 p. 51.

<sup>332</sup> Defence Exhibit 1B (statement of 21 April 1999) p. 4, which reads: "As there were no more Tutsis in Mukingo commune, the *Interahamwe* moved to other communes to kill. That was what happened in the Court of Appeal in Ruhengeri where the people who had taken refuge there were killed; I do not know how many people were killed. I saw them pass by the commune office every day singing. I should point out that the *Interahamwe*'s programme of activities in Mukingo and Nkuli was drawn up at Nzirorera's house which the *Interahamwe* visited every Saturday. The plan of action was prepared by Kajelijeli, Nzirorera and the trader, Baheza. I also believe that the killings were closely or remotely monitored by Nzirorera, for when Kajelijeli was reappointed *bourgmestre*, Nzirorera telephoned him every day before he left his office to supervise the attacks. ... Kajelijeli's *Interahamwe* had planned to kill the Tutsis in Busengo *sous-préfecture*; Nzirorera had to telephone Kajelijeli and tell him that the Tutsis in Busengo *sous-préfecture* were going to be transferred to Ruhengeri where it would be easier to get rid of them." See also Defence Exhibit 8A (statement of 15 July 2003) p. 4. A subsequent statement clarifies that the Tutsis transferred from the Busengo sub-prefecture were the ones killed at the Ruhengeri Court of Appeal. See Defence Exhibit 4A (statement of 24 September 2002) p. 6.

<sup>333</sup> Defence Exhibit 1B (statement of 21 April 1999) p. 3.



by these men throughout the prefecture.<sup>334</sup> The third statement from September 2002, like the witness's testimony, describes a meeting at the commune office where 600 *Interahamwe* assembled for training. It only refers to Kajelijeli's presence at the gathering. The statement also refers to Nzirorera telephoning Kajelijeli to organise the attack on the Court of Appeal, which was to be carried out with weapons supplied by Augustin Bizimungu.<sup>335</sup>

267. Witness SAA's evidence concerning the meeting and the attack is in general conformity with his fourth statement to Tribunal investigators from October 2002, which is the first to focus on Setako.<sup>336</sup> In the Chamber's view, the omission of Setako from his first three statements in relation to the expansion of the *Interahamwe* may be explained by their focus on Kajelijeli, Nzirorera and Augustin Bizimungu.<sup>337</sup> However, it does raise some questions when the witness's account is considered together with the other evidence.

268. Witness SAM made no mention at all of the 11 April meeting and training at the Mukingo commune office. Rather, he referred to an assembly at the Byangabo trading centre prior to the attack which was presided over by Kajelijeli and other local authorities. It is possible that he did not testify about the meeting at the commune office because he was not in attendance or specifically questioned on it. However, the event, as described by Witness SAA, appears significant both for the attack and the growth of the area militia. It is therefore noteworthy that Witness SAM, a local *Interahamwe* who participated in the attack, did not testify about this meeting or Setako's presence there.

269. The Chamber has taken into account the evidence of Witness SAW, who was not referred to by the parties. He appeared to confirm that local militia groups were expanded and trained at the communal office, but did not mention Setako's presence around 11 April. However, if the event had unfolded as described by Witness SAA, Setako's participation would not have gone unnoticed by the witness. Even assuming that the witness was not present on the day that Setako spoke, it is notable that he did not mention having been told about it, since his testimony did connect Setako to the militia. Instead, he placed Setako at a gathering of the *Amahindure* militia only at the end of their training, about two weeks later.<sup>338</sup>

270. The Chamber considers that these differences, when viewed together with the general concerns noted above, raise doubt about Witness SAA's uncorroborated account of Setako's presence at the Mukingo commune office on 11 April.<sup>339</sup> It has accorded limited weight to Setako's alibi for this date (II.3.6.1).

271. Turning to Setako's presence during the attack at the Court of Appeal on 14 April, this allegation is supported only by Witness SAM who provided a first-hand account. There

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<sup>334</sup> Defence Exhibit 3B (statement of 26 June 2000) pp. 3-4, 6.

<sup>335</sup> Defence Exhibit 4A (statement of 24 September 2002) pp. 5-6.

<sup>336</sup> Defence Exhibit 5A (statement of 16 October 2002) p. 5.

<sup>337</sup> The Chamber recalls that Witness SAA explained the omission of Setako in his initial statements by testifying that he had not been asked about particular individuals, had not yet confessed or pleaded guilty in Rwanda to offences connected with some of them, and wanted to shield himself from criminal responsibility (II.3.1).

<sup>338</sup> This subsequent gathering is not pleaded in the Indictment or referred to by the Prosecution as part of its case. The evidence supporting it is also uncorroborated. Thus, the Chamber does not need to make a finding on it.

<sup>339</sup> The Chamber has identified similar problems with other parts of Witness SAA's testimony, namely the killing of Bernard Bajyagahe (II.2); the meeting at the home of Joseph Nzirorera's mother (II.3.1); and the installation of Juvénal Kajelijeli as *bourgmestre* (II.5).

are, however, discrepancies between his evidence and his first statement to Tribunal investigators from September 2002. That statement describes in detail the witness's involvement in the attack at the Court. It refers to Augustin Bizimungu ordering the attack by pointing to the building housing the Tutsi refugees. Setako is not mentioned.<sup>340</sup> The witness's second statement to Tribunal investigators from November 2002, two months later, refers to Setako and is in general conformity with his testimony.<sup>341</sup>

272. The omission of Setako in the first statement could have been explained by its focus on Kajelijeli and Augustin Bizimungu. Moreover, it follows from the description of the attack in both statements that Bizimungu allegedly was in command. This said, the second statement does attribute a prominent role to Setako.<sup>342</sup> The fact that he is not mentioned in the first statement is therefore significant.

273. The witness instead cited security concerns to justify the difference.<sup>343</sup> As discussed above (II.3.1), the Chamber does not find convincing his reasons for omitting Setako in his first statement. Furthermore, the Prosecution has not eliminated the reasonable possibility that Setako was in Zaire between 12 and 21 April (II.3.6.2). Consequently, the Chamber has doubts about Witness SAM's uncorroborated testimony about Setako's participation in the attack.<sup>344</sup>

274. Accordingly, the Prosecution has not proved beyond reasonable doubt that, around 11 April 1994, Setako expanded the *Amahindure* militia, initiated their military training and urged them to kill throughout the prefecture, as alleged in the Indictment. The allegation that he participated in the attack on the Ruhengeri Court of Appeal on 14 April is also not proved.

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<sup>340</sup> Defence Exhibit 39A (statement of 26 September 2002) p. 6.

<sup>341</sup> Defence Exhibit 40A (statement of 13 November 2002) p. 5.

<sup>342</sup> *Id.* p. 5 (“Setako and Bizimungu were both present as the first grenades were thrown and then they both left in separate jeeps. Neither of these officers made any attempt to stop the assault as they were both there to supervise us ... At approximately 1400 hrs – 1500 hrs Setako and Bizimungu returned to the Court of Appeal. Setako got out of his jeep and he found us all singing. He asked us ‘have all the Tutsis been killed?’ to which we replied that not a single Tutsi had escaped. He then left without further comment.”).

<sup>343</sup> T. 16 September 2008 pp. 5-6, 8-10.

<sup>344</sup> The Chamber has identified similar problems with Witness SAM's testimony in connection with the meeting at the home of Joseph Nzirorera's mother (II.3.1).

### 3.6 Alibi, 6-21 April 1994

275. The Defence presented two alibis in connection with some of the allegations against Setako. The alibi evidence covers the period of 6 to 21 April 1994, involves two locations, Kigali and Zaire, and spans multiple criminal incidents. In order to preserve a coherent narrative of this evidence and to avoid repetition of details in specific sections, the alibis are recounted and assessed below. Other elements of the Defence evidence could also reasonably be characterised as an alibi, for example, Setako's explanation for his activities at the Ministry of Defence after his return from Zaire. The Chamber has set forth and assessed this evidence in the sections concerning the relevant events (II.3.1 to 3.5).

276. The Appeals Chamber has recently reaffirmed the basic principles concerning the assessment of alibi evidence:

An alibi does not constitute a defence in its proper sense. By raising an alibi, an accused is simply denying that he was in a position to commit the crime with which he was charged. An accused does not bear the burden of proving his alibi beyond reasonable doubt. Rather "[h]e must simply produce the evidence tending to show that he was not present at the time of the alleged crime" or, otherwise stated, present evidence "likely to raise a reasonable doubt in the Prosecution case." If the alibi is reasonably possibly true, it must be accepted.

Where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true. The Prosecution may do so, for instance, by demonstrating that the alibi does not in fact reasonably account for the period when the accused is alleged to have committed the crime. Where the alibi evidence does *prima facie* account for the accused's activities at the relevant time of the commission of the crime, the Prosecution must "eliminate the reasonable possibility that the alibi is true," for example, by demonstrating that the alibi evidence is not credible.<sup>345</sup>

277. According to established case law, the manner in which an alibi is presented may also impact its credibility.<sup>346</sup> Rule 67 (A)(ii) requires the Defence to notify the Prosecution before the commencement of trial of its intent to enter a defence of alibi. It follows from this provision that the notice of alibi must specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi. Consistent with Rule 67 (B), failure to do so does not limit the right of an accused to present an alibi.

278. The Defence gave notice of its alibi on 7 April 2009, near the close of the Prosecution's case. The Prosecution objected on 14 April 2009, arguing that notice had not been provided in conformity with Rule 67 because it was not filed prior to the commencement of trial, and also that in some instances it was insufficiently precise. In its Closing Brief, the Defence submits that the Prosecution was aware of Setako's alibi prior to the filing of notice, that the Defence presented its alibi witnesses in the latter part of its case in order to give the Prosecution sufficient time to prepare itself, and that the Prosecution

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<sup>345</sup> *Zigiranyirazo* Appeal Judgement paras. 17-18 (internal citations omitted).

<sup>346</sup> *Rutaganda* Appeal Judgement para. 242; *Musema* Appeal Judgement para. 201; *Kayishema and Ruzindana* Appeal Judgement para. 111.

enjoyed the opportunity to call rebuttal witnesses.<sup>347</sup> The Chamber will assess the impact of this late notice, if any, below.

### 3.6.1 Kigali, 6-12 April

#### *Introduction*

279. As set forth elsewhere in the judgement, the Prosecution alleges that on the night of 6 to 7 April 1994, Setako attended a meeting in Mukingo commune (II.3.1); on the morning of 7 April, he participated in another meeting in neighbouring Nkuli commune as well as the subsequent killings of Ziragwira and Ibambasi (II.3.2 and 3); on 8 April, he killed a Tutsi woman named Rachel in Nkuli commune (II.3.4); and on 11 April, he addressed militiamen at the Mukingo commune office (II.3.5). According to the Prosecution, his alibi during this period lacks credibility.<sup>348</sup>

280. The Defence submits that Setako was in Kigali from 6 to 12 April. During this period, he daily went to work at the Ministry of Defence and regularly communicated with and assisted friends. Reference is made to Witnesses Aminadab Iyakaremye, Emma Solange Akajeneza, David Biramahire, KAF and KAM.<sup>349</sup>

#### *Evidence*

##### Setako

281. Setako testified that he maintained a residence in Nkuli commune, to which he travelled on 2 April 1994 to spend Easter with his children. The next day, Augustin Bizimungu's mother died, and Setako and his wife went to Mukamira camp on 3 or 4 April to escort her body to Byumba prefecture for burial. That evening, they returned to their home in the Kiyovu area of Kigali.<sup>350</sup>

282. Around 5.00 p.m. on 6 April, Setako's driver took him home in a Peugeot 305. Setako changed into civilian clothes, went to collect a shop owner named Aminadab Iyakaremye and his family, and returned to Setako's house for dinner. At 8.30 p.m., he heard a loud explosion and a few minutes later received a call from Joseph Nzirorera, who explained that the President's plane may have been shot and enquired about the explosion. Setako then placed a call to the Ministry of Defence to obtain more information but received none. He put on his uniform and around 9.00 p.m. drove Iyakaremye and his family home, passing through three roadblocks manned by Belgian soldiers.<sup>351</sup>

283. Setako proceeded to the Ministry of Defence, arriving around 10.30 p.m. He and some other officers then went to the nearby military headquarters. The duty officer suggested that they return home and informed them that General Augustin Ndindiliyimana was meeting with a group of officers. Setako was also told that President Habyarimana had been killed. He returned home around 11.00 p.m. There, he received several telephone calls, including one

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<sup>347</sup> Defence Closing Brief paras. 103-106.

<sup>348</sup> Prosecution Closing Brief paras. 176, 180-181 (i-v); T. 5 November 2009 pp. 3-12, 14, 17-18.

<sup>349</sup> Defence Closing Brief paras. 102, 107-118; T. 5 November 2009 pp. 49-52.

<sup>350</sup> T. 25 June 2009 pp. 27-28, 30-31, 35-37. Setako testified that he drove to Nkuli commune in his Peugeot 504. T. 25 June 2009 p. 28.

<sup>351</sup> T. 22 June 2009 pp. 18-21, 23; T. 26 June 2009 pp. 28-29, 34-37, 40, 47.

from Iyakaremye around 1.00 a.m., enquiring about the situation. Setako then tried to get sleep until later that morning.<sup>352</sup>

284. Around 7.00 a.m. on 7 April, Joseph Nzirorera, his wife, brother, six children and domestic staff sought refuge at Setako's house. Setako also received a call from David Biramahire, the son of a prominent trader, seeking his assistance. Biramahire said that armed soldiers had broken into his house and demanded money. Setako expressed his sympathy, but said he could do nothing to help since he had no soldiers under his command. He then left around 8.00 a.m. for the Ministry of Defence where he sought more information concerning the attack on the President's plane. The day was unusual and Setako had difficulty concentrating. He returned home in the evening to find that Biramahire and his brother had sought refuge at his home.<sup>353</sup>

285. In the morning of 8 April, Setako received a call at home from a family friend, asking for assistance. He went to the Ministry of Defence but left around 9.00 a.m. to aid his friend, who lived nearby, by taking her mother to a clinic. Around 10.00 a.m. he returned to the Ministry. In the subsequent days, Setako continued working in Kigali and assisting his friend's mother with her medical needs. On 11 April, between 3.00 and 4.00 p.m., he learned that he would leave Kigali on mission, and he called his friend to inform her. The following day, he went to Kinshasa, Zaire, on an official mission. In view of his mission and the serious fighting in Kigali, Setako's family then accompanied Joseph Nzirorera to Mukingo commune.<sup>354</sup>

#### Aminadab Iyakaremye

286. Aminadab Iyakaremye, a Hutu, lived in the Gatsata sector of Kigali, where he had a small shop and bar. He fled Rwanda in July 1994 and has not returned because he fears for his security. The witness has been accused before a Gacaca court in his home area along with others, including his former business partner who is imprisoned there, for participating in the genocide. He denied any responsibility for these crimes and that he was an *Interahamwe* leader.<sup>355</sup>

287. At some point in mid-1992, Setako came to Iyakaremye's bar along with one of the witness's friends, Major Murekezi of the gendarmerie. Setako then began frequenting the establishment. Eventually, they became friends and visited each other's homes with their spouses towards the end of 1993. Iyakaremye's family was invited to dinner at Setako's house on 6 April 1994. According to the witness, Setako's oldest daughter had proposed the idea in order to get to know Iyakaremye's three young children, who were aged one to four at the time, before the end of the Easter recess.<sup>356</sup>

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<sup>352</sup> T. 22 June 2009 pp. 21-23; T. 25 June 2009 pp. 45-46; T. 26 June 2009 pp. 34, 36-37, 40, 47.

<sup>353</sup> T. 22 June 2009 pp. 24-25; T. 26 June 2009 pp. 29-30, 40, 48.

<sup>354</sup> T. 22 June 2009 pp. 26-28; T. 25 June 2009 pp. 52-53; T. 26 June 2009 p. 48.

<sup>355</sup> T. 16 June 2009 pp. 21-22, 35-38, 44, 54-60, 62, 66; T. 17 June 2009 pp. 7-10; Defence Exhibit 165 (personal identification sheet); Prosecution Exhibit 74 (charge sheet against Aminadab Iyakaremye); Prosecution Exhibit 75 (charge sheet against Etienne Kavurajabo, Iyakaremye's former business partner). Iyakaremye was formerly referred to as Defence Witness KBK. It follows from the transcripts that Iyakaremye, who is abroad, has only been charged, while Kavurajabo appears to have been convicted. However, only the charge sheet was entered as an exhibit.

<sup>356</sup> T. 16 June 2009 pp. 21-25, 41-46; T. 17 June 2009 pp. 15, 17.

288. Around 6.00 or 7.00 p.m. on 6 April, Setako, wearing civilian clothing, arrived at his home with the Iyakaremye family after picking them up in his Peugeot 504. Around 8.20 p.m., they heard loud explosions during the course of the dinner. Fifteen minutes later, Setako received a telephone call and informed the group that President Habyarimana's plane had been shot down under unknown circumstances. He proposed waiting to tell the children, who were in another room, until confirming the news. Everyone was upset, so Setako drove the Iyakaremye family home around 9.00 p.m. They arrived after 10.00 p.m. having passed through three roadblocks along the way manned by Belgian peacekeepers. When Setako returned home between 10.30 and 11.00 p.m., he called Iyakaremye and promised to contact him again with an update. When he had not heard from Setako, Iyakaremye telephoned from home around 1.00 a.m., but Setako said he was still seeking information. Around 2.00 a.m., the two spoke again, and Setako confirmed that the President and all others aboard the plane were dead. Iyakaremye continued to follow the situation on RTL, which later broadcast the news.<sup>357</sup>

289. On 7 April, Iyakaremye twice used his store telephone to reach Setako at work, once around 9.00 a.m., and again between 4.00 and 4.30 p.m. The next day, he spoke with Setako at work around 11.00 a.m., and again on 9 and 10 April between 10.00 a.m. and 1.00 p.m. each day. On 11 April, the witness called Setako at home between 6.00 and 7.00 a.m., then fled Kigali with his family because the fighting began in his area. He next spoke with Setako in July when they saw each other in Gisenyi prefecture.<sup>358</sup>

#### Defence Witness Emma Solange Akajeneza

290. Emma Solange Akajeneza, a Hutu, is Setako's youngest daughter, who was 12 years old at the time of the relevant events. On 6 April 1994, she was spending her Easter recess from boarding school at her family's home in the Kiyovu area of Kigali. That morning, her father left for work around 7.30 a.m. in a service vehicle. She next saw him between 6.00 and 7.00 p.m. returning home for dinner, dressed in military attire, in his Peugeot 504 with Aminadab Iyakaremye and his family. The witness, her siblings, a cousin and Iyakaremye's young children spent the evening watching a movie and eating in the room adjacent to the sitting room where their parents dined. Shortly after dinner was served around 8.00 p.m., there was a loud explosion, and the children raced into the sitting room. They were sent back into the adjacent room. Between 9.00 and 10.00 p.m., Setako took the Iyakaremye family home. Upon his return that night, Setako explained to his family that President Habyarimana's plane had been shot down. The witness then slept in the hallway due to gunfire in the area.<sup>359</sup>

291. The witness saw Setako again around 7.00 a.m. on 7 April. At that time, Joseph Nzirorera arrived to take refuge at Setako's home along with his brother, six children, wife, her sister's two children, and a servant. Around 8.00 or 9.00 a.m., a service vehicle took Setako to work. He returned home in the evening. In the afternoon, David Biramahire and his brother Jacques arrived for the same purpose. Except for Nzirorera, who possibly went out on 7 April, these individuals remained until 12 April. On that date, everyone in the house, except

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<sup>357</sup> T. 16 June 2009 pp. 25-29, 32-33, 39, 45-49, 51, 54; T. 17 June 2009 p. 6.

<sup>358</sup> T. 16 June 2009 pp. 29-35, 39, 51-54, 62-63; T. 17 June 2009 p. 6.

<sup>359</sup> T. 17 June 2009 pp. 19-27, 35-37, 41-42, 46-49, 51, 56-57, 59-63; Defence Exhibit 166 (personal identification sheet).

for Setako and Nzirorera's three eldest children, travelled to Mukingo commune. Setako instead said he had to leave on an official mission to Kinshasa, and the witness believed that this happened on the following day.<sup>360</sup>

#### Defence Witness David Biramahire

292. David Biramahire, a Hutu, was a wealthy merchant living in the Nyamirambo sector of Kigali. His father, who had passed away, hailed from the same region as Setako. As a friend of Biramahire's family, Setako visited him regularly. Around 6.00 a.m. on 7 April 1994, the witness heard the announcement of the death of President Habyarimana. Soon thereafter, armed soldiers broke into his house and stole 150,000 Rwandan francs at gunpoint. Biramahire was quite upset and telephoned Setako at home around 7.00 a.m., asking for assistance. Setako replied that he could do nothing since he had no soldiers at his disposal.<sup>361</sup>

293. Later that morning, a cousin of Biramahire passed by his house. This relative assisted him in taking his children and wife, who was Tanzanian, to that country's embassy. Because Biramahire and his brother were denied refuge there, they went to Setako's home in Kiyovu just after noon. Joseph Nzirorera and his family were already there, and Setako returned that night around 6.00 or 7.00 p.m. Over the next four days, the witness saw Setako after work in the evenings. On 12 April, Setako went on mission to Zaire, and Biramahire and his brother joined the families of Setako and Nzirorera when they evacuated Kigali for Nzirorera's home in Mukingo commune.<sup>362</sup>

#### Defence Witness KAF

294. Witness KAF, a Hutu, was a Rwandan army officer working at the Ministry of Defence. On the night of 6 April 1994, he went to army headquarters shortly after the shooting down of President Habyarimana's plane. The witness acknowledged that he was not in a position to know whether Setako was in Kigali on the night of 6 April. However, around 9.30 a.m. on 7 April, Setako and other officers spoke with him at the Ministry to obtain news about the prevailing situation in Rwanda. On 8 April, the witness attended a meeting at the *Ecole supérieure militaire* and therefore did not see Setako on that day. However, he saw Setako at the Ministry every day from 9 to 12 April since it was not a large building.<sup>363</sup>

#### Defence Witness KAM

295. Witness KAM, a Hutu family friend of Setako, lived in Kigali. On 6 April 1994, her mother came to Kigali from Gisenyi prefecture in order to attend a medical appointment the next day at the *Centre Hospitalier de Kigali*. Due to the insecurity in Kigali following the death of President Habyarimana, the witness was neither able to take her mother to the appointment nor reach the internist by phone. On the evening of 7 April, her mother became quite sick due to lack of insulin. Around 8.00 a.m. on 8 April, the witness called Setako at home and asked for assistance. From 9.00 a.m. to 10.00 a.m., Setako accompanied the

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<sup>360</sup> T. 17 June 2009 pp. 28-33, 42, 46-47, 62-64, 66-69, 71, 73-74. Emma Solange Akajeneza did not recall David's last name, T. 17 June 2009 p. 30, but it is clear from the context that she referred to David Biramahire.

<sup>361</sup> T. 18 June 2009 pp. 32-38, 45, 47-49, 53, 56; Defence Exhibit 169 (personal identification sheet).

<sup>362</sup> T. 18 June 2009 pp. 37-43, 49, 51-53, 56.

<sup>363</sup> T. 23 June 2009 pp. 17-18, 21, 25-27, 29-31, 34-36, 42-43, 46-47, 51-54; Defence Exhibit 172 (personal identification sheet).

witness and her mother in his chauffeur-driven Peugeot to a medical dispensary at the National Bank of Rwanda. Setako brought the witness's mother to the clinic the following three days during the same time span. On the evening of 11 April, Setako informed the witness by telephone that he was leaving Kigali, and thus could not continue to assist. By that time, however, the dispensary had obtained a sufficient supply of insulin from a hospital to give to the witness's mother.<sup>364</sup>

#### *Deliberations*

296. On the night of 6 April 1994, Setako claimed that he was at his house in Kiyovu having dinner with the family of Aminadab Iyakaremye. After hearing the explosion of President Habyarimana's plane, he took the Iyakaremye family home, drove to the Ministry of Defence and army headquarters to obtain more information, then went home around 11.00 p.m., where he spoke with Iyakaremye by telephone around 1.00 a.m. Six hours later, he received a telephone call from David Biramahire who, along with his brother, later sought refuge at Setako's house.

297. That week, Setako went to work every morning at the Ministry of Defence as usual and returned in the evening. However, between 9.00 and 10.00 a.m. on 8 to 11 April, he assisted a friend by taking her mother to a health clinic to deal with a medical emergency. On 12 April, he departed for Kinshasa, and his family and others at his house left the fighting in Kigali for Joseph Nzirorera's home in Mukingo commune.

298. This version of events is corroborated to varying degrees by other Defence witnesses and accounts for much of Setako's activities during the period of 6 to 12 April. In the Chamber's view, however, this portion of the alibi contains numerous elements which call into question its reasonableness. The Chamber has no doubt that Setako spent a significant part of this period in Kigali, which the Prosecution concedes.<sup>365</sup> On close examination, though, the key parts of the alibi for when Setako was allegedly in Ruhengeri prefecture, according to the Prosecution, appear to be artificial and questionable. The Chamber's concerns are reinforced by the fact that the Defence provided notice of its alibi for this period only when the Prosecution's case was coming to a close.

299. The Chamber notes the significant gap in social standing between Setako and Iyakaremye. Setako was a jurist and a lieutenant colonel in the Rwandan army (I.3). His elevated status is illustrated in part by his assignments for sensitive missions, including participation in the Neutral Military Observers Group, the first mission to meet with President Mobutu of Zaire, as well as the cease-fire negotiations of June 1994. In contrast, Iyakaremye was a war refugee from Byumba prefecture and the owner of a small shop on the outskirts of Kigali. Given their purported friendship spanning almost two years, it is surprising that Iyakaremye did not know if Setako's wife worked and never sought to "check out that detail".<sup>366</sup> These asymmetries raise important questions as to why their families would be dining together and why they would have maintained daily telephone contact as the war intensified.

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<sup>364</sup> T. 23 June 2009 pp. 59-64, 66-75, 77-78, 81; Defence Exhibit 174 (personal identification sheet).

<sup>365</sup> T. 5 November 2009 p. 14 ("Ms. Okali: ... So what we're saying, in essence, is that his alibi for the meeting of the 6th is a fabrication, and ... on the 8th, he went back to Kigali.").

<sup>366</sup> Aminadab Iyakaremye, T. 16 June 2009 p. 46. The Chamber notes that Setako's wife worked at the Rwandan Development Bank. See Emma Solange Akajeneza, T. 17 June 2009 p. 41.



300. The Chamber also notes that Iyakaremye, currently a refugee, has been accused in Rwanda of participating in the genocide, and that at least one of his associates has been convicted on a similar charge. The Chamber recalls that the witness asserted that the allegations against him were false. The existence of a charge sheet does not establish his involvement. A number of his responses, however, are indicative of where his sympathies lie. In particular, he noted that he followed the news of the President's death "especially" on RTLM "because that radio station beamed information which was truthful".<sup>367</sup> This remark, when considered in context with others about the role of the *Interahamwe* in the killings is problematic. In particular, he averred that he was unaware of accusations against *Interahamwe* for committing crimes in 1994, and claimed that "a real *Interahamwe* would not be involved" in killings.<sup>368</sup>

301. Setako's own account of his time after dropping the Iyakaremye family at home and for the subsequent days seems contrary to his significant standing in the Rwandan army. In particular, he went to the Ministry of Defence and army headquarters on the night of 6 April to seek information, but promptly returned home at the suggestion of a duty officer as other officials planned their response to the country's loss of its head of state. Other officers, in contrast, gradually arrived at the meeting.<sup>369</sup> Furthermore, Setako's description of his activities at the Ministry the following week is devoid of detail. It is difficult to accept that, as the country descended into war and fighting intensified in the capital, he simply spoke with others, patiently awaited instructions, travelled to and from work in his chauffeur-driven car, and aided a family friend's sick mother.

302. Certain aspects of the evidence of the other alibi witnesses also raise questions about their credibility and impartiality. Emma Solange Akajeneza, who was only 12 years old in April 1994, is Setako's daughter. While this would put her in a position to closely follow her father's activities, it equally provides an incentive to give evidence favourable to him. In addition, the Chamber notes that, during her testimony in the *Ndindiliyimana et al.* trial, the witness made no mention of David Biramahire seeking refuge at Setako's home on 7 April or leaving Kigali with his family on 12 April.<sup>370</sup> The witness explained that the questions in that trial focused on the activities of her family and that of Nzirorera. This may be the case, but it

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<sup>367</sup> T. 16 June 2009 pp. 29, 32. After being asked whether it was possible to listen to other stations, Aminadab Iyakaremye stated that he "customarily" listened to Radio Rwanda and only listened to RTLM because its broadcasts were uninterrupted. T. 16 June 2009 p. 33. In the Chamber's view, this explanation appears to be an unconvincing attempt to distance himself from his earlier positive remarks about RTLM, in particular when viewed in context with his positive description of the *Interahamwe*, mentioned below.

<sup>368</sup> T. 17 June 2009 p. 11 ("Q. What about during 1994? Did you learn about, hear about or see any of these activities [of *Interahamwe* carrying various types of weapons and killing Tutsis]? A. The events happened generally. They cannot be blamed on the *Interahamwe*. They cannot – it should be said that maybe it was bandits who got involved in all those activities. A real *Interahamwe* would not be involved therein. So maybe it was the work of bandits who perpetrated those acts during the war, and then those crimes were blamed on the *Interahamwe*, whereas it was not the case. Q. Witness, I'm not asking you whether you knew for a fact whether the *Interahamwe* committed these acts. I'm asking you whether or not you were aware that the *Interahamwe* were accused of carrying out certain acts. The *Interahamwe* – meaning that the name, *Interahamwe*, were accused of carrying out certain acts both prior to 1994 and during 1994. Were you aware? A. No, I was not aware.").

<sup>369</sup> Witness KAF, T. 23 June 2009 p. 48.

<sup>370</sup> T. 17 June 2009 pp. 67-69. Relevant excerpts from Emma Solange Akajeneza's testimony in the *Ndindiliyimana* case were read into the record.

still raises some questions about her credibility as well as Biramahire's presence during this period and the corroborative value of his evidence.

303. As for David Biramahire, it is not easily understandable why he would contact Setako and seek refuge with his family until their flight to Zaire in July 1994. It is true that his father hailed from the same region as Setako, but there is no indication that Setako and the witness were particularly close. His description of their encounters prior to March 1994 is similarly vague, especially when compared to the detail he provides of Setako securing his release from prison.<sup>371</sup> It is also noted that Biramahire could not recall the name of the cousin who appears to have saved his family's lives by delivering his wife and children to the Tanzanian embassy and bringing him and his brother to Setako's home.

304. Witness KAF was a high-ranking Rwandan army officer at the Ministry of Defence. His testimony about Setako's presence at the Ministry of Defence during the week of 7 to 12 April was vague.<sup>372</sup> Furthermore, his former position provides him with an incentive to give testimony favourable to Setako. The Chamber also notes that Witness KAM was married to a former high-ranking government official implicated in the genocide.<sup>373</sup> Her friendship with the Setako family may also impact the nature of her evidence.

305. In sum, the Chamber considers that this part of the alibi has limited evidentiary value. Its reasonableness would be overcome by convincing evidence placing Setako in Ruhengeri prefecture during this period.

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<sup>371</sup> Compare 18 June 2009 p. 45 ("Q. And what contact did you have with Setako after your first meeting [in the early 1980's]? A. After having met Mr. Setako, subsequently we had some problems. My father and my brother-in-law died and Setako remained a family friend. Q. And how often would you see Setako between 1988 and 1994? A. Setako is somebody different. I often saw him. And, I think, over time I got to see him more often. Sometimes he would come to my house. And, by the way, one day Setako came with one of his colleagues of the [Neutral Military Observer Group], who was an Ethiopian, and both of them came to my house. He often came to my house.") with T. 18 June 2009 p. 45 ("Q. And was he in the habit of solving problems for you? A. Yes. Once I was jailed because I had sold a machine – I had sold a machine to somebody who returned the machine to the shop, and because of this, I was imprisoned, and he intervened, thereafter, I was released. I explained what had happened to him, and then he helped in my release. He was a logical person. He was a rational person. He went to the authorities to explain that I had been unjustly accused. So Setako was a fair man. He had read law and he was the one who explained to the authorities that that person was being falsely accused."). As for David Biramahire's assertion that Setako visited him with an Ethiopian GOMN member, the Chamber notes Setako's testimony that the first mission of the Neutral Military Observer Group consisted of Rwanda, the RPF, Burundi and Uganda, and that the second mission was comprised of Rwanda, the RPF, Nigeria, Zimbabwe, Mali and Senegal. T. 22 June 2009 pp. 9, 11.

<sup>372</sup> See, for instance, T. 23 June 2009 p. 31 ("Q. What about from the 9th to the 12th of April? Did you see Colonel Setako during that period? A. From the 9th to the 12th – indeed, the war started on the morning of the 9th with the attacks on the northern frontier of Rwanda, and all officers of the Ministry of Defence, as from that date, were meant to stay at their positions in the Ministry of Defence. So Colonel Setako was there from the 9th to the 12th. Mr. President: Did you see him yourself? The witness: Yes, I – I did see him myself, because the Ministry of Defence, as I told you, it is not a large place. Everybody gets to see each other. We see each other every day. So you don't have to look somebody up. You – they are there. You see them with everybody else.").

<sup>373</sup> T. 23 June 2009 p. 60. In addition, according to Prosecution Witness 006, Witness KAM's husband was close to Setako and Nzirorera. T. 20 April 2009 p. 20.

### 3.6.2 Kinshasa, Zaire, 12-21 April

#### *Introduction*

306. As set forth elsewhere (II.4), the Prosecution alleges that on 14 April 1994, Setako was present during an attack at the Ruhengeri Court of Appeal. It argues that Setako's alibi during this period lacks credibility.<sup>374</sup>

307. The Defence presented evidence that, from 12 to 21 April, Setako travelled as part of an official delegation to Zaire, along with Casimir Bizimungu, in order to discuss the situation in Rwanda with President Mobutu. He arrived in Kinshasa on the night of 12 April, where he stayed at the Inter-Continental Hotel until his departure. Reference is made to Witness Innocent Nzabona as well as documentary evidence.<sup>375</sup>

#### *Evidence*

##### Setako

308. According to Setako, he left Kigali on 12 April 1994 to go on mission to Kinshasa, Zaire, as part of a delegation headed by Casimir Bizimungu, the Minister of Health. Setako travelled by military helicopter to Gitarama, where he was met by Bizimungu, and then the two continued to Gisenyi. From there they flew by plane to Kinshasa, where they were met at the airport by the Rwandan Ambassador around 5.30 p.m. Setako checked into the Inter-Continental Hotel and the next day met the Ambassador and his staff at the Rwandan Embassy, where they drafted a *note verbale* seeking audience with President Mobutu. Setako did not read the *note verbale*. The request was granted, and Setako, Bizimungu and the Ambassador flew to Gbadolite on 16 April. Mobutu received the delegation that afternoon. The group asked for assistance in implementing the Arusha Accords and discussed the current military situation in Rwanda. Mobutu promised to raise the issue with President Museveni of Uganda, who was the only person who could influence the RPF. The delegation returned to Kinshasa after the meeting.<sup>376</sup>

309. Setako remained with the delegation in Kinshasa for the next several days awaiting a response from President Mobutu. On 20 April, Bizimungu informed Setako that Mobutu had prepared a letter addressed to President Sindikubwabo of Rwanda. The next day, 21 April, Setako departed Kinshasa and returned to Rwanda. He conveyed the message to the Minister of Defence in Gitarama who in turn gave it to the Prime Minister and the President. Setako then returned to Kigali on 22 April on the Minister's instructions.<sup>377</sup>

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<sup>374</sup> Prosecution Closing Brief paras. 176 (also referring to "Kigali events" without further specification), 181 (vi); T. 5 November 2009 pp. 15-18.

<sup>375</sup> Defence Closing Brief paras. 102, 119-130; T. 5 November 2009 pp. 49, 52-53. At paras. 120-121 of its Closing Brief, the Defence refers to Witness KAM's testimony that Setako told her on 11 April 1994 that he would be leaving Kigali the following day. This evidence is set forth elsewhere (II.3.6.1), but taken into account here.

<sup>376</sup> T. 22 June 2009 pp. 27-31; T. 24 June 2009 p. 52; T. 25 June 2009 pp. 52-55, 57-58, 61, 63, 69; T. 26 June 2009 pp. 11-12, 27, 48, 50, 60.

<sup>377</sup> T. 22 June 2009 pp. 30-35; T. 24 June 2009 p. 52; T. 25 June 2009 p. 64; T. 26 June 2009 pp. 11-12, 50.

Defence Witness Innocent Nzabona

310. Innocent Nzabona, a Hutu, was the first secretary of the Rwandan Embassy in Kinshasa, Zaire, in 1994. On the morning of 13 April, he saw Setako and Casimir Bizimungu at the embassy. They were the first official Rwandan delegation to travel to Zaire after the death of President Habyarimana. Julien Havugiyaremye, the first counsel, drafted a *note verbale* requesting a meeting for them with President Mobutu. Setako and Bizimungu remained in Kinshasa for three to five days before they were granted the meeting. They flew to Gdabolite with the Rwandan Ambassador, met with Mobutu and returned the next day. According to what the delegation told the witness, the main purpose of the mission was to update Mobutu on the situation in Rwanda. Setako and Bizimungu returned to Rwanda on 20 or 21 April. Throughout the mission, they stayed at the Intercontinental Hotel.<sup>378</sup>

*Deliberations*

311. According to Setako, he accompanied Casimir Bizimungu to Kinshasa on 12 April 1994, where he stayed at the Inter-Continental Hotel. On 13 April, he went to the Rwandan Embassy, where the staff prepared a *note verbale* seeking audience with President Mobutu. On 16 April, he, Bizimungu and the Ambassador travelled to Gbadolite, spoke with Mobutu and returned to Kinshasa that evening. He remained in Kinshasa until 21 April after receiving a response from Mobutu, which he delivered to the government in Gitarama.

312. This part of Setako's alibi is corroborated by Innocent Nzabona as well as by documentary evidence emanating from the Grand Hotel, the successor to the Inter-Continental Hotel in Kinshasa, confirming his stay during this period.<sup>379</sup> Furthermore, in light of Setako's high rank, prior affiliation with the Neutral Military Observers Group and his involvement in the June 1994 ceasefire negotiations with the RPF, it is also conceivable that he would form part of this mission (I.3).

313. The Prosecution highlights several possible problems with the alibi to show that it lacks credibility. In challenging Nzabona's evidence, it argues that the witness could not point to any news coverage of the mission in the Zairian media. The dates he provided for seeing Setako were vague and non-committal. At the same time, he acknowledged the ease of movement to and from Zaire. His knowledge about the purpose of Setako's meeting is suspect since it was limited and hearsay. Also, while he described the purpose of Setako's visit, he knew little about the mission of General Marcel Gatsinzi, who arrived around the same time.<sup>380</sup> According to the Prosecution, this suggests a bias towards providing favourable testimony to Setako.<sup>381</sup>

314. As a former Rwandan government official, Nzabona may have an interest in testifying for Setako. The Chamber also agrees that the witness's testimony concerning Setako's presence in Kinshasa, the purpose of his visit as well as the dates of the mission is somewhat vague and equivocal. The main point, however, remains that he purportedly saw Setako in

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<sup>378</sup> T. 17 June 2009 pp. 76-79; T. 18 June 2009 pp. 1-9, 12, 14, 16-19, 28-30; Defence Exhibit 168 (personal identification sheet).

<sup>379</sup> Defence Exhibit 181A (hotel invoice).

<sup>380</sup> Innocent Nzabona agreed that General Marcel Gatsinzi may have signed a ceasefire agreement on 23 April 1994 in Kinshasa, as the Prosecution suggested. T. 18 June 2009 p. 12.

<sup>381</sup> Prosecution Closing Brief para. 181.

Kinshasa on several occasions throughout his stay. The ambiguities in his account may be explained by the lapse in time since the relevant events as well as the fact that his function in the embassy, as its first secretary, did not relate to the mission. His greater knowledge about Setako's mission than that of Gatsinzi may be explained by his interest in the embassy's request for funds from the Zairian government that, unofficially, accompanied the *note verbale* carried by Setako's delegation.<sup>382</sup> The Prosecution reliance on the purported absence of media coverage for the mission is not convincing especially in light of the visit's sensitive purpose.

315. The Prosecution also points to several contradictions between Setako's account of the mission and that provided by Casimir Bizimungu during the testimony in his own trial. In particular, Setako stated that, on 12 April, he flew from Kigali to Gitarama by helicopter where he met Bizimungu, and that the two continued together to Gisenyi prefecture. However, Bizimungu testified that he flew from Gitarama to Gisenyi prefecture where he met Setako. Furthermore, Bizimungu said that he alone met with Mobutu while Setako indicated that he and the Rwandan Ambassador equally attended the meeting. Finally, Bizimungu recalled that President Mobutu's message was transmitted directly to the Rwandan government whereas Setako stated that he received the letter and delivered it to the Minister of Defence in Gitarama for transmission to the President and Prime Minister.<sup>383</sup>

316. The Chamber agrees that there are important differences in the accounts offered by Setako and Bizimungu. The fundamental features of their evidence, however, are consistent, namely that they both travelled to Kinshasa on 12 April, stayed at the Inter-Continental Hotel, and visited Gbadolite on 15 April. The varying details could reasonably result from the passage of time and their differing recollection of the events. As the Defence notes, Setako had access to Bizimungu's testimony before taking the stand.<sup>384</sup> Therefore, he certainly had the opportunity to greater tailor the details of his testimony to that of Bizimungu. Furthermore, Bizimungu did not testify in this trial, and thus the Chamber did not have an opportunity to elicit comments from him about the mission. The Chamber is not convinced that these differences eliminate the reasonable possibility that Setako was in Kinshasa during this period.

317. Finally, the Prosecution also argues that the documentary evidence of Setako's stay in Kinshasa is fabricated. It points to the lack of a daily accounting of expenses on the record in contrast to the record from Bizimungu's stay. It further submits that the documents were generated after the Inter-Continental Hotel ceased to exist. Finally, it mentions that Setako was unfamiliar with the passport and visa numbers that were associated with the hotel booking.<sup>385</sup>

318. The Chamber notes that the record of Setako's stay at the Inter-Continental Hotel is documented by a printout dated 22 May 2007 of his guest history in April 1994 from the archives of its successor, the Grand Hotel Kinshasa.<sup>386</sup> It shows that he spent a total of 8 nights there during a single visit in April 1994. It was accompanied by an attestation

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<sup>382</sup> See T. 18 June 2009 pp. 3-4.

<sup>383</sup> T. 5 November 2009 pp. 15-16; T. 25 June 2009 p. 64; Prosecution Exhibit 90 (*Bizimungu et al.*, T. 28 May 2007).

<sup>384</sup> T. 5 November 2009 pp. 52-53.

<sup>385</sup> *Id.* pp. 16-17. See also Defence Exhibit 181A (hotel invoice); Prosecution Exhibit 91 (hotel invoice for Casimir Bizimungu).

<sup>386</sup> Defence Exhibit 181A (hotel invoice).

containing similar information signed by the hotel's current acting manager and witnessed by an official at the Congolese Ministry of Justice. The attestation was prepared in May 2009 at the request of the Defence.<sup>387</sup> Its appearance is different than the record of Bizimungu's stay.<sup>388</sup> His record details the daily expenses charged to the room. However, it is unclear when and how Bizimungu obtained his records, which, if generated by a different method, may account for the dissimilarities. In this respect, the hotel manager explained in the transmission letter related to Setako's records that a new printout of his bill was not possible because the previous system is no longer in place. In the absence of compelling evidence of fabrication, the Chamber has no reason to doubt its provenance and authenticity. Setako's lack of familiarity with the visa and passport numbers listed on the hotel invoice could be explained by the lapse of time since the event as well as the fact that the embassy likely made the hotel arrangements.<sup>389</sup>

319. There is also limited evidence of Setako's presence in Rwanda during this period, which offers some circumstantial support for his alibi.<sup>390</sup> The Prosecution refers primarily to the testimony of Witness SAM, who placed Setako around 14 April at the attack on the Ruhengeri Court of Appeal (II.3.5). This evidence is uncorroborated, and the Chamber has questioned the credibility of his account of Setako's activities (II.3.1 and 5). Accordingly, the Chamber is not satisfied that the Prosecution has eliminated the reasonable possibility that Setako was in Zaire from 12 until 21 April 1994.

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<sup>387</sup> Defence Exhibit 181B (hotel attestation)

<sup>388</sup> Prosecution Exhibit 91 (hotel invoice for Casimir Bizimungu).

<sup>389</sup> The Prosecution suggested to Setako that "[t]his is an important event that you would not forget the passport number of your passport that you travelled with for this mission". T. 25 June 2009 p. 69. In the Chamber's view, it is reasonable to forget one's passport number after a lapse of 15 years.

<sup>390</sup> See similarly *Bagosora et al.* Trial Judgement para. 1980 (comparison of General Gratien Kabiligi's alibi and the limited Prosecution evidence for the relevant period).

#### 4. KILLINGS AT MUKAMIRA MILITARY CAMP, 25 APRIL AND 11 MAY 1994

##### *Introduction*

320. The Indictment alleges that, on or about 25 April 1994, Setako and his co-perpetrators instigated and ordered members of the civil defence and soldiers at Mukamira camp to kill about 30 to 50 Tutsi refugees there. He also directed those present to establish roadblocks to hunt down Tutsis and their accomplices for elimination. That day, roadblocks were set up at the Mukamira junction where several Tutsi refugees were arrested. These refugees were killed along with 30 to 50 others who were at the camp. Around 11 May, Setako brought nine Tutsis to the Mukamira camp and ordered Captain Hasengineza to have them killed. The bodies were thrown into a pit at the camp. Reference is made to Witnesses SLA and SAT.<sup>391</sup>

321. The Defence disputes the credibility of Witnesses SLA and SAT. Setako did not order the killings at Mukamira military camp, and the civil defence program was not yet in place, as they testified. It refers to Witnesses NBO, NEC, NDI and NCA, who lived at the camp and were unaware of killings occurring there.<sup>392</sup>

##### *Evidence*

##### Prosecution Witness SLA

322. In April 1994, Witness SLA, a Hutu, was recruited into the civil defence force in Nkuli commune. On 21 April, he and about 500 other recruits began one-and-a-half to two weeks of training at Mukamira camp. Corporals Ruhumuriza, Rusagara and Bizumuremyi instructed them in weapons handling and in how to search for the *Inkotanyi* and their accomplices. Tutsis and any Hutu who supported them were identified as the enemy. They received identification cards signed by Colonel Marcel Bivugabagabo. Military uniforms and firearms were provided to those who had joined the civil defence force.<sup>393</sup>

323. At some point between 9.00 a.m. and 1.00 p.m. on 25 April, Setako, General Augustin Bizimungu, Juvénal Kajelijeli and *Bourgmestre* Dominique Gatsimbanyi participated in a meeting with approximately 170 to 220 members of the civil defence force and soldiers. Major Bizabarimana, who was stationed at Mukamira camp, presented the group, and Setako introduced himself. From about nine metres away, the witness heard Setako inform the crowd that Tutsis and their accomplices needed to be hunted down. He also called for the establishment of more roadblocks and for the killing of Tutsi soldiers and their accomplices

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<sup>391</sup> Indictment paras. 40-41, 44, 58; Prosecution Closing Brief paras. 101-106; T. 5 November 2009 pp. 18-21, 27-28.

<sup>392</sup> Defence Closing Brief paras. 145, 165-166, 195-196, 370-393, 422-443, 518-521, 577-579, 588-589, 601, 605-607, 613-615, 617-618; T. 5 November 2009 pp. 46-48. The Defence submissions with respect to Expert Witness Bert Ingelaere are summarised elsewhere (I.2.4), but also taken into account here.

<sup>393</sup> T. 16 September 2008 pp. 39-43; T. 18 September 2008 pp. 11-13; Prosecution Exhibit 20 (personal identification sheet). Witness SLA confessed his role in the killing a young man and in looting his door, after which the Ruhengeri court of first instance imposed an 18-year sentence in 2002. In January 2003, he was provisionally released to a solidarity camp, and he was later freed. In 2008, the Kitobo Gacaca court charged him with looting, for which he confessed and paid compensation. He also confessed to his role in the killing of four members of the young man's family. T. 16 September 2008 pp. 25-32, 34, 59, 63-67; T. 18 September 2008 pp. 1-6; Prosecution Exhibit 21 (confession and guilty plea of 21 July 1999); Defence Exhibit 48 (confession and guilty plea of 10 August 1999).

at the camp. The meeting lasted two hours, and no other prominent personality addressed the crowd. This was the first time the witness saw Setako.<sup>394</sup>

324. Following the meeting, the witness assisted in the establishment of a roadblock near the camp at the junction of the roads from Kabaya and to Gisenyi prefecture. Later on 25 April, the witness, other civil defence personnel and soldiers at the roadblock stopped two Toyota Hilux vehicles carrying 30 to 40 Tutsis. They were identified as such based on their identity cards and physical features. The Tutsis were taken to Mukamira camp, and around 10.00 p.m., the witness and other assailants stabbed them to death with knives. The bodies were buried in a pit in the camp referred to as Ibibare. Major Bizabarimana and Captain Hasengineza were present during the killings.<sup>395</sup>

325. That night, assailants also killed between 30 to 50 Tutsi refugees from Kigali. These persons had arrived as early as the day after the killing of President Habyarimana and had been staying with family members who were soldiers stationed at the camp in houses on the bank of Lake Karago. The witness did not participate in this attack. However, he heard gunfire and saw the bodies, which were left in the camp to be eaten by dogs. He did not see any refugees at the camp from the morning of 26 April onwards and assumed that they had all been killed.<sup>396</sup>

326. Around 2.00 or 3.00 p.m. on 11 May, Setako returned to the camp in a military-style Land Rover, carrying six males, three women and a baby. The soldier driving Setako stopped near the camp commander's office. Setako spoke with Colonel Bivugabagabo and Lieutenant Mburuburengero as other junior soldiers and members of the civil defence force gathered. Captain Hasengineza was also present. Setako recalled his instruction that there were to be no Tutsis in the camp or region. He asked what the civil defence forces had been doing since he had found some. Three soldiers and two civil defence personnel removed the persons from

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<sup>394</sup> T. 16 September 2008 pp. 43-45, 49; T. 18 September 2008 pp. 15-17, 22, 26-27, 55-56. Witness SLA did not know whether any Tutsi soldiers were present during the meeting. T. 18 September 2008 p. 22. There is no indication in his evidence why the full contingent of the civil defence recruits was not in attendance. The witness referred to Augustin Bizimungu as the Ruhengeri operational commander, and was unaware if he had been promoted to Chief of Staff of the Rwandan army by 25 April 1994. T. 16 September 2008 p. 37; T. 18 September 2008 p. 17. Bizimungu was operational commander until he was promoted to the Chief of Staff of the Rwandan army around 15 April 1994. See Witness KBX, T. 21 May 2009 p. 20.

<sup>395</sup> T. 16 September 2008 pp. 45-49, 67; T. 18 September 2008 pp. 17-20, 24, 26-27, 41, 46. Witness SLA indicated that Major Bizabarimana and Captain Hasengineza were present at the killings on 25 April 1994, but did not issue any instructions. T. 16 September 2008 p. 48 ("Q. Witness, do you know if any authority of the Mukamira camp was present while the Tutsis were killed that night of 25th April? A. Yes, there was an authority of the camp. Q. Who were those present, the authorities? A. There was Bizabarimana and Hasengineza. But, I should state that at that time they did not give instructions concerning the persons we had killed, given that we had already received instructions in that regard."); T. 18 September 2008 p. 41 ("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.").

<sup>396</sup> T. 16 September 2008 pp. 49-50; T. 18 September 2008 pp. 7-8, 19-24, 26-27. It is not clear from Witness SLA's testimony whether Tutsi soldiers at Mukamira camp were killed with those who had sought refuge with them. See T. 18 September 2008 pp. 22-23 ("Q. ... [Y]ou testified that it is your view that they were killed together; that is, Tutsi soldiers were killed together with the refugees. Is that correct? A. Mr. President, Your Honour, I have said that I confirm that these persons were killed because gunshots were heard at the camp in the night, but I don't know whether they were separated before being killed. I thus affirm that on the basis of the gunshots that were heard in the night at the camp, the Tutsis were killed.").



the vehicle. The witness later learned from one of the assailants that the individuals brought by Setako were killed that night.<sup>397</sup>

#### Prosecution Witness SAT

327. Witness SAT, a Hutu, was among 450 to 500 civilians that received military training from soldiers at Mukamira camp in April 1994. Starting after 17 April, he was instructed in weapons handling and taught that the Tutsis and their accomplices were the enemy. The training lasted less than 20 days, after which he was deployed to positions in Nkuli and Mukingo communes. They were not paid, but received military-style uniforms and an identity card signed by Colonel Marcel Bivugabagabo. The witness did not meet Witness SLA during the training.<sup>398</sup>

328. Around 10.30 a.m. on 25 April, the witness and over 200 other persons were gathered by soldiers in front of the camp headquarters. Several officers and other prominent personalities were in attendance, including Setako, Bivugabagabo, General Augustin Bizimungu, Major Bizabarimana, who was the camp commander, Captain Hasengineza, Lieutenant Mburuburengero, Juvénal Kajelijeli and *Bourgmestre* Dominique Gatsimbanyi. Setako told the crowd that he was surprised that Tutsis had sought refuge at the camp since they were being killed elsewhere in Rwanda. Bizimungu then stated that they would find a solution. Setako also informed Gatsimbanyi and Kajelijeli that he would provide them with assistance. The meeting lasted around two hours.<sup>399</sup>

329. Around 9.00 p.m. that night, between 30 and 40 Tutsi civilians, ranging in age from 7 to 40 years old, were assembled. These individuals had sought refuge with their relatives stationed at the camp. The witness and less than 10 other assailants fired on the group and left their bodies in the bushes near the armoury. Soldiers named Mironko and Bizumuremyi lost relatives as a result of these killings. The corpses were left to be eaten by dogs, and in the morning they were seen dragging the arms and legs of the dead bodies.<sup>400</sup>

330. On 11 May 1994, around 3.00 p.m., Setako returned to Mukamira camp in a green, military-style Land Rover. The soldier driving for Setako parked in front of the camp headquarters, and the witness saw nine persons, including a woman with a child on her back, in the vehicle. Setako told Captain Hasengineza to take “these Tutsis” and kill them. Around 8.00 p.m. that night, the witness who was posted near camp headquarters watched as these

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<sup>397</sup> T. 16 September 2008 pp. 49-54; T. 18 September 2008 pp. 39-41.

<sup>398</sup> T. 18 September 2008 pp. 77-78, 81-82, 85-86; T. 19 September 2008 pp. 17-18; T. 22 September 2008 pp. 3-4, 14-15, 17; Prosecution Exhibit 22 (personal identification sheet); Defence Exhibit 55A (name of Witness SLA). Witness SAT has twice confessed and pleaded guilty to the crimes of killing and looting. The Ruhengeri court of first instance sentenced him to 16 years of imprisonment in 2001, and he was released in January 2003 to a solidarity camp. The Musumba Gacaca court convicted him in December 2006 and imposed an eight-year sentence which it commuted to community labour. T. 18 September 2008 pp. 64-66, 68-70, 72-73, 90; T. 19 September 2008 pp. 2-5, 7; Prosecution Exhibit 23 (confession and guilty plea of 20 March 2001); Prosecution Exhibit 24 (confession and guilty plea of 10 May 2005); Prosecution Exhibit 25 (Musumba Gacaca court judgment).

<sup>399</sup> T. 18 September 2008 pp. 75-83; T. 22 September 2008 p. 14. Witness SAT did not state why the full contingent of the civil defence recruits was not in attendance.

<sup>400</sup> T. 18 September 2008 pp. 77-83, 90-91; T. 19 September 2008 pp. 2-6, 30; T. 22 September 2008 pp. 7, 9.

individuals were killed near the armoury. Their corpses were dumped in the bushes and pits, and later eaten by dogs.<sup>401</sup>

### Setako

331. Setako maintained a home in Nkuli commune about 600 to 800 metres away from the communal office and four kilometres from Mukamira camp. He returned to work at the Ministry of Defence in Kigali on 22 April 1994 after his mission to Kinshasa (II.3.6.2). On 24 April, he began an investigation into whether the commander of the Mutara operational sector had collaborated with the RPF given its swift advance in that region which met with minimal resistance. The investigations lasted for two weeks and concluded on 8 May. Setako remained in Kigali during this period where he summoned individuals and questioned them in his office at the Ministry of Defence.<sup>402</sup>

332. Around 9 and 10 May, Setako investigated allegations that the commander of a unit in the Bugesera area, commonly called Gako, had collaborated with the RPF, given the commander's destruction of the Rwabosoro bridge. During this investigation, he travelled to Gitarama town to verify certain information. Setako did not provide an itinerary for 11 May, but testified that he did not go to Mukamira camp between 4 April and 4 July 1994.<sup>403</sup>

### Defence Witness NBO

333. Witness NBO, a Hutu, joined her husband at Mukamira camp in late February 1994 and remained there until June. She stayed in a residence about one kilometre from the command centre, and never visited the armoury. After the death of President Habyarimana, the witness noticed many refugees staying in the camp. She identified two groups: persons from near Mukamira and family members of soldiers who had come from Kigali. According to the witness, no one was killed at the camp, and corpses were not devoured by dogs. Had either occurred, she would have learned about it from friends who lived throughout the camp. The witness befriended two Tutsi children who were still alive when she left in June. She had never seen Setako before her testimony.<sup>404</sup>

### Defence Witness NEC

334. Witness NEC, a Tutsi, lived at Mukamira camp with her husband, a Tutsi sergeant, from April 1992 until July 1994. From her quarters where non-commissioned officers – including a Tutsi first sergeant named Mironko and his family – lived, she could not see the command centre, the armoury or the woods behind it. Moreover, only soldiers were permitted near the arms deposit, and their families “could not know” what took place there. Soldiers' families arrived from Kigali between 15 and 30 April 1994, and they numbered less than 200 persons. According to her, there were only two refugees from the surrounding area, and they

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<sup>401</sup> T. 18 September 2008 pp. 84-85; T. 19 September 2008 p. 28; T. 22 September 2008 pp. 1-3. Witness SAT first stated that the child was the tenth person brought by Setako, but then consistently talked about nine Tutsis. T. 18 September 2008 p. 84; T. 22 September 2008 pp. 1-3.

<sup>402</sup> T. 22 June 2009 pp. 35-37; T. 25 June 2009 pp. 27, 37.

<sup>403</sup> T. 22 June 2009 pp. 36-38; T. 24 June 2009 p. 47; T. 25 June 2009 pp. 27-28, 30-31, 35-36.

<sup>404</sup> T. 6 May 2009 pp. 24-28, 35-37, 41, 48, 52, 54-56; Defence Exhibit 114 (personal identification sheet).

were the fiancées of soldiers. The witness never saw civilians being trained but did not go to the location where military exercises took place.<sup>405</sup>

335. Three days after families arrived from Kigali, Major Laurent Bizabarimana assembled everyone at the camp, around 300 persons, and forbade Tutsis and those resembling Tutsis from leaving it because of the killings. The refugees from Kigali stayed at the camp until July, and the witness became acquainted with at least 15 who were Tutsis. She testified that no Tutsis were killed within the camp and she never saw unburied corpses. She would have known unless it took place inside the armoury. During her evacuation to Gisenyi prefecture in July, she noticed that nobody was missing among those living at the camp.<sup>406</sup>

#### Defence Witness NDI

336. Witness NDI, a Hutu, lived with her uncle, a warrant officer, at Camp Kigali. On 16 April 1994, she travelled to Mukamira camp by bus with her aunt and cousins, along with about 20 other families staying at Camp Kigali. She stayed in a house that was about 700 to 800 metres from the armoury. From there, she could not see either the command headquarters or the armoury. Twice a week, she passed the armoury on her way to church, and she moved around the camp at least five times daily to collect various materials for the house. She never learned that any Tutsis were killed at the Mukamira camp between mid-April and July when she left. The witness never saw or smelled corpses when passing the armoury, and she said that everyone she met at the camp survived the genocide, including numerous Tutsis.<sup>407</sup>

#### Defence Witness NCA

337. Witness NCA, a Tutsi, lived with her father, a Tutsi corporal, at Kami military camp in early 1994. After the President's plane was shot down, she was evacuated to Camp Kanombe. Around 16 or 17 April, a bus took her, her five siblings, her mother and some 35 others to Mukamira camp. The refugees from Kigali were all housed in Mukamira's canteen for corporals. The witness remained there until early May, during which time she stayed inside and was unaware of activities outside of it. While there, she met the wife of a soldier named Mironko, as well as a corporal stationed at the camp. She and the corporal became engaged after her second week at the camp. The witness moved with her Tutsi family into an empty house allotted for corporals. She did not leave it until they fled, and as a consequence did not see Mironko's wife again. To her knowledge, no Tutsis were killed at Mukamira camp between mid-April and July. The witness believed that her fiancée, who visited her frequently, would have told her of any exceptional events. She left the camp in July with her family. They were accompanied by two other Tutsi women and their husbands who were lieutenants.<sup>408</sup>

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<sup>405</sup> T. 19 May 2009 pp. 9-10, 13, 15-16, 22, 24-25, 27-32, 34-35, 37; Defence Exhibit 137 (personal identification sheet).

<sup>406</sup> T. 19 May 2009 pp. 16-18, 22, 24-25, 29-32, 35.

<sup>407</sup> T. 11 May 2009 pp. 22-25, 28, 31-37, 42-43, 45-48, 51-55, 61-63; Defence Exhibit 123 (personal identification sheet).

<sup>408</sup> T. 26 May 2009 pp. 62-66; T. 27 May 2009 pp. 1-2, 4-12; Defence Exhibit 156 (personal identification sheet).

### Deliberations

338. The Prosecution presented Witnesses SLA and SAT in support of its allegations that Setako ordered the killings of Tutsi refugees at Mukamira camp on 25 April and on 11 May 1994. The two witnesses attended the meeting on 25 April where Setako urged the killing of Tutsis at the camp. They also directly participated in the crimes against two different groups of Tutsis, respectively, on the night of 25 April. Furthermore, Witnesses SLA and SAT observed Setako bring around 10 individuals to the camp on 11 May and either witnessed (Witness SAT) or heard about (Witness SLA) their death.

339. The Chamber has noted that Witnesses SLA and SAT were released from prison in January 2003 and implicated Setako to Tribunal investigators for the first time while in solidarity camp in April 2003.<sup>409</sup> The Defence has alleged that certain witnesses detained in Ruhengeri prison were the subject of efforts by Rwandan officials to influence their testimony. These submissions and the supporting evidence focus primarily on Witness SAA and others implicated in attacks in Mukingo commune (II.2 and 3.1).<sup>410</sup> Witnesses SAT and SLA were detained in Ruhengeri prison, but were released more than five years prior to their testimony in September 2008. There is also no specific evidence implicating any authorities or other prisoners in manipulating their testimonies.<sup>411</sup> Therefore, the suggestion that they were manipulated is speculative. They remain, however, alleged accomplices of Setako at least with respect to the killings of 25 April. Accordingly, the Chamber views their evidence against Setako with appropriate caution.

340. The fundamental features of the two witnesses' accounts of the events at Mukamira camp are largely consistent. They were recruited into the civil defence forces in Nkuli commune in mid-April, and their descriptions of the training period and purpose are similar. Both witnesses also recalled attending a meeting on the morning of 25 April where Setako, in the presence of other prominent personalities, addressed the crowd and called for the killing of Tutsis at the camp.<sup>412</sup> Witness SAT acknowledged killing between 30 and 40 Tutsi civilians who had sought refuge with family members there that night. Witness SLA heard the gunfire that evening. The two witnesses observed the remains of the dead being eaten by dogs. In addition, both saw Setako return to the camp with nine or 10 Tutsis on 11 May,

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<sup>409</sup> See Witness SLA, T. 18 September 2008 pp. 1, 3-4; Witness SAT, T. 19 September 2008 pp. 7, 9, 11-12. The Chamber has also taken into account the possibility of collusion. The witnesses, however, testified that they did not know each other and that they were interviewed by Tribunal investigators privately. Witness SLA, T. 18 September 2008 pp. 2-5, 50; Defence Exhibit 49 (two names); Witness SAT, T. 19 September 2008 pp. 8-9, 12; Defence Exhibit 55A (name of Witness SLA). The Chamber accepts this and observes that there is no convincing evidence to the contrary. As pointed out by Defence counsel, the first statements where Witnesses SLA and SAT mentioned Setako were both dated 15 April 2003 and signed two days later. T. 18 September 2008 pp. 3-4. Furthermore, the witnesses' testimonies in Arusha commenced the same week. However, this is not a sufficient basis to conclude that they colluded in the absence of more concrete evidence. The proximity in date of their second statements likely follows from the fact that they were taken during the same investigative mission to the area in order to obtain information about Setako. It is also speculative to suggest that their joint presence in Arusha resulted in collusion. No details of this were elicited during their cross-examinations.

<sup>410</sup> Defence Closing Brief paras. 145, 233, 283, 287, 542; T. 5 November 2009 p. 61. See also testimony of 18 May 2009 of Defence Witness RBN; Defence Exhibit 14A (*Karemera et al.*, T. 10 April 2008).

<sup>411</sup> Witnesses SLA and SAT denied that they had been coached to give false testimony. Witness SLA, T. 18 September 2008 p. 7; Witness SAT, T. 19 September 2008 p. 14.

<sup>412</sup> There is not a reliable indication in the evidence of the number of soldiers or refugees and what percentage of those groups were Tutsis at Mukamira camp.

including at least one woman and a child. Witness SAT saw their killing from his position at the camp, and Witness SLA heard about their murder.

341. There are also differences between the two testimonies. Many of them are reasonably explained by their varying vantage points and the passage of time. In particular concerning the events of 25 April, both witnesses testified that General Augustin Bizimungu, Juvénal Kajelijeli, *Bourgmestre* Dominique Gatsimbanyi and Major Bizabarimana were present. However, Witness SAT added that Colonel Marcel Bivugabagabo, Captain Hasengineza and Lieutenant Mburuburengero were also among the attendants. In the Chamber's view, this is not a significant difference.

342. More notably, Witness SLA indicated that only Setako addressed the crowd, whereas Witness SAT recalled Bizimungu speaking as well. However, the intervention of Bizimungu, as described by Witness SAT, amounts only to a brief comment. The difference in their accounts on this point is not surprising or material.

343. Finally, Witness SLA was the only witness to mention Setako's order to establish roadblocks. He was also alone in discussing the killing of 30 to 40 Tutsis that evening who were captured at a roadblock that had been established based on Setako's instructions. The Chamber notes, however, that Witness SLA was ultimately tasked with mounting the barrier outside of the camp, which accounts for his more precise recollection of this instruction. Furthermore, 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.<sup>413</sup>

344. 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.<sup>414</sup>

345. Bearing in mind that the fundamental features of the two mostly first-hand accounts are largely consistent, the Chamber will now view the two testimonies in the context of their criminal proceedings in Rwanda, prior statements to Tribunal investigators and evidence in other trials in Arusha.

346. The Defence confronted Witnesses SLA and SAT with documents from their criminal proceedings in Rwanda, which do not refer to the events of 25 April and 11 May. Specifically, Witness SLA was shown his January 1997 *pro justitia* statement, his July 1999

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<sup>413</sup> T. 16 September 2008 p. 48 (“Q. What happened to their bodies? Do you know? A. The bodies of the victims who were killed at the camp were thrown in the pits that are found at the camp. Q. Witness, what is this pit called, if it has a name? A. They are called Ibibare in Kinyarwanda.”); T. 18 September 2008 p. 24 (“The witness: ... I stated that we buried the bodies in pits called Ibibare. However, those are not the only bodies that were at the camp. There were many other bodies, and some of them were eaten up by dogs. I have explained that at some point we dumped bodies in that pit, Ibibare, but that does not stop the fact that there were other bodies.”).

<sup>414</sup> T. 18 September 2008 pp. 40-41.

letter of confession, and the transcript from his August 1999 confession.<sup>415</sup> The Defence challenged Witness SAT's evidence with his guilty pleas of March 2001 and May 2005 as well as his subsequent Gacaca judgment.<sup>416</sup>

347. Witnesses SLA and SAT each explained that they did not discuss these events because they had not been charged with them.<sup>417</sup> Witness SLA added that he presently was prepared to confess and ask for forgiveness in Rwanda for his participation in the 25 April killings. Witness SAT commented that the killings he committed that day were ordered by high-ranking soldiers who should be held responsible for the crime rather than him.<sup>418</sup>

348. The Chamber observes that neither witness was directly involved in the 11 May killings. They only observed Setako order the killing of the Tutsis 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.<sup>419</sup> This reflects the general need, mentioned above, to view their evidence with caution. It does not, however, invalidate their accounts of these events.<sup>420</sup>

349. The Defence also challenged the testimonies of Witnesses SLA and SAT with their statements to Tribunal investigators from the second half of 2002, which similarly do not refer to the events of 25 April and 11 May 1994.<sup>421</sup> Witness SLA explained that the October 2002 investigation concerned Augustin Bizimungu, and that he only replied to questions asked of him. He also did not mention Setako for "purposes of security".<sup>422</sup>

350. Witness SLA's testimony that Bizimungu was the focus of his October 2002 statement is a reasonable explanation for the omissions of events related to Setako. While he testified that Augustin Bizimungu was present during the meeting which initiated the killings on 25 April, he did nothing more than attend.<sup>423</sup> Moreover, Bizimungu does not feature in the

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<sup>415</sup> Defence Exhibit 47 (*pro justitia* statement of 15 January 1997); Prosecution Exhibit 21 (confession and guilty plea of 21 July 1999); Defence Exhibit 48 (confession and guilty plea of 10 August 1999).

<sup>416</sup> Prosecution Exhibit 23 (confession and guilty plea of 20 March 2001), Prosecution Exhibit 24 (confession and guilty plea of 10 May 2005), Prosecution Exhibit 25 (Gacaca judgment).

<sup>417</sup> Witness SLA disavowed his January 1997 *pro justitia* statement in its entirety, testifying that he provided it as a result of torture. He said the Ruhengeri court of first instance acquitted him of the charges that followed from this statement. T. 16 September 2008 pp. 60-63. Irrespective 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.

<sup>418</sup> Witness SLA, T. 16 September 2008 pp. 67, 69-70. Witness SAT, T. 18 September 2008 pp. 90-91; T. 19 September 2008 pp. 2-6.

<sup>419</sup> Witness SAT testified that he confessed to other crimes because his "conscience bothered" him. T. 18 September 2008 pp. 69, 90. Although it would seem that the killing of 30 to 40 refugees might also trouble his conscience, the Chamber recalls that, in his mind, the ultimately responsibility for these killings rested with the authorities who ordered them.

<sup>420</sup> See, for instance, *Simba* Trial Judgement paras. 165-166, 168 (relying on a witness who had not mentioned his involvement in a massacre in Rwandan proceedings). The Chamber's reliance on this witness, notwithstanding the discrepancy with statements in his Rwandan proceedings, was affirmed on appeal. See *Simba* Appeal Judgement paras. 125-130.

<sup>421</sup> Defence Exhibit 45 (statement of 28 and 29 October 2002); Defence Exhibit 53 (statement of 13 September 2002). Witnesses SLA and SAT were both held in Ruhengeri prison at the time.

<sup>422</sup> T. 16 September 2008 p. 32; T. 18 September 2008 pp. 14-15.

<sup>423</sup> Witness SLA appeared to suggest that because Augustin Bizimungu's role was limited to his presence at the 25 April 1994 meeting, there was no need to describe it to Tribunal investigators. See T. 18 September 2008 pp. 15-16.

11 May event. In any case, the Chamber observes that Witness SLA's statement is consistent with his testimony that he had received training at Mukamira military camp.

351. Witness SAT testified that his September 2002 statement was given in connection with investigations about Captain Hasengeza, Augustin Bizimungu and Juvénal Kajelijeli.<sup>424</sup> According to his testimony, each of these individuals attended the meeting of 25 April 1994, and Bizimungu even briefly spoke. Thus, it is notable that this event does not feature in his first statement. Furthermore, Witness SAT testified that Captain Hasengeza played a central role in detaining the Tutsis and shepherding them to their death during the 11 May incident, whereas the May killings are not mentioned in his statement from September 2002. The Chamber notes, however, that the statement, which is rather brief, spans from early 1992 to July 1994, includes his own acts in April 1994, and that the events at Mukamira are only covered in a cursory manner in the statement. The witness also explained that he did not fully understand who the Tribunal investigators were, did not trust them, and in certain instances, lied to them.<sup>425</sup> He gave a complete statement to investigators in 2003 once he was assured of their identity.<sup>426</sup> In the Chamber's view, this accounts for the variances between his first statement from September 2002 and his testimony.

352. In addition, the Chamber notes that Witness SAT's statement in 2002 is also consistent with his testimony that he and others received military training at Mukamira during this period.<sup>427</sup> Moreover, his account to investigators mentions that Tutsis who had sought refuge with relatives based at the camp were killed during the three months he spent there.<sup>428</sup> Given the overall context, the Chamber does not find that his omissions reflect material inconsistencies with his evidence.

353. The Defence also challenged Witness SLA's evidence in the present trial by confronting him with his testimony from the *Ndindiliyimana et al.* case in May 2005. There, he stated that for the two weeks he received training at Mukamira camp, no "particular" event occurred.<sup>429</sup> When he was confronted in that trial with the fact that he did not mention the 25 April killings, he explained that he was being asked questions only about Bizimungu, who did not commit any crime then.<sup>430</sup>

354. Witness SLA's failure to testify about the 25 April meeting and subsequent killings in the *Ndindiliyimana et al.* trial can be explained by the fact that this event is not part of that

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<sup>424</sup> T. 18 September 2008 p. 75.

<sup>425</sup> T. 19 September 2008 pp. 14, 21-22. Witness SAT highlighted the passage in his September 2002 statement that he had remained at home on 7 April 1994 as information he provided to investigators that was false. *Id.*

<sup>426</sup> *Id.* p. 21.

<sup>427</sup> Defence Exhibit 53B (statement of 13 September 2002) p. 6.

<sup>428</sup> *Id.* pp. 6-7 ("During the three months I spent in the camp before we fled, I noticed that some families of Tutsi soldiers were coming to take refuge at the camp. But each time their Tutsi relatives went to the front, the other soldiers seized the opportunity to exterminate them. Those Tutsi soldiers complained whenever they returned from the front. The victims were shot and we saw bodies in bushes around the camp.").

<sup>429</sup> Defence Exhibit 50 (*Ndindiliyimana et al.*, T. 19 May 2005 p. 17: "Q. ... then you underwent or started between the 20th and the 25th April, then it lasted two weeks. Apart from all the events you mentioned that happened during the training session, was there any particular event that occurred between when you started your training session and when you were leaving camp? A. No, none."). Moreover, the witness did not mention Setako's visits even when asked if he had met with officers who spoke to him at Mukamira camp. *Id.* p. 18. ("Q. Witness during this period that you were in Camp Mukamira, you said that nothing, apart from your training session happened, no particular event, or did you sometimes meet officers who spoke to you at Camp Mukamira? A. I never personally met an officer during that period.").

<sup>430</sup> T. 18 September 2008 pp. 26-27.

case.<sup>431</sup> During examination-in-chief, he was not specifically questioned about Setako or the meeting by the Prosecution.<sup>432</sup> Furthermore it follows from Witness SLA's testimony in the *Ndindiliyimana et al.* case that he was uncertain of the extent to which it was permissible to mention Setako in that trial. This was evident already from the beginning of his testimony where he was hesitant to mention his statement about Setako in 2003.<sup>433</sup> However, the witness readily acknowledged the content of his statement against Setako when it was put to him in cross-examination and he was assured it was permissible to discuss it.<sup>434</sup>

355. Although in the *Ndindiliyimana et al.* case the witness stated that Bizimungu was not present at the camp during his training, the Chamber is not convinced that this difference is significant.<sup>435</sup> The meeting was not directly related to the group's training in weapons handling or combat techniques. The witness also did not recall in the present trial that Bizimungu made any statements during it.

356. The Chamber also observes that, in the *Ndindiliyimana et al.* trial, the witness stated that the meeting of 25 April occurred on 25 May.<sup>436</sup> His change of the date of the 25 April meeting to 25 May in his evidence in *Ndindiliyimana et al.* contradicts his prior statement from April 2003 and his subsequent account in the present case. This is clearly an error, and in the present trial the witness confirmed that the killings happened on 25 April instead of 25

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<sup>431</sup> The incident is not specifically pleaded in the indictment of 23 August 2004 in the *Ndindiliyimana et al.* case.

<sup>432</sup> Defence Exhibit 50 (*Ndindiliyimana et al.*, T. 19 May 2005 p. 17: “[Ms. Okali]: ... Your Honours will agree with me that when I did my presentation on examination-in-chief, I restricted the evidence strictly to specific acts ... that were committed by General Bizimungu.”).

<sup>433</sup> See Defence Exhibit 51 (*Ndindiliyimana et al.*, T. 10 May 2005 p. 51: “Q. Do you recall how many times you were interviewed and for which accused? A. I have two statements, one on Bizimungu and another on another accused whose name I cannot disclose because my testimony does not have a bearing on that person. However, with regard to the statement on Bizimungu, the investigators interviewed me twice. Q. Witness, you are free to tell the Court who the second person is, and I’ll urge you to do so. A. If it is not a problem for this Tribunal, I can say so. It is Setako.”).

<sup>434</sup> Defence Exhibit 50 (*Ndindiliyimana et al.*, T. 19 May 2005 pp. 26-29). Witness SLA's belief that he should not discuss Setako is illustrated at pp. 26-27 (“Q. ... So tell the Court how you are able to assert – or how do you reconcile this event that occurred on the 25th April 1994, with your testimony of a while ago? A. Mr. President, Your Honours, ... I want the Defence counsel to explain to me if I’m being questioned on Setako’s case. When that answer is given, then I can answer. ... It’s not because I have no answer to that question. I was just concerned by the fact that we’re going to go into two different cases. By that, it’s not creating a problem. I can answer.”), 29 (“Q. Witness, is it not a particularly peculiar fact that you could not have forgotten this event, an event described in the questions that I put to you a while ago. A. ... You can well imagine that if I did not mention this event, it is due to the fact – you might think that if I did not mention this event, it might be because I forgot it or did not know it, but it is a fact I relayed to somebody else. Otherwise, this event did take place. I’m not here to testify against Setako. That is why I told you that no other particular event took place. I’m not expected to mention events in relation to Setako because if the Tribunal so wished, I’m going to have the opportunity to testify against Setako. But if the Court so wishes, we can talk about events in relation to Setako. So in short, I’m saying that this event did take place and someone else was a person concerned by this event, and I’m ready to testify against that person, but don’t think it is because I forgot this fact. The person I’m testifying against is not the one who carried out this act.”)

<sup>435</sup> Defence Exhibit 51 (*Ndindiliyimana et al.*, T. 10 May 2005 p. 65).

<sup>436</sup> Defence Exhibit 50 (*Ndindiliyimana et al.*, T. 19 May 2005 pp. 34: “I never mentioned the date 25 April. Rather I said 25 May. The person who took down my statement was mistaken. I mentioned the date of 25 May.”, 35: “Mr. President, Your Honors, I’m challenging a sentence in the statement – or a part of that statement, which is the date regarding the events in which Setako was involved. I am contesting just one point. That is the date, Mr. President.”).



May 1994. He explained that he may have been mistaken when testifying in the preceding case.<sup>437</sup>

357. Witness SLA also testified during the *Ndindiliyimana et al.* case that he left Mukamira camp on 5 May, was posted at Nyamagumba for about two days, Mubona for around six days, Muhingo for two days, one day in Nkumba and returned to camp around 17 May 1994.<sup>438</sup> In the present trial, the witness confirmed that he was posted at these locations but could not recall his length of stay at them.<sup>439</sup> To explain his presence at Mukamira camp on 11 May, he stated that he was responsible for supplying foodstuffs to the positions, which required that he return to it in the morning and afternoon even when posted elsewhere.<sup>440</sup>

358. This explanation varies slightly from the one he gave in the *Ndindiliyimana et al.* case, where he explained his presence there on 11 May because that morning he had asked for leave to go to Mukamira camp.<sup>441</sup> Furthermore, he made no mention of his daily returns to Mukamira camp in his prior testimony or statements to Tribunal investigators. The witness was unaware of whether he was questioned on these details and affirmed his testimony.<sup>442</sup> In the Chamber's view, his prior evidence that he was posted elsewhere at the time of the 11 May incident does not raise any questions. It is reasonable, as the witness explained, that he returned to the camp for provisions, which was likely also viewed as leave.<sup>443</sup>

359. The Chamber has also considered the accounts of Witnesses SLA and SAT in the context of the documentary evidence that, according to the Defence, raises doubt that a

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<sup>437</sup> T. 18 September 2008 pp. 24, 27, 30, 31 (“And you also have to understand that I may have been mistaken because I was talking about two different individuals: Mr. Bizimungu and Mr. Setako.”).

<sup>438</sup> See Defence Exhibit 50 (*Ndindiliyimana et al.*, T. 19 May 2005 pp. 7, 17 (training lasted for two weeks and Witness SLA left Mukamira camp on 5 May 1994), 18 (at Nyamagumba for “about two days”), 19 (at Mubona for “six days, but that is just an estimate” and Muhingo for “two days”), 21-22 (was at Nkumba and returned to Mukamira camp around 17 May 1994)).

<sup>439</sup> T. 18 September 2008 pp. 32-36.

<sup>440</sup> *Id.* 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.”). Witness SLA did not provide distances between Mukamira camp and the various positions other than to note that they were in Ruhengeri prefecture. However, his evidence suggests that they were in relatively close proximity to the camp since individuals could request to return to the camp to take a bath. *Id.* pp. 36-37.

<sup>441</sup> Defence Exhibit 50 (*Ndindiliyimana et al.*, T. 19 May 2005 p. 37).

<sup>442</sup> T. 18 September 2008 p. 37 (“Q. Witness, if I were to tell you that during your testimony in the trial of Augustin Bizimungu, you never mentioned anything about you going back on a daily basis for supplies, nor in any of your statements that you've given to the ICTR have you mentioned this fact, what do you say about that, Witness? A. ... I don't know if all your questions were found in my previous statements or my previous testimonies, but I will answer your question. ... Effectively, I did not mention that fact in that earlier testimony, but I am doing so now on the basis of the question that has been put to me.”).

<sup>443</sup> Even if the explanations were inconsistent, such a minor difference is not unexpected given the elapse of time between his appearances before the Tribunal and the events. The main consideration is that there were multiple valid reasons for his return to the camp. The fact that he might not have consistently recalled the particular one is not material and does not call into question the overall credibility of the primary features of his account.

civilian defence force existed during these events.<sup>444</sup> It refers to a cable of 30 April 1994 from the Ministry of Defence to recruit retired soldiers, the Directive of 25 May 1994 from Prime Minister Jean Kambanda to all Prefects, and the instruction from Interior Minister Edouard Karemera of the same date concerning the establishment and implementation of civil defence forces throughout Rwanda.<sup>445</sup> In the Chamber's view, these documents concern the formal implementation of the civil defence program on a national scale. They do not therefore raise doubt about the consistent, first-hand evidence of training at the camp.<sup>446</sup>

360. The Chamber has also viewed the Prosecution evidence in light of the testimonies of Witnesses NBO, NEC, NDI and NCA. These Defence witnesses were at the camp during the relevant period and did not observe or hear about killings on 25 April or 11 May. In the Chamber's view, their evidence carries limited weight. Each 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. In particular, Witness NBO's husband was related to an accused before the Tribunal, raising questions about her impartiality.<sup>447</sup>

361. Moreover, the Defence witnesses' lack of knowledge concerning the killings may also be explained by varying vantage points at the time of the killings and the fact that they were civilians with limited knowledge of camp activities. Mukamira camp appears to have been significant in size, and the Defence witnesses also did not live in the part of the camp near the command centre or the armoury.<sup>448</sup> Witness NEC also stated that only soldiers were permitted near the arms depot. This raises questions about the extent of Witness NDI's purported daily movements around the camp.<sup>449</sup> Witness NCA hardly left her quarters, and

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<sup>444</sup> Defence Closing Brief para. 371. See also Witness SAT, T. 22 September 2008 pp. 3-4 (affirming that he had received civil defence training when confronted with the assertion that civil defence was implemented on 25 May 1994 and under different circumstances); Witness SLA, T. 18 September 2008 p. 13 (rejecting counsel's assertion that civil defence training did not exist at Mukamira camp in 1994).

<sup>445</sup> Defence Exhibit 56 (Prime Minister's Civil Defence Directive of 25 May 1994); Defence Exhibit 57 (Ministerial instruction on the implementation of civil defence of 25 May 1994); Defence Exhibit 100 (cable of 30 April 1994 from the Ministry of Defence to all camp and operational sector commanders).

<sup>446</sup> The Chamber notes that the existence of informal or regional measures concerning civil defence pre-date the distribution of these documents. See, for instance, *Bagosora et al.* Trial Judgement paras. 460-495 (noting the existence of civil defence programs from 1990 in particular in Northern border areas such as Ruhengeri prefecture).

<sup>447</sup> T. 6 May 2009 p. 42.

<sup>448</sup> The testimony and sketches provided by Defence witnesses reflect that Mukamira camp was substantial in size and inhabited by many persons. See, for instance, Witness NDI, T. 11 May 2009 pp. 25-30 (description of a sketch); Defence Exhibit 124 (sketch of Mukamira camp); Witness NEC, T. 19 May 2009 pp. 10-11, 22 ("There were many families at the camp. I could not know all of them. ... There were many Tutsis at the camp, but I knew mostly my neighbours and my friends. I could not know all the Tutsis at the camp because Mukamira camp had a lot of people."), 31 (long distance between the witness's quarters and the command centre), 36-37 (estimating that not more than 1000 soldiers and around 200 refugees lived at the camp); Defence Exhibit 138 (sketch of Mukamira camp). See also Prosecution Exhibit 8C (photograph of entrance of Mukamira camp). As mentioned in their evidence summarised above, Witness NBO lived about one kilometre from the command centre, and Witness NDI described her housing as 700 to 800 metres away from the armoury. Witness NEC could not see the command centre or armoury from her residence.

<sup>449</sup> In discussing her movements, Witness NDI testified that she passed the armoury twice a week to attend church services. This route appears to be near where killings occurred. Thus, she would have been the best placed of the Defence witnesses to see the corpses. However, the Chamber considers that even if her evidence were accepted, it is inconclusive as to whether she would have been in a position – in time and space – to see the bodies. In light of the first-hand evidence of the Prosecution witnesses, her testimony fails to raise reasonable doubt that killings occurred at the camp.

Witness NBO agreed that she never visited the armoury. Given the distance of the witnesses' housing from the armoury and the woods behind it, it is not surprising that they did not observe the corpses of those shot on the night of 25 April even though the bodies were left for a period of time in an open and notorious manner. The bodies of refugees stopped at the roadblocks on 25 April were allegedly disposed of in a relatively inconspicuous way.

362. Turning to more specific challenges to the Prosecution witnesses based on Defence evidence, the Chamber notes that, whereas Witness SAT indicated that the family members of a soldier called Mironko were killed on 25 April 1994, Witness NCA testified that she saw the wife of a soldier of the same name until early May. Witness NEC knew a Tutsi first sergeant named Mironko and testified that she was unaware of any Tutsi families being killed. It is not clear to the Chamber that Witnesses SAT, NCA and NEC were referring to the same Mironko.<sup>450</sup> Moreover, Witness NCA only discussed meeting Mironko's wife, while Witness SAT did not specify who among Mironko's family was killed.<sup>451</sup> Witness NEC's evidence is unspecific as to whether she observed Mironko's family after 25 April, although she stated that no Tutsis were killed at the camp.

363. Furthermore, while Captain Hasengineza features in Prosecution evidence about the killings on 25 April and 11 May, Witnesses NEC and NDI testified that he was not seen at the camp during the war even though his family maintained a residence there, and Witness NEC stated that he had been transferred from it.<sup>452</sup> The evidence concerning Hasengineza does not call into question the Prosecution evidence, given the Defence witnesses' limited basis of knowledge in matters of military deployment.

364. The Defence also argues that Witness SAL's assertion that all Tutsis in the 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.<sup>453</sup> In the Chamber's view, Witness SAL did not have a sufficient basis of knowledge concerning the full scope of persons present at the camp to reliably determine that all Tutsis had been killed. Similarly, the Defence witness as well lacked full knowledge of all activities or persons at the camp in view of its size and the temporary nature of the refugees' presence there. The Defence evidence therefore does not raise doubt about the killings on 25 April.

365. The Defence points to Expert Witness Bert Ingelare as well as various Gacaca records in support of its argument that if these crimes had occurred both Setako and the events would have been mentioned in Rwandan national proceedings (I.2.4). It argues that there is no reference to these killings.<sup>454</sup> In the Chamber's view, this argument is speculative and is

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<sup>450</sup> Witness SAT did not describe Mironko's position as a soldier within Mukamira camp. T. 18 September 2008 p. 83; T. 22 September 2008 p. 9. However, in his statement of 15 April 2003, he referred to him as a "Tutsi soldier". Defence Exhibit 54A (statement of 15 April 2003) p. 4. Witness NCA identified Mironko as a Tutsi and believed that he was a cook given the duties he performed at the canteen in which she stayed. She was unaware of his rank or if he was a driver. T. 26 May 2009 p. 66; T. 27 May 2009 p. 10. Witness NEC also discussed a Tutsi first sergeant, named Mironko, who was a driver and transported troops to the war front. T. 19 May 2009 pp. 14, 24.

<sup>451</sup> See T. 18 September 2008 p. 83; T. 22 September 2008 p. 9.

<sup>452</sup> Witness NEC, T. 19 May 2009 pp. 13, 22-23; Witness NDI, T. 11 May 2009 pp. 31-32, 52-53.

<sup>453</sup> Defence Closing Brief paras. 373, 387-390.

<sup>454</sup> T. 5 November 2009 pp. 46-47.

insufficient to call into question convincing and corroborated first-hand evidence.<sup>455</sup> As discussed above, Witnesses SLA and SAT explained why they did not mention this in Rwanda. Ingelare as well noted the lack of complete confessions in Gacaca proceedings.

366. In the Chamber's view, 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. It further observes that, at the relevant time, he had a home nearby in Nkuli commune and that his family was also present in the area (II.3.6.1).

367. In sum, the Chamber considers that Witnesses SLA and SAT provided convincing and largely corroborated accounts of Setako's presence at the camp on 25 April and 11 May 1994 as well as the ensuing killings. The fact that both witness acknowledged personally participating in the crimes on 25 April resolves many of the Chamber's concerns with their credibility. Even though released, they have exposed themselves to new and very serious criminal liability. However, out of an abundance of caution, the Chamber will only accept their evidence about the events at the camp where they corroborate each other. As a result, the Chamber declines to rely on Witness SLA's evidence concerning Setako's order on 25 April to establish roadblocks near the camp or of the killing of refugees captured there on the same evening.<sup>456</sup>

368. Accordingly, the Chamber finds that, on 25 April 1994, Setako addressed a gathering of soldiers and militiamen at Mukamira camp and told them to kill the Tutsis who had sought refuge there. Following this, 30 to 40 refugees were shot that night. On 11 May 1994, Setako brought nine or 10 Tutsis to the camp, who were then killed on his instructions.

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<sup>455</sup> See *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification (AC), 8 December 2006 para. 13, quoting *Kajelijeli Appeal Judgement*, para. 176; *Eliézer Niyitegeka v. The Prosecutor*, ICTR-96-14-R, Decision on Request for Review (AC), 30 June 2006 para. 70, citing *Niyitegeka Appeal Judgement*, para. 180.

<sup>456</sup> The Chamber recalls that Defence Witness NCB, a high-ranking policeman from Kigali, testified that he was informed about the killing of Tutsi refugees who were stopped at a roadblock near Mukamira camp. T. 20 May 2009 pp. 2-3. This evidence is not sufficient to corroborate Witness SLA's account since it is unclear when the event occurred. However, it offers general support for the fact that killings occurred in the area surrounding the camp.

## 5. INSTALLATION OF JUVÉNAL KAJELIJELI AS *BOURGMESTRE*, MID-MAY 1994

### *Introduction*

369. The Indictment alleges that, at a ceremony in mid-May 1994 held at a football field near the Mukingo communal office, Setako and his co-perpetrators, including Joseph Nzirorera, Juvénal Kajelijeli, Casimir Bizimungu, Esdras Baheza and other military and civilian authorities, congratulated the *Interahamwe* for their good work in killing Tutsis in the commune and encouraged them to continue this work in neighbouring areas. Reference is made to Prosecution Witness SAA.<sup>457</sup>

370. The Defence makes no specific submissions concerning Setako's role in this alleged event. However, it generally challenges the credibility of Witness SAA.<sup>458</sup>

### *Evidence*

#### Prosecution Witness SAA

371. Witness SAA, a Hutu, was a policeman in Mukingo commune. In mid-May 1994, he attended the ceremony re-installing Juvénal Kajelijeli as *bourgmestre* of Mukingo commune at a football field across from the communal office. A number of officials and prominent persons attended, including Setako, Joseph Nzirorera, Casimir Bizimungu, Augustin Bizimungu, Esdras Baheza, Jérôme Bicamumpaka and Basile Nsabumugisha. Nzirorera was the main speaker and congratulated the *Interahamwe* for having exterminated the Tutsis in the area. This sentiment was met with applause by the large crowd. Setako also spoke and reiterated Nzirorera's expressions of appreciation for the work of the *Interahamwe*. Following the ceremony, a reception was held at the *Institut supérieur d'agriculture et de l'élevage*.<sup>459</sup>

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<sup>457</sup> Indictment para. 45; Prosecution Closing Brief para. 119.

<sup>458</sup> Defence Closing Brief paras. 137, 145, 165-166, 230-231, 233, 236, 243. The Chamber notes that Setako testified about some of his activities in mid-May 1994. Specifically, between 16 and 18 May, he conducted an investigation into an incident where the commander of the Gako unit operating in Rwabosoro, between Myaga and Bugesera, had destroyed a bridge on his own initiative, thereby preventing refugees from fleeing an RPF advance. T. 22 June 2009 pp. 38-39. This may be relevant as an alibi for this incident, but neither Setako nor his Defence have pointed to it for this purpose. In view of the Chamber's findings, it is unnecessary to assess this evidence.

<sup>459</sup> T. 25 August 2008 p. 57; T. 26 August 2008 pp. 8, 11, 18, 25-26; T. 27 August 2008 p. 27; T. 28 August 2008 pp. 9, 64; Prosecution Exhibit 1 (personal identification sheet). At the time of his testimony, Witness SAA was sentenced to life imprisonment on 16 July 2008 by a Gacaca court in Busugo sector based on charges of participating in *Amahindure* training, setting up roadblocks, distributing weapons, personally killing two persons and selling looted property of Tutsis. On 30 October 2008, following his evidence in this case, his sentence was reduced on appeal to 20 years of imprisonment. T. 25 August 2008 pp. 46-47, 50; T. 27 August 2008 pp. 17-18; Defence Exhibit 2 (judgment of 16 July 2008); Prosecution Exhibit 98 (judgment of 30 October 2008). He testified that, on 8 April 1994, *Bourgmestre* Emmanuel Harerimana died under mysterious circumstances. Assiel Ndisetse replaced him for around one week, and then a deputy *bourgmestre* named Felicien acted in the post until Juvénal Kajelijeli was officially appointed. Prior to the appointment, Kajelijeli had been elected to the post by the communal development council. T. 26 August 2008 p. 19; T. 28 August 2008 p. 64.

*Deliberations*

372. Witness SAA provided the only account of the installation ceremony of Juvénal Kajelijeli as *bourgmestre* of Mukingo commune in mid-May 1994. The Chamber recalls the need generally to view the evidence of this witness with caution (II.3.1). There are also notable differences between his testimony about this incident and his prior statements to Tribunal investigators.

373. The witness's first four statements from April 1999, June 2000, September 2002 and October 2002 do not mention the installation ceremony in May 1994, even though they are focused on its prominent participants, including Kajelijeli, Joseph Nzirorera, Setako and Augustin Bizimungu.<sup>460</sup> In particular, the fourth statement taken in October 2002, the first to focus on Setako, avers that the witness did not see him after 11 April 1994 until they were in exile.<sup>461</sup>

374. The mid-May ceremony was first included in his fifth statement to Tribunal investigators from March 2003, which focused on Jérôme Bicumupaka and Casimir Bizimungu. There, the witness listed several prominent officials in attendance, including Nzirorera, Kajelijeli and Bicumupaka. However, there is no reference to Setako's involvement, despite the fact that he is mentioned in the previous paragraph.<sup>462</sup> The Chamber notes that the witness was not cross-examined on this specific difference. The witness's sixth interview in April 2003, which deals primarily with Setako, omits any reference of him in May 1994.<sup>463</sup>

375. In his seventh statement to Tribunal investigators on July 2003, the witness again discussed the mid-May meeting. He added Augustin Bizimungu and Casimir Bizimungu to the list of attendees, but not Setako. The witness explained his omission of the Accused in this statement by suggesting that he had mentioned Setako in connection with meetings in other statements.<sup>464</sup> The Chamber does not find his justification for the omission convincing. Notably, Setako is mentioned in connection with other events in the seventh statement.<sup>465</sup> The witness's eighth statement to Tribunal investigators from September 2003 equally refers to the mid-May meeting, but does not place Setako at it, even though he is mentioned elsewhere.<sup>466</sup>

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<sup>460</sup> Defence Exhibit 1 (statement of 21 April 1999); Defence Exhibit 3 (statement of 26 June 2000); Defence Exhibit 4 (statement of 24 September 2002); Defence Exhibit 5 (statement of 16 October 2002).

<sup>461</sup> Defence Exhibit 5A (statement of 16 October 2002) p. 5 reads: "I did not see Colonel Setako after this special briefing of the youths [on 11 April 1994] until I went into exile in Kibumba in Goma of DRC (former Zaire). I saw him around October 1994 even though I arrived in Kibumba on 17 July 1994."

<sup>462</sup> Defence Exhibit 6B (statement of 17 March 2003) p. 4.

<sup>463</sup> Defence Exhibit 7 (statement of 16 April 2003).

<sup>464</sup> T. 28 August 2008 pp. 13-14 ("Q. Now, Witness, what if I were to tell you that you were interviewed by representatives of the ICTR on [14 and 15 July 2003] and, in your interview, you talked about this alleged May meeting – or May – mid-May ceremony but you never mentioned Setako? What would you say to that? A. I spoke of Setako even though I did not mention him in that statement. But I must have mentioned him in other statements."); Defence Exhibit 8A (statement of 15 July 2003) p. 4.

<sup>465</sup> Defence Exhibit 8A (statement of 15 July 2003) pp. 3-4. This statement describes Setako's presence at meetings at the end of January and on 6 to 7 April 1994.

<sup>466</sup> Defence Exhibit 9B (statement of 23 September 2003) pp. 3-4. This statement refers to Setako's presence at meetings in 1993 and on 6 to 7 April 1994. Witness SAA's ninth statement in March 2008 addresses collateral

376. During cross-examination, the witness was also challenged with the transcript of a Radio Rwanda broadcast of a government communiqué, issued on 17 June 1994, indicating that Kajelijeli had just been appointed *bourgmestre*.<sup>467</sup> The witness contended that the transcript was a fabrication and maintained his testimony that Kajelijeli was installed at the ceremony in May 1994.<sup>468</sup> The Chamber has no reason to doubt the authenticity of the transcript which originated from the Prosecution. It is clear that Kajelijeli was re-appointed *bourgmestre* for the second time in June 1994.<sup>469</sup> Although the witness could have been mistaken about the date or confused about the purpose of the gathering, this raises further questions about the reliability of his account.<sup>470</sup>

377. Finally, the Chamber notes that Witness SAA was the only witness to testify about this event. A large number of *Interahamwe* purportedly attended the ceremony. Several of its local members were called as witnesses in this trial (II.3.1).

378. Consequently, the Chamber does not find credible Witness SAA's uncorroborated testimony about this incident.<sup>471</sup> The Prosecution has not proved beyond reasonable doubt that Setako participated in an installation ceremony in Mukingo commune for Kajelijeli in mid-May 1994, congratulated the *Interahamwe* on having killed Tutsis, and encouraged them to continue their work in other communes, as alleged in the Indictment.

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issues related to his testimony and prior statements before Rwandan officials. Defence Exhibit 10 (statement of 28 March 2008).

<sup>467</sup> Defence Exhibit 15 (various transcripts of Radio Rwanda broadcasts) pp. 15-17; T. 28 August 2008 p. 12.

<sup>468</sup> T. 28 August 2008 pp. 13, 64.

<sup>469</sup> *Kajelijeli* Appeal Judgement para. 2; *Kajelijeli* Trial Judgement paras. 6, 268.

<sup>470</sup> When the Defence suggested to Witness SAA that Juvénal Kajelijeli was installed only in June 1994, he agreed that he may have been mistaken about the date but knew that it was in May. T. 28 August 2008 p. 9. During his re-examination, the witness confirmed his testimony that Kajelijeli's appointment and the installation ceremony occurred in May 1994. *Id.* p. 64.

<sup>471</sup> The Chamber recalls that it has identified credibility problems with other parts of the Witness SAA's testimony, namely the killing of Bernard Bajyagahe (II.2); the meeting at the home of Joseph Nzirorera's mother (II.3.1); and the attack on Ruhengeri Court of Appeal (II.3.5).

## 6. KIGALI, APRIL – JULY 1994

### 6.1 Setako's Role as Liaison Officer to *Interahamwe*

#### *Introduction*

379. The Indictment alleges that, between April and July 1994, Setako was the unofficial liaison officer between the Ministry of Defence and the *Interahamwe* of Kigali-Ville prefecture, particularly those of Kiyovu *cellule* and Rugenge and Gitega sectors, for the purpose of supplying weapons. The Prosecution submits that in this capacity he provided weapons at the end of April to Georges Rutaganda at the Amgar garage, as well as to others in the city. It relies on Witnesses 006 and SHA.<sup>472</sup>

380. The Defence claims that the Prosecution's evidence is not credible, and that these allegations have not been proved beyond reasonable doubt. Moreover, the Indictment neither alleges his role as an unofficial liaison officer nor specifically pleads the distribution of weapons at the Amgar garage. Reference is made to Witnesses KBX, KAF and KEP.<sup>473</sup>

#### *Evidence*

##### Prosecution Witness 006

381. Witness 006, a Hutu, was a senior *Interahamwe* official in 1994. After the RPF attacked locations in Ruhengeri prefecture in February 1993, the Ministry of Defence decided that members of the population should be armed and trained. Colonel Rutayisire, a senior official in the Ministry, told the witness that 5,000 weapons had been given to members of the populations in Ruhengeri and Byumba prefectures at the request of Théoneste Bagosora. The witness did not specify when this conversation occurred. He believed that the distribution occurred before January 1994. Setako was not involved in it.<sup>474</sup>

382. On 10 April 1994, a soldier delivered an invitation to Bernard Maniragaba, a member of the national leadership of the *Interahamwe*, inviting leaders of that organisation to a meeting with the government at the *Hôtel des Diplomates*. When the witness asked for more information, Maniragaba told him that the invitation was from Setako, who served as a liaison between the *Interahamwe*'s leadership in Kigali and the Ministry of Defence. He also heard about Setako's role from Ephrem Nkezabera, a national *Interahamwe* leader. According to the witness, Joseph Nzirorera, Edouard Karemera and Justin Mugenzi attended the meeting, but Setako did not. The witness left Kigali on 12 April for Butare prefecture.<sup>475</sup>

383. At the end of April 1994, the witness briefly visited Kigali and spoke with Maniragaba and Nkezabera. They told him that, in the afternoon of 12 April, Nzirorera and

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<sup>472</sup> Indictment para. 8; Prosecution Closing Brief paras. 120-129, 132-133; T. 5 November 2009 p. 30. The Chamber also considers the evidence of Prosecution Witness SBI to be relevant. Witness SON testified that Setako supplied weapons to members of the *Interahamwe* in Rugenge sector which were used during attacks. The Prosecution has not referred to this part of his evidence in its Closing Brief. There is also insufficient notice for this allegation (I.2.2.7).

<sup>473</sup> Defence Closing Brief paras. 140-142, 145, 151, 268-269, 281, 461-471, 484-497.

<sup>474</sup> T. 20 April 2009 pp. 6, 16, 23; T. 21 April 2009 pp. 18, 21-22, 31-32, 50; Prosecution Exhibit 51 (personal identification sheet).

<sup>475</sup> T. 20 April 2009 pp. 26-27, 29, 44-45; T. 21 April 2009 p. 28.



Bagosora had arranged for the distribution of weapons from Setako to the *Interahamwe*. The witness noted on his visit to Kigali that *Interahamwe* throughout the city were armed. Maniragaba also explained that Setako was working with the *Interahamwe*, and that the Ministry of Defence had sent them to fight on the frontline with the army. Furthermore, Setako had facilitated a meeting convened by Bagosora between the *Interahamwe* leadership and General Roméo Dallaire. Setako did not attend the meeting.<sup>476</sup>

384. The witness visited Kigali again in the second week of May and attended a meeting at the Ministry of Defence with Colonel Gasake, a retired officer, who was responsible for coordinating civil defence. Setako did not attend the meeting. However, the witness saw him outside of the Ministry handing a gun to a businessman. The witness did not know the individual well and could not recall his name. In June, the witness greeted Setako in the lobby of the *Hôtel Méridien* in Gisenyi prefecture, where the interim government was located. At the time, Félicien Kabuga was chairing a meeting of several prominent businessmen who were trying to raise money for the war effort. Setako was not attending the meeting.<sup>477</sup>

#### Prosecution Witness SHA

385. Witness SHA, a Hutu, was a local official in Kigali. On 9 April 1994, he was summoned to a meeting by Prefect Tharcisse Renzaho. The prefect told the assembled officials to mount roadblocks in their areas to prevent incursions from the RPF *Inyenzi* and their Tutsi accomplices. The witness established roadblocks which were manned by the *Interahamwe* and local inhabitants, armed with traditional weapons. At these barriers, assailants checked identity cards and killed Tutsis. During a meeting at the prefecture office on 12 April, Renzaho asked the local officials to obtain firearms from the Ministry of Defence for the local population. The next day, the witness received five guns from the Ministry for distribution. Other weapons were distributed in his area by Bernard Maniragaba, a national *Interahamwe* leader from Gitega sector, François Karera from the MRND party, and Telesphore Twagirayezu from the MDR party.<sup>478</sup>

386. The witness saw Setako three times between April and mid-May 1994. The first occasion was at the end of April, when the witness was driving to a meeting at the prefecture office. As he passed the Amgar garage, a white double-cabin Toyota Hilux carrying four soldiers left its premises. Georges Rutaganda, the vice-president of the *Interahamwe*, lived and worked at the garage. Robert Kajuga, the organisation's president, also frequented there. Out of curiosity, the witness stopped and asked the guard, an *Interahamwe* named Gervais Kajabo whom the witness knew well, about the identity of the soldiers and the purpose of their visit. Kajabo told him that Setako had met with Rutaganda and Kajuga and

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<sup>476</sup> T. 20 April 2009 pp. 46-48; T. 21 April 2009 pp. 33-34, 36, 38, 42, 44-45, 51-54, 64-65; T. 22 April 2009 pp. 11, 16, 19-20.

<sup>477</sup> T. 20 April 2009 pp. 49, 54-55; T. 21 April 2009 pp. 47-49, 54-55; T. 22 April 2009 pp. 4-6, 22.

<sup>478</sup> T. 19 February 2009 pp. 5, 9-13, 29-30; T. 20 February 2009 pp. 13-15, 18, 20; Prosecution Exhibit 45 (personal identification sheet). Witness SHA was convicted of distributing firearms, convening meetings to plan the genocide and mounting roadblocks by a Gacaca court in May 2007 in Cyahafi sector. He was serving a life sentence based on this conviction at the time of his testimony although he had filed an appeal. Moreover, in May 2007, a Gacaca court in Kimisagara sector sentenced him to 11 years of imprisonment for leading refugees back to their sector of origin where they were killed. T. 19 February 2009 pp. 3-4, 35-36.

offloaded weapons there. The witness had never seen Setako before that occasion, and he was not aware of Setako's particular position at the Ministry.<sup>479</sup>

387. At the beginning of May, the witness went to the Amgar garage to meet with Rutaganda and Kajuga. Upon arrival, he saw them completing a meeting with the individual who Kajabo had previously identified as Setako. That person then departed the garage in the white double-cabin Hilux. On 15 May, Major Bivamvagara, who was the head of civil defence in Kigali, called the witness and asked him to bring 12 *Interahamwe* to the Nyamirambo brigade to assist soldiers fighting near the Ghadafi mosque. The witness saw Setako standing outside of the brigade. He asked the witness if he had brought the 12 militiamen requested by Bivamvagara. The witness declined Setako's offer to accompany the men on their mission. Later that day, the *Interahamwe* informed the witness that they had assisted the soldiers and afterwards killed Tutsis at the mosque.<sup>480</sup>

#### Prosecution Witness SBI

388. Witness SBI, a Hutu, was a local official in Kigali in 1994. He testified that *Interahamwe*, armed with traditional weapons and firearms, perpetrated killings of Tutsis and Hutus opposed to the government at roadblocks and other locations throughout the city on the implicit orders of Prefect Tharcisse Renzaho. The assailants obtained their weapons at the Ministry of Defence, in Kigali-ville prefecture and from political parties. The witness heard from Renzaho, various sector *conseillers* and Bernard Maniragaba, who was an *Interahamwe* leader in Gitega sector, that several specific officials at the Ministry were responsible for this distribution. They included Setako, Théoneste Bagosora and Athanase Gasake, who was coordinating the city's civil defence activities. The witness never personally saw Setako distribute weapons.<sup>481</sup>

389. Around 20 April, Renzaho introduced Major Bivamvagara during a meeting of local officials at the prefecture office. Bivamvagara was a retired officer, who had been called back to service to assist with civil defence in the city. Renzaho explained that the purpose of civil defence was to train youths and the *Interahamwe* to reinforce roadblocks and support the soldiers fighting in town. Two days before that meeting, the witness had seen Setako speaking with Renzaho. He was not in a position to follow their conversation, but believed they spoke about civil defence. The witness saw Setako for a second time at the end of April in the company of senior military officers, including Bagosora and Augustin Bizimungu.<sup>482</sup>

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<sup>479</sup> T. 19 February 2009 pp. 15-19, 33-34; T. 20 February 2009 pp. 13, 19-22, 41.

<sup>480</sup> T. 19 February 2009 pp. 19-28; T. 20 February 2009 pp. 23-24, 34.

<sup>481</sup> T. 23 February 2009 pp. 23, 29-30, 50-53, 55-57; T. 24 February 2009 pp. 12-13, 21-23; Prosecution Exhibit 49 (personal identification sheet). Witness SBI was arrested in April 1998 and detained until July 2005, when he was provisionally released and attended a solidarity camp. On 10 August 2008, a Gacaca court in Kimihurura sector acquitted him of genocide. A Gacaca court in Rugenge sector also acquitted him of genocide on 11 November 2008 in relation to charges of participating in an attack at the *Centre d'étude de langues africaines*. T. 23 February 2009 pp. 32-35; Prosecution Exhibit 50 (judgment of 10 August 2008).

<sup>482</sup> T. 23 February 2009 pp. 56-59; T. 24 February 2009 pp. 9, 15-17, 27-28, 33. Witness SBI stated that if it were true that Setako was not in Kigali between 12 and 22 April 1994, then the civil defence meeting occurred between 22 and 25 April. T. 24 February 2009 p. 17.

Defence Witness KBX

390. Witness KBX, a Hutu, was a former senior army officer who had retired from service in the early 1990s. He stated that all weapons imported into Rwanda were procured by the Ministry of Defence after receiving requests from unit commanders or other governmental authorities. Upon receipt, the army Chief of Staff directed them to the relevant unit or governmental services, such as the heads of the communal police, prisons, immigration service or national parks. In the witness's knowledge, it would not be possible to clandestinely circumvent the official process. It would also be illogical for someone in legal affairs, like Setako, to be in charge of such a process.<sup>483</sup>

Defence Witness KAF

391. Witness KAF, a Hutu, was a Rwandan army officer working at the Ministry of Defence in 1994. He was involved in the procurement of technical supplies, including weapons and ammunition. According to the witness, various military units would submit their requests for weapons and ammunition to the Ministry, which would then assess them, prioritise the needs, and arrange for their purchase and delivery to the storage unit at the barracks of the requesting unit. Once delivered, the management of the weapons was the responsibility of that specific military command, and not the Ministry. In any case, as a jurist in the legal department, Setako would play no role in this process. Rather, the Ministry's services that managed budget and equipment as well as intelligence and external security were the only two divisions which were likely to deal with weapons. Setako would not have been in a position to divert weapons since he had no access to them. The witness acknowledged that he did not monitor Setako's relationship with various unit commanders who might have had access to weapons.<sup>484</sup>

392. From 7 to 18 April, when the witness left Rwanda, he observed militiamen at roadblocks armed with traditional weapons in areas of Kigali, such as Nyamirambo. None of them were carrying firearms. He later heard that militiamen did have such weapons.<sup>485</sup>

Defence Witness KEP

393. Witness KEP, a Hutu student, testified that from 16 April 1994, he participated in night patrols in Cyahafi sector. Around 20 April, he manned the "Gafuku" roadblock, located 50 metres from the Amgar garage, for three days under the supervision of an *Interahamwe*, Gervais Kajabo. The roadblock was then dismantled, and he and the others worked at a barrier immediately in front of the Amgar garage until mid-June. They checked identity cards of individuals and searched vehicles which passed by, including to and from the garage. During this period, he did not see Setako or Witness SHA. Robert Kajuga visited twice, but only in May.<sup>486</sup>

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<sup>483</sup> T. 21 May 2009 pp. 3, 9-16, 24, 27; Defence Exhibit 146 (personal identification sheet).

<sup>484</sup> T. 23 June 2009 pp. 17-25, 32-33; Defence Exhibit 172 (personal identification sheet).

<sup>485</sup> T. 23 June 2009 pp. 18, 54-56.

<sup>486</sup> T. 14 May 2009 pp. 63, 73-74; T. 15 May 2009 pp. 2-15, 25, 28-30, 32-39, 42-43; Defence Exhibit 131 (personal identification sheet). Witness KEP testified that he was arrested in Rwanda in 1998 because he was at a nightclub operating after hours. He was questioned about events in 1994 and detained for two months. After his release, he left Rwanda for Kenya. The witness was subsequently accused and tried *in absentia* by a Gacaca

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394. Paragraph 8 of the Indictment states that between April and July 1994, Setako was the unofficial liaison officer between the Ministry of Defence and the *Interahamwe* of Kigali-Ville prefecture. Therefore, the Chamber finds no merit in the Defence's contention that this allegation is not pleaded.<sup>487</sup> As discussed elsewhere (I.2.2.8), there is insufficient notice for the alleged distribution of weapons at the Amgar garage. The Chamber, however, considers this evidence more generally with respect to paragraph 8 of the Indictment.

395. The Prosecution relies primarily on Witness 006 to establish that Setako acted as an unofficial liaison officer and provided weapons to *Interahamwe* groups in Kigali. The witness received this information from senior *Interahamwe* officials. As corroboration, the Prosecution points to the evidence of Witness SHA who purportedly saw Setako meeting with Robert Kajuga and Georges Rutaganda and dispatching *Interahamwe* to the war. He was also informed that Setako provided weapons. The Chamber also recalls that Witness SBI allegedly was told that Setako was involved in distributing weapons to the *Interahamwe* and played a supervisory role. The Prosecution has not referred to his testimony.

396. Witness 006 is a former senior *Interahamwe* official who has been cooperating as an informant for the Prosecution since 1996.<sup>488</sup> He has testified in five other trials.<sup>489</sup> The Prosecution has provided him with a letter stating that it does not have sufficient evidence to implicate him in any criminal activity. He understood this to mean that he could still be prosecuted should it obtain such information.<sup>490</sup> In view of these circumstances, the Chamber approaches the witness's evidence with appropriate caution.

397. As a former senior *Interahamwe* official, Witness 006 would likely have had access to sensitive information concerning the organisation's ties with government officials, including at the Ministry of Defence. The Chamber observes, however, that his basis of knowledge for implicating Setako is hearsay. Furthermore, the witness testified that he spent most of the period between 12 April and July 1994 in Butare prefecture. This suggests that his day to day first-hand knowledge of the activities of the *Interahamwe* in Kigali was limited.

398. The two occasions when the witness personally saw Setako in May and June 1994, even if true, do not substantiate the claim that Setako acted as a liaison officer. It is notable that the witness only saw him outside the Ministry of Defence in early May 1994 rather than at the meeting with Colonel Gasake, which he allegedly facilitated. The evidence about Setako handing a weapon to an unknown businessman on this occasion lacks sufficient context and detail to permit the Chamber draw any conclusions. Similarly, Setako's general presence at the *Hôtel Méridien* in Gisenyi prefecture while an important fundraising meeting was being held is of limited significance in demonstrating his alleged role. There is no

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court in Cyahafi sector for illegally possessing a weapon in 1994. His mother appeared on his behalf, and he was acquitted. T. 14 May 2009 pp. 64-68; T. 15 May 2009 pp. 17, 20. The witness prepared a sketch of the area. Defence Exhibit 132 (sketch of area near Amgar Garage).

<sup>487</sup> See Defence Closing Brief para. 484.

<sup>488</sup> T. 20 April 2009 pp. 7-8. In this capacity, Witness 006 has also received payments for expenses. T. 20 April 2009 p. 8, 57-58; T. 21 April 2009 pp. 3-5; Prosecution Exhibit 52 (list of payments to Witness 006 dated 15 February 2002).

<sup>489</sup> Witness 006 testified for the Prosecution in the *Nahimana et al.*, *Bagosora et al.*, *Karemura et al.*, *Bizimungu et al.* and *Ndindiliyimana et al.* cases. T. 20 April 2009 p. 7.

<sup>490</sup> Prosecution Exhibit 53 (letter of 5 February 2002); T. 21 April 2009 p. 8.

evidence that Setako attended any of the high-level meetings which he allegedly arranged between government officials and the *Interahamwe* leadership. This is significant, given his purported prominent role.<sup>491</sup>

399. The key features of Witness SBI's testimony about Setako supplying weapons to the *Interahamwe* are also hearsay. Even if accepted, his first-hand testimony about seeing Setako with Renzaho two days before a large meeting on civil defence does not provide a sufficient basis to substantiate the claim that he provided weapons or was involved in this effort. The witness did not hear what the lieutenant colonel and the prefect were saying.

400. Turning to Witness SHA, the Chamber notes that he had limited prior knowledge of Setako and had not seen him until allegedly observing him drive out of the Amgar garage at the end of April 1994. The witness was in his vehicle at the same time, and the guard at the gate provided the information about Setako's identity and the purpose of the visit. The witness did not explain how the guard knew these details. This brief incident was the sole foundation for his subsequent identifications of Setako during the May meeting with Robert Kajuga and Georges Rutaganda as well as at the Nyamirambo brigade deploying *Interahamwe* to the front. The reliability of Witness SHA's ability to identify Setako is questionable.<sup>492</sup>

401. There is an important difference between Witness SHA's testimony that he saw Setako at the meeting with Rutaganda and Kajuga inside the Amgar garage, and his prior evidence in the *Karemera et al.* case. In that trial, the witness was confronted with the proposition that he attended a particular meeting at the Amgar garage to plan the killings in his area. He responded by saying that he was never at Rutaganda's residence "during the genocide". The witness explained this response by noting that he only denied attending that particular meeting.<sup>493</sup> The Chamber does not find this explanation convincing. A plain reading of his testimony in *Karemera et al.* reflects that he broadly denied ever going to the Amgar garage. This discrepancy raises questions about the witness's credibility.

402. The Chamber is mindful that Witness KEP did not see Setako or Witness SHA during the period when he manned the roadblock outside the Amgar garage. This evidence is not dispositive in view of the witness's interests in distancing himself from criminal conduct connected to his position. However, given the Chamber's concerns with the credibility of Witness SHA's testimony concerning Setako, it presents some doubt.

403. The Chamber has also considered the Prosecution's evidence in light of the accounts of Witnesses KBX and KAF. As former senior military officers who had some involvement in the process of procuring and distributing weapons, they have an interest in distancing themselves from allegations that the Rwandan military armed militiamen during their tenure. While the Chamber has no reason to doubt the official procedure for weapons procurement, their explanations do not sufficiently address the main issue of clandestine distribution during the extraordinary events from April to July 1994.

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<sup>491</sup> T. 21 April 2009 p. 29: ("Q. Witness, is it not a fact that you have never seen Colonel Setako at any meetings either attending or participating in any meetings of the leadership of the MRND? A. No, I never saw him at any MRND meeting or at any meeting anywhere.").

<sup>492</sup> Witness SHA positively identified Setako in court. T. 19 February 2009 p. 32. This carries limited probative value. See *Kunarac et al.* Appeal Judgement para. 320.

<sup>493</sup> T. 20 February 2009 pp. 29-31. This portion of the transcripts quotes key experts from Witness SHA's evidence in the *Karemera et al.* case.

404. In sum, there are a number of problems with the reliability of key aspects of the evidence connecting Setako to the *Interahamwe* in Kigali. Moreover, even if true, the various sightings of Setako recounted by the witnesses when considered together do not compel the conclusion that he served as liaison officer or as a conduit of weapons. Such a conclusion would rest primarily on hearsay and speculation. Accordingly, the Prosecution has not proved beyond reasonable doubt that Setako served as the unofficial liaison officer between the Ministry of Defence and the *Interahamwe*, or provided weapons to them.

## 6.2 Looting

### *Introduction*

405. The Indictment alleges that, from April to June 1994, militiamen and soldiers looted and destroyed the property of Tutsis throughout Kigali-Ville prefecture, particularly in Kiyovu *cellule* and Gitega and Rugenge sectors, on the orders or encouragement of Setako. Reference is made to Prosecution Witness SON and Defence Witness NCB. The Defence does not specifically dispute this evidence about looting, but argues that the witness is generally not credible.<sup>494</sup>

### *Evidence*

#### Prosecution Witness SON

406. Witness SON, a Hutu, was an *Interahamwe* in Kigali operating in Rugenge sector from April 1994. He explained that the *Interahamwe* looted the homes and vehicles of Tutsis whom they killed, which served as a form of compensation for the crimes. Many of these houses were also destroyed. On 22 April, the witness and other *Interahamwe* looted vehicles from *Centre d'étude de langues africaines* during an attack on Tutsis there. The attack was planned at the home of Angéline Mukandituye based on Prefect Tharcisse Renzaho's instructions in collaboration with local officials.<sup>495</sup>

#### Prosecution Witness SBI

407. Witness SBI, a Hutu local official in Kigali, testified that, during the course of the killings in Kigali, the assailants stole the personal property of their victims. They also appropriated their homes on the orders of Prefect Tharcisse Renzaho. The witness did not provide any details about when these orders were given.<sup>496</sup>

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<sup>494</sup> Indictment paras. 66-68; Prosecution Closing Brief paras. 117-118, 171, 173; Defence Closing Brief paras. 136, 145, 165-166, 171-172. In the Prosecution Closing Brief, reference is also made to the evidence of Witness 006 who testified about widespread looting in Kigali (para. 122). During the course of his testimony, the Chamber held that this evidence was inadmissible because the Prosecution did not give the Defence adequate notice that it would be covered by him at trial. T. 20 April 2009 pp. 50-54. The Chamber considers the testimony of Witness SBI to be relevant, and summarises it here. The Indictment also refers to looting in Ruhengeri prefecture which is discussed elsewhere (II.3.1-.2).

<sup>495</sup> T. 24 September 2008 pp. 52-53; T. 25 September 2008 pp. 7-8, 13-14, 36; Prosecution Exhibit 34 (personal identification sheet). Witness SON pleaded guilty in April 2003 to participating in the killing of Tutsis and the looting of their property in the Rugenge sector of Kigali. In October 2003, he was convicted and sentenced to 15 years of imprisonment. T. 24 September 2008 pp. 45-47; Prosecution Exhibit 35 (confession and guilty plea of 1 April 2003); Prosecution Exhibit 36 (judgment dated 24 October 2004).

<sup>496</sup> T. 23 February 2009 pp. 23, 29-30, 56; Prosecution Exhibit 49 (personal identification sheet). Witness SBI was arrested in April 1998 and detained until July 2005, when he was provisionally released and attended a solidarity camp. On 10 August 2008, a Gacaca court in Kimihurura sector acquitted him of genocide. A Gacaca court in Rugenge sector also acquitted him of genocide on 11 November 2008 in relation to charges of participating in an attack at the *Centre d'étude de langues africaines*. T. 23 February 2009 pp. 32-35; Prosecution Exhibit 50 (judgment of 10 August 2008).

Defence Witness NCB

408. Witness NCB, a Hutu police officer in Kigali, testified that there was widespread looting of property and vehicles throughout the city from April to July 1994. To combat this, Prefect Tharcisse Renzaho ordered the police to conduct patrols.<sup>497</sup>

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409. There is no dispute that widespread looting occurred in Kigali during the course of attacks there in 1994. This also follows from the evidence of Witnesses SON, SBI and NCB.<sup>498</sup> These witnesses for the most part gave only general testimony. There is no reason, however, to doubt the fundamental feature of their accounts that looting occurred. Notably, Witness SON was convicted for these crimes committed in Rugenge sector, and Witnesses SBI and NCB were local authorities who by virtue of their positions would have been aware of the widespread occurrence of looting.

410. The Prosecution, however, has not presented or pursued any admissible evidence of Setako ordering or encouraging militiamen or soldiers in Kigali who committed looting.<sup>499</sup> It is also not established that Setako acted as the liaison officer for the *Interahamwe* (II.6.1). Accordingly, the Prosecution has not proved beyond reasonable doubt that Setako ordered, instigated or encouraged militiamen and soldiers to loot and destroy property in Kigali during the course of attacks, as alleged in the Indictment.

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<sup>497</sup> T. 19 May 2009 p. 39; T. 20 May 2009 p. 6; Defence Exhibit 139 (personal identification sheet).

<sup>498</sup> The Chamber has also determined that there was widespread looting of Tutsi property in Ruhengeri prefecture (II.3.1-.2). The looting of property in Kigali has been noted in other judgements which concern crimes committed there. See, for instance, *Renzaho* Trial Judgement paras. 123, 135, 142, 146, 170, 184, 547, 580, 635; *Bagosora et al.* Trial Judgement paras. 731-732, 880, 1325, 1355, 1406, 1570, 1912.

<sup>499</sup> The Prosecution presented evidence from Prosecution Witness SQY that Setako personally participated in looting at the European Economic Community building and at Jeaninne's house. There is insufficient notice for these allegations (I.2.2.9-.10).



### 6.3 Killings at the *Péage* Roadblock, May

#### *Introduction*

411. The Indictment alleges that, sometime in May 1994, Setako brought two Tutsi girls to a roadblock known as the *Péage* in the Kiyovu area of Kigali. He left them with an *Interahamwe* named Fidèle and said *bajyane*, which meant “take them and kill them”. Having executed the order, the *Interahamwe* threw the dead bodies of the two girls into a pit known as the CND at the compound of a Tutsi man called Straton. Reference is made to Witnesses SON and SQY.<sup>500</sup>

412. The Defence disputes the Prosecution evidence and points to Witnesses Stanislas Harelimana, KBC, KCM and KDY.<sup>501</sup>

#### *Evidence*

##### Prosecution Witness SON

413. Witness SON, a Hutu, was an *Interahamwe* operating in Rugenge sector from April 1994. He claimed to be the vice-president of his local militia group. As part of his functions, he supervised activities at roadblocks and maintained the stock of weapons at the home of Angéline Mukandituye, where the *Interahamwe* had their headquarters. A number of roadblocks existed in his area of responsibility, including one in the *Péage* neighbourhood. This roadblock was located on the tarmac road leading to the Saint Famille church, near Rutabana’s house and the building housing the *Jeunesse ouvrière chrétienne*.<sup>502</sup>

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<sup>500</sup> Indictment para. 42; Prosecution Closing Brief paras. 130-131, 149, 161, 170; T. 5 November 2009 pp. 23-25, 27, 29-30. The CND was an abbreviation for the Rwandan parliament (*Conseil National pour le Développement*), where RPF soldiers had been cantoned prior to 6 April 1994 in accordance with the Arusha Accords. It subsequently was used also as the name for a notorious mass grave site for Tutsis in the Rugenge sector. The Indictment incorrectly spells the Kinyarwanda word *bajyane* as *bajane*. The Chamber has clarified this spelling with the Tribunal’s Language Services Section. For consistency, the Chamber uses the correct spelling as reflected in the transcripts of Witness SON’s testimony. However, the Chamber notes that a Kinyarwanda speaker from northern Rwanda might pronounce this word as *bajane*.

<sup>501</sup> Defence Closing Brief paras. 89, 94, 136, 145, 161-162, 165-166, 171-172, 195, 399-416, 577, 579, 585-588, 601, 605, 613, 615, 623-626; T. 5 November 2009 pp. 47-48. Setako did not testify concerning this event. However, he provided some evidence concerning his activities in mid-May. As part of his official duties, he travelled to Gitarama prefecture between 16 and 18 May 1994 to investigate the destruction of the Rwabosore bridge. T. 22 June 2009 pp. 36-39. The Defence does not mention this evidence to refute Setako’s alleged involvement in the killing of the two girls. In paragraphs 195 and 405 of its Closing Brief, the Defence refers to the expert report of Bert Ingelaere as it relates to this allegation. This evidence is set forth elsewhere (I.2.4), but considered here.

<sup>502</sup> T. 24 September 2008 pp. 52-54, 62-66; T. 25 September 2008 pp. 3 (the French version correctly uses JOC – not GSO – for *Jeunesse ouvrière chrétienne*), 8-9, 24, 37, 39; Prosecution Exhibit 34 (personal identification sheet). Witness SON pleaded guilty in April 2003 to participating in the killing of Tutsis and the looting of their property in the Rugenge sector of Kigali. In October 2003, he was convicted and sentenced to 15 years of imprisonment. T. 24 September 2008 pp. 45-47; Prosecution Exhibit 35 (confession and guilty plea of 1 April 2003); Prosecution Exhibit 36 (judgment dated 24 October 2004). A review of the judgment with the assistance of a Kinyarwanda translator from the Tribunal’s Language Services Section reflects that it was pronounced on 24 October 2003, but that the certified copy exhibited at trial is dated 24 October 2004. Prosecution Exhibit 36 (judgment dated 24 October 2004) pp. 1, 189. The other roadblocks mentioned by Witness SON were located at or near Sopecya, George’s house, Saint Famille, the junction of the road that leads to Saint Paul and Saint

414. At some point in mid-May, the witness was manning the *Péage* roadblock along with other *Interahamwe*, including Kishimana and Fidèle Habimana (aka “Caster”). He saw Setako driving a cream-coloured Pajero towards the barrier from the direction of the home of a former prefect named Habarushaka. At the roadblock, Setako removed two young girls from his vehicle, handed them to Habimana and said *bajyane*. According to the witness, this meant take them away and kill them. As Setako continued to town, the witness and the other militiamen drove the girls to the compound of Straton Iyaremye, shot them and dumped their bodies into a pit there known as the CND.<sup>503</sup>

#### Prosecution Witness SQY

415. Witness SQY, a Tutsi, lived and worked in the Kiyovu area of Kigali. From April 1994, the *Interahamwe* group called Bikomagu operated in the area under the command of a man named Fidèle (aka “Lieutenant Colonel Bikomagu”). Fidèle was frequently in the company of Noël and Furaha, who were militiamen. This group controlled a roadblock in the *Péage* area near the World Health Organization.<sup>504</sup>

416. Towards the end of May, the witness left his house to look for food at the home of Matthieu Ngirumpatse and the Presbyterian church. Around 9.30 a.m., he was at the roadblock near the church, the Rwandan Prosecutor’s office, and the homes of Ngirumpatse and Protais Zigiranyirazo. Setako drove past the barrier in a Pajero leaving the German Embassy. There were two girls in his vehicle. Setako continued along the road until he reached the roadblock in the *Péage* area. The militiamen manning that position removed the two girls from the vehicle, and Setako departed. Later that day, the witness heard that the two girls were the daughters of Maharangari, a Tutsi resident of Kiyovu, and that they were killed at the CND.<sup>505</sup>

#### Defence Witness Stanislas Harelimana

417. Stanislas Harelimana, a Hutu, worked as solicitor general at the Kigali Court of Appeals. A roadblock existed near his office and buildings owned by the Presbyterian church at the junction of Kayuku and Baudouin streets. From that location, it would not be possible to see anything which occurred in the area known as *Péage* given the distance, the slope of the hill and other obstructions such as trees and buildings.<sup>506</sup>

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Famille, Pan-Afrique, a JOC building, a convent near the home of Odette Nyirabagenzi, Sekamana’s house, *poids lourd*, the house of Straton Iyaremye, the house of Mukungwakore, and the home of Angéline Mukandituye. T. 24 September 2008 pp. 62-63.

<sup>503</sup> T. 24 September 2008 pp. 61-62; T. 25 September 2008 pp. 3-5, 36-37. Witness SON spelled Fidèle Habimana’s alias as “Gastar”. This appears to be a mistake in view of the spelling provided in his confession in Rwanda (“Castal”) and by other witnesses (“Caster”). See, for instance, Defence Exhibit 72B (confession of 4 January 2004) p. 1.

<sup>504</sup> T. 17 February 2009 pp. 2-5, 10-11, 30-32, 35; Prosecution Exhibit 42 (personal identification sheet). Witness SQY referred to the World Health Organization by its French initials, OMS (*Organisation mondiale de la Santé*).

<sup>505</sup> T. 17 February 2009 pp. 5, 29-33; T. 18 February 2009 pp. 13, 15.

<sup>506</sup> T. 26 May 2009 pp. 27-30, 32, 49-51, 53-54; Defence Exhibit 153 (personal identification sheet); Defence Exhibit 154 (photos taken in Kigali) p. 0646. Stanislas Harelimana left Kigali and Rwanda on 20 April and 14 July 1994, respectively. He has not since returned. His name is listed among 2,000 other persons alleged to be planners of the genocide. Harelimana denied playing such a role. T. 26 May 2009 pp. 37-38, 48, 54.

Defence Witness KBC

418. Witness KBC, a Hutu, lived in the Rugenge sector of Kigali. On 8 April 1994, sometime after 9.30 or 10.00 a.m., he found a roadblock located in the *Péage* area on a dirt road in front of the residences of Manasse Karangwa and François Nzisabara. There was no barrier on the nearby tarmac road. The witness manned this roadblock daily from 6.00 a.m. to 6.00 p.m. until July 1994. The others who were regularly posted there included Competa, Mukeshabatwari and Jean Pierre Ndisabera. Individuals such as Fidèle Nshimiyimana (aka “Saddam”), Pascal Habintwali (aka “Shitani”), Nkeshimana, Eugène and Bikomago would often pass by. He never saw Witness SON at the roadblock. The witness did not know Setako. He also did not recall an incident where a soldier left two girls with Fidèle to kill at the CND.<sup>507</sup>

Defence Witness KCM

419. Witness KCM, a Tutsi, was a shop owner who lived in Rugenge sector. Around 6.00 p.m. on 8 April 1994, an *Interahamwe* named Fidèle (aka “Castar”) came to the witness’s home and ordered him to man the nearby “cemetery” roadblock where around 10 persons were stationed. Fidèle was armed, in uniform, and his hands were stained with blood. They were ordered to arrest anyone unknown who passed the roadblock and to wait for Fidèle to arrive. However, no one was ultimately arrested at it. The witness worked at the roadblock every day until 4 July in two shifts from 1.00 a.m. to 6.00 a.m. and again from 1.00 p.m. to 10.00 p.m.<sup>508</sup>

420. The *Péage* roadblock was about 70 metres away and some 30 metres from the tarmac road in front of the homes of Manasse and François Nzisabira. Some of those working there included Jean Pierre Nzisabira, François Competa, Innocent Kagame, Mukeshabatware, Innocent Nzisabira, Karangwa, Sebyondo (aka “Saddam”), Pascal Habintwali (aka “Shitani”) and Nyalitwa. No one named Fidèle was at the roadblock. The two groups at the *Péage* and cemetery roadblocks frequently intermingled. The witness could see the *Péage* roadblock from his post.<sup>509</sup>

421. The witness did not see or hear about the killing of Maharangari’s daughters or anyone else there, and he never heard Setako’s name mentioned at Gacaca trials in connection with any killings in the Rugenge sector. He knew Witness SON, but never saw

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<sup>507</sup> T. 20 May 2009 pp. 15-16, 19, 21-26, 30-31, 34-36, 59, 64-68, 71-75; Defence Exhibit 141 (personal identification sheet); Defence Exhibit 144 (sketch of the *Péage* area). Witness KBC testified that he was arrested in 1994, that his proceedings commenced in 2000, and that he was acquitted in 2003. T. 20 May 2009 pp. 26, 40, 46-47. He was tried together with Witness SON. T. 20 May 2009 pp. 50-51, 54-58, 74. Subsequently, Witness KBC was acquitted of charges of destruction of property and looting in a Gacaca proceeding in 2008. T. 20 May 2009 pp. 40, 43-44, 46.

<sup>508</sup> T. 12 May 2009 pp. 74, 77-79; T. 13 May 2009 pp. 2-5, 8, 29, 31, 34, 39, 42, 44, 68; Defence Exhibit 126 (personal identification sheet). Witness KCM stated that he appeared before the Rugenge Gacaca court in February 2004 as a witness. He was charged before this court that same month, but fled Rwanda because he feared that his trial would not be fair and wanted to look for better employment opportunities. The witness was convicted *in absentia* and sentenced to 19 years of imprisonment. T. 13 May 2009 pp. 14-29, 51-60; Prosecution Exhibits 63A (accused sheet) and 63B (judgment of 11 November 2007). Relevant excerpts were interpreted into English.

<sup>509</sup> T. 12 May 2009 pp. 78-79; T. 13 May 2009 pp. 2, 4-8, 39-41.

him at either the cemetery or the *Péage* roadblock. He also did not hold a leadership position in the *Interahamwe*.<sup>510</sup>

#### Defence Witness KDY

422. Witness KDY, a Hutu whose wife and mother were Tutsis, lived in Rugenge sector in the vicinity of the *Péage* area. Between 7 and 9 April 1994, a roadblock was established at *Péage*, on the dirt road near the house of François Nzisabira. It was not possible to see the roadblock from the World Health Organization. The witness identified several persons who manned it, including Vénuste Mukeshabware, Ntuyembarusha, Innocent Kagame, Jean Pierre Karangwa, François Nzisabira (aka “Sebyondo”) and Jean Bosco Kanyampereri. The witness did not man the roadblock although some of his family members did. He stayed at home with his wife and her family, but went out each day. The witness never heard about Setako handing over the daughters of Maharangari to be killed at the *Péage* roadblock during the events or subsequently during Gacaca proceedings. The name Fidèle Nshimiyimana (aka “Saddam”), however, was frequently mentioned during the proceedings. The witness also heard about Fidèle (aka “Castar”), but that person did not man the roadblock. The witness did not see Witness SON at the roadblock.<sup>511</sup>

#### *Deliberations*

423. The Prosecution presented two witnesses to establish that Setako ordered the killing of two young girls at the *Péage* roadblock in May 1994. Witness SON provided a first-hand account of Setako arriving at the barrier in a Pajero and instructing an *Interahamwe* named Fidèle to take the two girls away (*bajyane*). The militiamen killed them at the CND. As corroboration, Witness SQY testified that he saw Setako pass through a roadblock near the home of Protais Zigiranyirazo and the Presbyterian church in a Pajero carrying two girls. He then saw Setako leave them at the *Péage* roadblock and later heard that they were killed at the CND.

424. Witness SON stated that he was present at the roadblock when Setako allegedly instructed the militiamen there to kill the two girls. The witness also accompanied the victims to the CND where they were shot. He is thus an alleged accomplice of Setako. At the time of his testimony, the witness was serving a sentence based on crimes he confessed to committing in Rugenge sector. His testimony may be influenced by a desire to positively impact his circumstances in Rwanda. The Chamber views his evidence with appropriate caution.

425. There is no mention of Setako in Witness SON’s first statement to Tribunal investigators in September 2006.<sup>512</sup> The statement is a detailed nine-page recitation of many

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<sup>510</sup> T. 13 May 2009 pp. 8-11, 42-43, 46, 68. The transcripts refer to the World Health Organization’s French abbreviation, OMS (*Organisation mondiale de la Santé*).

<sup>511</sup> T. 11 May 2009 pp. 69-72; T. 12 May 2009 pp. 3-6, 9-10, 12, 14-15, 20-21, 27-30, 33, 39; Defence Exhibit 125 (personal identification sheet). Witness KDY was sentenced to 25 years of imprisonment by the Rugenge sector Gacaca court and acquitted on appeal. T. 12 May 2009 pp. 10, 41, 51. He was aware of several persons tried for killings in May and June 1994 at the *Péage* roadblock or in the surrounding area, namely Léonard Tulimukaga, Thomas Ntuyembarusha, Jean Pierre Nzisabira, Fidèle Nshimiyimana (aka “Saddam”), Jean Bosco Kanyampereri, Innocent Kagame, Jean Pierre Karangwa, Simon Pierre and Claudette Mujawabega. T. 12 May 2009 pp. 10-12.

<sup>512</sup> Defence Exhibit 70 (statement of 12 September 2006).

of the events experienced by Witness SON from April to July 1994. It also implicates a number of important officials, including Prefect Tharcisse Renzaho, Major Laurent Munyakazi, Major Patrice Bivamvagara, Wenceslas Munyeshyaka, *Bourgmestre* Jean Bizimana, Angéline Mukandituye and Odette Nyirabagenzi. It is notable therefore that it does not refer to Setako. However, the omission could plausibly be explained by the fact that it was prepared with a view to the witness's testimony for the Prosecution in the *Renzaho* case.<sup>513</sup>

426. Witness SON also provided two letters of confession to Rwandan authorities and appeared in domestic judicial proceedings. In his first confession from April 2003, he acknowledged being a member of a criminal association and participating in several local attacks.<sup>514</sup> There is no mention of Setako or the incident at the *Péage* roadblock or any other barrier in Rugenge sector. It follows from the letter, however, that the confession was incomplete since the witness stated that he would provide additional details later when he remembered them.<sup>515</sup>

427. The second confession, from January 2004, supplements the first by providing information about additional members of the witness's local *Interahamwe* group. It also describes three different killings. As in his earlier confession, this one does not mention Setako, the *Péage* roadblock or the death of the two girls.<sup>516</sup>

428. In his judgment of October 2004, the witness was convicted of genocide based on membership in a criminal association and his participation in attacks at Sainte Famille, Saint Paul, *Centre d'étude de langues africaines* and Technoserve as well as the killing of Leonard Habarugira and others.<sup>517</sup> His judgment also refers to killings at roadblocks, including *Péage*.

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<sup>513</sup> Witness SON's pseudonym in the *Renzaho* case, which was tried before this Chamber, was Prosecution Witness BUO. T. 25 September 2008 p. 15. He did not mention Setako in his testimony in the *Renzaho* trial, which was also heard by this Chamber. *Id.* p. 24 ("By the way, when I testified in the *Renzaho* case, I did not mention Setako either."). The witness suggested that this Chamber prevented him from doing so. *Id.* pp. 24 ("But, I am lucky because the President of this Trial Chamber was also presiding the *Renzaho* case. So when I started mentioning names and talked about Marcel Gatsinzi, the President asked me to stop and I was not able to talk about Setako."), 36 ("And on that occasion, I mentioned the co-perpetrators, that is, Renzaho's accomplices, and when I started citing them, I got to the name of Marcel Gatsinzi. The President interrupted me and I was unable to cite other persons, including your client, Ephrem Setako."). This, however, is not the case. See *Renzaho*, T. 29 January 2007 pp. 21-22.

<sup>514</sup> Prosecution Exhibit 35C (confession of 1 April 2003). It follows from the confession that Witness SON admitted to leading a looting operation at Technoserve and participating in attacks at *Centre Pastoral Saint Paul*, on the Rutabana family, and at Léonard Haberurema's house. He also witnessed the looting of Rutare's property and the killing of Charlotte, her child and Vincent.

<sup>515</sup> *Id.* pp. 3-4, which reads: "I should mention that quite some time has elapsed since the acts were committed. However, I shall not fail to testify about everything that I remember before any court. ... In conclusion, I would like to ask for forgiveness for all the acts that I committed and for all other acts in which I played a role, for those I remember and those that I do not remember. I shall not hesitate to testify before the court about acts that I have forgotten once I remember them."

<sup>516</sup> Defence Exhibit 72B (confession of 4 January 2004). The letter refers to the murder of Frodouald's child, Felecité Nyababiri and Daniel.

<sup>517</sup> Prosecution Exhibit 36 (judgment dated 24 October 2004); Defence Exhibit 69B (excerpt of judgment convicting Witness SON). The Chamber has reviewed the judgment with the assistance of a Kinyarwanda translator from the Tribunal's Language Services Section.

However, like the second confession, his conviction makes no reference to Setako or the incident involving the two girls.<sup>518</sup>

429. He provided two explanations for the omission of Setako in his confessions and judgment. First, he pointed to the language in his letter from April 2003 indicating that it might be supplemented at a later stage. Second, he stated that Setako was a powerful person and he feared for his safety.<sup>519</sup>

430. The proviso in the witness's first confession does not reasonably explain why he did not acknowledge participating in or witnessing the killing of the two girls at the *Péage* roadblock. Setako was a prominent military officer, and during his testimony the witness repeatedly blamed the accused for his own crimes.<sup>520</sup> It is clear that, if this incident had occurred, the witness would not have forgotten it at the time of his confession. Therefore, the claim that he did not recall the incident at the time can only be considered as misleading. This calls for careful scrutiny of his evidence.

431. Witness SON's security concerns provide a more plausible justification for the omission. However, his account of these threats was general and he offered no concrete reason for being concerned with retaliation from Setako.<sup>521</sup> In any case, this does not adequately explain why his confessions and judgment do not mention the killing of the two girls at *Péage* even without reference to Setako.<sup>522</sup> In this respect, it is noted that the witness accused Fidèle Habimana (aka "Caster") of other crimes in his confession.<sup>523</sup>

432. Differences between Witness SON's testimony and other evidence raise some concern. He claimed to be the vice-president of his local *Interahamwe* group which gave him a supervisory role over area roadblocks. Defence Witnesses KBC, KCM and KDY, who lived in the area, disputed that he held a position of authority or manned area roadblocks. Their evidence is consistent with the witness's own trial judgment in Rwanda, which rejects Witness SON's claim of authority in the local militia group.<sup>524</sup> These differences go to the core of Witness SON's basis of knowledge for asserting that Setako instructed the killing of two girls at the *Péage* roadblock in May 1994. It is not easy to understand why the witness would claim an official position in the *Interahamwe* if it were not the case since it would potentially expose him to more serious sanctions.

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<sup>518</sup> T. 25 September 2008 p. 31 ("Q. Witness, the question that I was putting to you was concerning a hearing that you had before the Rwandan authorities and, particularly, at the court of first instance on your confession. ... I'm assuming that, again, there you never mentioned Colonel Setako. A. ... Counsel, that is correct.").

<sup>519</sup> *Id.* pp. 31-32; Prosecution Exhibit 35C (confession of 1 April 2003) pp. 3-4.

<sup>520</sup> T. 25 September 2008 pp. 30 ("[Y]our client is a criminal. I am not accusing him, but – but he pushed me to commit crimes, and he injected a poisonous poison – a criminal poison into my heart."), 31 ("Let me repeat, Setako, I know him. My colleagues and I were obliged to carry out some actions because of him"), 40 ("Setako, Renzaho, and others used us and helped us in this task of killing. If that had not been the case, those Tutsis and others would not have been killed."), 41 ("[Setako] and others caused us to kill."), 47 ("We committed the genocide, but were incited to do so by the person who is before you.").

<sup>521</sup> *Id.* p. 31 ("Something bad was done today to me, and I am ready to say that. I would like the Trial Chamber to allow me to say that. I was poisoned. They tried to kill me. Some people advised me against mentioning all the names at the same time. Gatsinzi is very influential in the current government. Renzaho and Setako are very powerful people.").

<sup>522</sup> Defence Exhibit 69B (excerpt of judgment convicting Witness SON).

<sup>523</sup> Defence Exhibit 72B (confession of 4 January 2004) p. 1 (calling him by his full name and by "Castal").

<sup>524</sup> Defence Exhibit 69B (excerpt of judgment convicting Witness SON) p. 2.

433. In view of Witness SON's status as an alleged accomplice and the differences between his testimony, confessions in Rwanda and judgment as well as other evidence, the Chamber declines to accept his testimony against Setako in the absence of sufficient corroboration.

434. Turning to Witness SQY, he purportedly observed Setako pass through a roadblock with two girls in a Pajero near the Presbyterian church, the Prosecutor's office and the homes of Mathieu Ngirumpatse and Protais Zigiranyirazo. From this position, he then saw Setako leave the two girls with *Interahamwe* at a roadblock in the *Péage* area. This appears to offer clear corroboration for Witness SON's account of this event. However, a closer examination of Witness SQY's testimony raises issues about his credibility in relation to Setako.

435. First, the witness gave two statements to Tribunal investigators in May 2001 and February 2007.<sup>525</sup> The first statement focuses on Captain Simbikangwa, but also refers to other authorities such as Théoneste Bagosora and Renzaho. It does not mention Setako. The witness explained that he had likely forgotten Setako.<sup>526</sup> This explanation appears reasonable in relation to Setako's participation in the *Péage* incident since it has no link with Simbikangwa. The witness's second statement to Tribunal investigators from February 2007 is in general conformity with his testimony.<sup>527</sup>

436. Second, by his own admission, his life was continuously threatened as a Tutsi living in the Kiyovu area, and there were several attempts on his life.<sup>528</sup> This raises questions about the extent to which he would be freely moving about the area, in particular at a roadblock where a number of Tutsis were killed.<sup>529</sup> The witness explained that Captain Simbikangwa intervened on numerous occasions to protect him.<sup>530</sup> He also acknowledged that he manned a roadblock to give the impression that he was "participating".<sup>531</sup> Therefore, the Chamber

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<sup>525</sup> Defence Exhibit 76 (statement of 9 May 2001); Defence Exhibit 77 (statement of 18 February 2007).

<sup>526</sup> T. 17 February 2009 p. 39.

<sup>527</sup> Defence Exhibit 77 (statement of 18 February 2007).

<sup>528</sup> T. 17 February 2009 p. 33.

<sup>529</sup> T. 18 February 2009 p. 16 ("I do not know the names and I do not know the number of persons who were killed at the roadblock in front of Zigiranyirazo's house. What I know is that many people were killed at that roadblock. Some escaped, but were caught at the roadblock next to the Chinese residence. Now, as you put these questions to me, all these events are now coming back into my memory. You see, there were lorries, tractors that were used to cart away the dead bodies, while some remained at that location and were eaten up by dogs. Many people were killed at that location. The cadavers were picked and buried in front of the mortuary at the Kigali hospital centre where a deep hole had been dug and into which various dead bodies were dumped, as they had been collected from various parts of the city. I don't know what else to tell you because these were very tragic things that happened at that location.").

<sup>530</sup> T. 17 February 2009 pp. 33 ("Q. Witness, have you ever been to CND? A. The good Lord protected me using other persons. I was led to CND, but Captain Simbikangwa saved me three times, but I must point out that I did not get to the pit or to the area where this slaughter house had been set up. Each time on my way there, something happened and I was intercepted. Q. And who were the people that took you there? Who took you there? A. Fidèle, Furaha and others. Q. When was your first encounter? Was it April, May, June? A. All that happened in the month of April, and in the month of May, I was saved. I was living in a secure area. Simbikangwa granted me protection and nobody dared to harm me, and the last time was when Fidèle fired at me."), 35-36.

<sup>531</sup> *Id.* p. 32 ("Q. And did you man any roadblock yourself, Witness? A. Please repeat your question, so I can better understand you. Q. I'm asking if you participated in manning any roadblock in Kiyovu? A. No. Nevertheless, I observed that which was unfolding there. And there was a roadblock which was there manned by nobody, in particular, but people used to say it was my roadblock. That is what people said. Well, I did that just to deceive the others, to act as if I was, in fact, participating."). Other trials have established that a number of

cannot exclude that the witness would be able to move about the area, but it certainly has some doubt about the extent of his movements.

437. Third, Witness SQY recognised Setako as a prominent personality living in the Kiyovu area, but he did not know him “physically”.<sup>532</sup> This basis of identification is not particularly strong when viewed in context with his response about whether he knew a prominent banker who also lived in the area: “I did not know [Augustin] Maharangari. I did not know his home, and I did not know the Tutsis who lived in the Kiyovu neighbourhood, nor even the Hutus who lived there. We just heard their names being cited after they had died.”<sup>533</sup>

438. Fourth, the chronology provided by the witness for the events is not clear. In his examination-in-chief, he testified that the incident at the *Péage* roadblock occurred a week after the mid-May meeting held at the Kiyovu Hotel (I.2.2.11). Shortly after seeing Setako at the roadblock, he was shot around 20 May.<sup>534</sup> When asked to clarify the date of the meeting, he then stated that it occurred a few days after 20 May.<sup>535</sup> During cross-examination, the Defence sought further details about the approximate dates for the sequence of events based on when he was shot. The witness first stated that he was no longer in Kiyovu after 20 May due to his injury.<sup>536</sup> In view of this response, he was asked about his earlier testimony of seeing Setako a few days after 20 May. The witness stated that the Defence’s proposition was not correct.<sup>537</sup> Later, the witness affirmed that he was shot on 26 May and arrived at the hospital on 28 May for only a brief visit.<sup>538</sup>

439. The Defence confronted Witness SQY with his first statement to Tribunal investigators from May 2001 that placed the shooting and his hospitalisation sometime in

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Tutsi watchmen in the Kiyovu area survived after assisting in the manning of roadblocks. *Zigiranyirazo* Trial Judgement paras. 218-220, 237; *Bagosora et al.* Trial Judgement paras. 1467-1468, 1489, 1501.

<sup>532</sup> T. 17 February 2009 p. 5 (“I told you I lived in Kiyovu. And Setako was one of the national officials. He usually went past on that road on his way to his office. And, from time to time, I visited some other streets, for example, I could go from the hospital going past the military academy, and I would walk close by the residence of Setako, even though I did not know this gentleman physically, but I knew his residence all the same.”). See also *id.* (French version: “*Mais je ne connaissais pas physiquement ce monsieur*”).

<sup>533</sup> *Id.* p. 32.

<sup>534</sup> *Id.* p. 29 (“Q. Witness, about how many days after the meeting in May did you see Setako for the fourth time? Are you able to recall? A. Maybe a week later. Q. And about what time? A. I have told you that I cannot give an exact date. I can’t give you exact dates. During that period, we had lost count of the days. We see the sun rise and set, but I know that this happened in the course of the month of May. That I know after I checked on my hospital consultation form, which I checked when I remembered that I was shot some days around the 20th of May.”).

<sup>535</sup> *Id.* (“Q. Are you then saying, Witness, that this meeting took place before the 20th of May; is that correct? A. No, a few days after the 20th. That was towards the end of my stay in Kiyovu.”). For Augustin Maharangari’s relationship with the Rwandan development bank, see Witness SQB, T. 18 February 2009 p. 53; Witness KCM, T. 13 May 2009 p. 48.

<sup>536</sup> *Id.* p. 41 (“Q. Witness, you have told us that you were shot and wounded, and you checked your hospital records to pinpoint the date of your – the last time that you saw Setako; is that correct? A. Counsel, you’re reporting what I did not say. I said that to determine the period that I went to Kiyovu for the – for the last time, I had to refer to what I experienced. What I meant was that beyond the 20th of May, I was no longer in Kiyovu to testify about what happened there.”).

<sup>537</sup> *Id.* p. 42 (“Q. Witness, ... I'm just trying to confirm what my notes have said that based upon you checking your hospital records, you said that you saw Setako a few days after May 20th. Did I get that correct? A. No. You're putting words in my mouth; that is not correct.”).

<sup>538</sup> *Id.* pp. 44-45.



June.<sup>539</sup> He asserted that he never reviewed the statement or at least had no recollection of doing so. The witness added that, at the time it was given, he did not know it would be used in court or that the Tribunal even existed.<sup>540</sup> It is understandable that the witness may be confused about the dates of various events.<sup>541</sup> His inability to recall them clearly at the time of his testimony may be explained by the witness's heart problems.<sup>542</sup> However, it does raise some issues about the reliability of some of the specific details of his testimony.

440. Finally, while the Chamber has no doubt that there were one or more roadblocks in the *Péage* area, a number of differences exist between the Prosecution and Defence evidence with respect to the location of the roadblock in question. Witness SON placed the roadblock close to the *Jeunesse ouvrière chrétienne* on the tarmac road leading towards the Sainte Famille church. It appears to be on the Boulevard de l'OUA.<sup>543</sup> Witness SQY described the roadblock as being near the World Health Organization, which was situated on Kayuku road.<sup>544</sup> This raises questions as to whether their evidence in fact corroborates each other.

441. Moreover, Defence Witnesses KBC, KCM and KDY denied that there was a roadblock on the tarmac road. They instead placed it about 30 metres away, near the house of François Nzisabira. Furthermore, according to Stanislas Harerimana, it would not be possible to see what was happening in the *Péage* area from the roadblock near the Presbyterian church given the distance, elevation and various obstructions. There are good reasons to doubt the

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<sup>539</sup> Defence Exhibit 76B (statement of 9 May 2001) p. 7, which reads: "Sometime in June, *Interahamwe* came to loot Dibost's house. One of them shot at me hitting my left thigh. They left me for dead."); T. 17 February 2009 pp. 45-48.

<sup>540</sup> T. 17 February 2009 pp. 46-48 ("Now you are talking to me about a statement that was made in 2001, and today, I must bring to your attention the fact that I never read that statement again. So I made a statement and you're putting questions to me today on that statement. I may have been mistaken on a date or on a specific location at that time. Today, things are more or less calm, and we are seeking the truth. So I do not think that you need to insist too much on what was said in 2001. What really matters is to determine whether the crimes were, indeed, committed. ... We had the interview, and I signed the document and then I went home, so I did not know at the time that such a document would ever come before this Court. I did not know that this Tribunal was going to be created. Those who came to talk to me did not tell me that the Tribunal existed already. It is only subsequently that I met the staff of the Tribunal."). The Chamber notes that the statement is signed and contains an attestation that it was translated to the witness in Kinyarwanda. The opening passage also indicates that the witness was being interviewed by Tribunal investigators and prepared to appear as a witness. Defence Exhibit 76A (statement of 9 May 2001) pp. 3, 8.

<sup>541</sup> Witness SQY also stated that he could not remember certain aspects of his testimony from earlier that day. T. 17 February 2009 p. 48 ("Since this morning, we have been talking about a number of things, and even some of the things that we talked about this morning, I have already forgotten.").

<sup>542</sup> *Id.* p. 50 ("A. Counsel, you have to understand that I'm tired. And if the President would allow me, I would like to take some rest. I'm ill and you are tiring me. Mr. President, I see that counsel for the Defence does not want us to get through this. And if you allow me, I'd like to take some rest. Mr. President: We are in a very fortunate position today, Mr. Witness. That, unlike our normal work days, we will only sit to 3:45 because there is a meeting. So we would be grateful if you could bear with us for another eight or nine minutes and then you can rest in the afternoon. Shall we try? ... The witness: I can, Mr. President. I have been patient. But it should be noted that counsel for the Defence is repeating his questions. He's just making me tired for nothing, and I'm already tired. And, as I've said, I have heart problems. ... Ms. Okali: Just by way of information, it's really true that he's sick and he was attended to during the lunchtime by the nurse. He's actually sick. Mr. President: Okay. Well, under the circumstances it's only ten minutes to go and if there was a problem during the lunch break – shall we start again 8:45 tomorrow?").

<sup>543</sup> Defence Exhibit 155 (road map of Kiyovu area).

<sup>544</sup> See Witness KDY, T. 12 May 2009 p. 18 (affirming that the "OMS" and the "Presbyterian mission" were on the same road); Prosecution Exhibit 60 (sketch by Witness KDY), which places them on the same road; Stanislas Harelimana, T. 26 May 2009 p. 50.

general credibility of these witnesses since they have each been implicated in events there.<sup>545</sup> Their evidence, however, when coupled with the differences between Witnesses SON and SQY, raises additional questions.

442. Accordingly, the Prosecution has not proved beyond reasonable doubt that Setako instructed militiamen at the *Péage* roadblock to kill two young girls in May 1994, as alleged in the Indictment.

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<sup>545</sup> Stanislas Harerimana has been named as a suspect in Rwanda, but not tried. Witnesses KBC and KDY were ultimately acquitted. Witness KCM fled Rwanda prior to his conviction *in absentia*.

## CHAPTER III: LEGAL FINDINGS

443. The Prosecution has charged Setako with genocide (count 1) or complicity in genocide (count 2); murder (count 3) and extermination (count 4) as crimes against humanity; and violence to life, health and physical or mental well-being of persons (count 5) and pillage (count 6) as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto. His alleged responsibility is based on Articles 6 (1) and 6 (3) of the Statute.

444. In its factual findings, the Chamber determined that Setako was involved in the killing of 30 to 40 Tutsis at Mukamira camp on 25 April and nine or 10 others there on 11 May 1994 (II.4). No other allegation in the Indictment has been proved. Therefore, the Chamber will only address his criminal responsibility for these two events, which are charged as genocide and, in the alternative, complicity in genocide. The killings of 25 April are also cumulatively charged as extermination as a crime against humanity and violence to life as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.

### 1. CRIMINAL RESPONSIBILITY

#### 1.1 Article 6 (1) of the Statute

445. Article 6 (1) of the Statute sets out several forms of individual criminal responsibility applicable to the crimes falling within the Tribunal's jurisdiction, namely planning, instigating, ordering, committing as well as aiding and abetting.

##### 1.1.1 Planning, Instigating, Committing, Ordering, Aiding and Abetting

446. "Planning" requires that one or more persons design the criminal conduct constituting a statutory crime that is later perpetrated. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct. The *mens rea* entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.<sup>546</sup>

447. "Instigating" implies prompting another person to commit an offence. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused. It is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime. The *mens rea* is the intent to instigate another person to commit a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.<sup>547</sup>

448. The Appeals Chamber has held that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law.<sup>548</sup> "Committing" has also been interpreted to contain

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<sup>546</sup> *Nsengimana* Trial Judgement para. 796, citing *Dragomir Milosević* Appeal Judgement para. 268, *Nahimana et al.* Appeal Judgement para. 479.

<sup>547</sup> *Nsengimana* Trial Judgement para. 797, citing *Nahimana et al.* Appeal Judgement para. 480.

<sup>548</sup> *Nsengimana* Trial Judgement para. 798, citing *Nahimana et al.* Appeal Judgement para. 478, *Seromba* Appeal Judgement para. 161, *Gacumbitsi* Appeal Judgement para. 60.

three forms of joint criminal enterprise: basic, systemic, and extended.<sup>549</sup> The Chamber discusses below Setako's alleged participation in a joint criminal enterprise.

449. "Ordering" requires that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order. The authority creating the kind of relationship envisaged under Article 6 (1) of the Statute for ordering may be informal or of a purely temporary nature.<sup>550</sup>

450. The Appeals Chamber has explained that an aider and abetter carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on its commission.<sup>551</sup> The *actus reus* need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated.<sup>552</sup> The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.<sup>553</sup> In cases of specific intent crimes, such as persecution or genocide, the aider and abetter must know of the principal perpetrator's specific intent.<sup>554</sup>

451. The Chamber will discuss these modes of liability where applicable in making its legal findings on the crimes it has found that Setako was involved in.

### 1.1.2 Joint Criminal Enterprise

452. The Prosecution is pursuing the basic and extended forms of joint criminal enterprise.<sup>555</sup> According to settled jurisprudence, the required *actus reus* for each form of joint criminal enterprise comprises three elements.<sup>556</sup> First, a plurality of persons is required. They need not be organised in a military, political or administrative structure. Second, there must be a common purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts. Third, the participation of the accused in the common purpose is necessary, which involves

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<sup>549</sup> *Simba* Trial Judgement para. 386, citing *Kvočka et al.* Appeal Judgement paras. 82-83, *Ntakirutimana* Appeal Judgement paras. 463-465, *Vasiljević* Appeal Judgement paras. 96-99, *Krnojelac* Appeal Judgement para. 30. See also *Nahimana et al.* Appeal Judgement para. 478.

<sup>550</sup> *Bagosora et al.* Trial Judgement para. 2008, citing *Semanza* Appeal Judgement paras. 361, 363.

<sup>551</sup> *Bagosora et al.* Trial Judgement para. 2009, citing *Blagojević and Jokić* Appeal Judgement para. 127, *Simić* Appeal Judgement para. 85, *Blaškić* Appeal Judgement paras. 45-46, *Vasiljević* Appeal Judgement para. 102, *Ntagerura et al.* Appeal Judgement para. 370.

<sup>552</sup> *Bagosora et al.* Trial Judgement para. 2009, citing *Blagojević and Jokić* Appeal Judgement para. 127, *Blaškić* Appeal Judgement para. 48, *Simić* Appeal Judgement para. 85, *Ntagerura et al.* Appeal Judgement para. 372.

<sup>553</sup> *Bagosora et al.* Trial Judgement para. 2009, citing *Blagojević and Jokić* Appeal Judgement para. 127, *Simić* Appeal Judgement para. 86, *Vasiljević* Appeal Judgement para. 102, *Blaškić* Appeal Judgement para. 46, *Ntagerura et al.* Appeal Judgement para. 370.

<sup>554</sup> *Bagosora et al.* Trial Judgement para. 2009, citing *Blagojević and Jokić* Appeal Judgement para. 127, *Simić* Appeal Judgement para. 86, *Krstić* Appeal Judgement paras. 140-141.

<sup>555</sup> Indictment paras. 16-23; Prosecution Closing Brief para. 138 (incorporating submissions on criminal responsibility from the Prosecution Pre-Trial Brief); Prosecution Pre-Trial Brief paras. 74-92, in particular para. 84.

<sup>556</sup> *Nsengimana* Trial Judgement para. 802, citing *Brđanin* Appeal Judgement para. 364, *Simba* Trial Judgement para. 387.

the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of the provisions (for example, murder, extermination, torture, or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose. The Appeals Chamber in *Kvočka et al.* provided guidance on distinguishing between joint criminal enterprise and other forms of liability, such as aiding and abetting.<sup>557</sup>

453. The required *mens rea* for each form of joint criminal enterprise varies. The basic form of joint criminal enterprise requires the intent to perpetrate a certain crime, this intent being shared by all co-perpetrators.<sup>558</sup> Under the extended form of joint criminal enterprise an accused can only be held responsible for a crime outside the common purpose if, under the circumstances of the case: (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.<sup>559</sup> Where the underlying crime requires a special intent, such as discriminatory intent, the accused, as a member of the joint criminal enterprise, must share the special intent.<sup>560</sup>

454. Paragraphs 16 and 20 of the Indictment allege that Setako participated in the joint criminal enterprise with other military officers, politicians, civilian authorities, businessmen, and leaders of militia groups.<sup>561</sup> The purpose of the joint criminal enterprise was the destruction of the Tutsi population and their property in Rwanda and the destruction of persons considered to support Tutsis. It encompassed the crimes charged in the Indictment.<sup>562</sup>

455. The principal basis for asserting that Setako was a member of the joint criminal enterprise follows from the Prosecution evidence of his extensive meetings with its other members as well as his alleged active participation in the criminal events alongside them. As the Chamber's factual findings demonstrate, there is no convincing evidence that Setako participated in any meetings or crimes other than the incidents at Mukamira camp on 25 April and 11 May 1994.

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<sup>557</sup> *Simba* Trial Judgement para. 387, citing *Kvočka et al.* Appeal Judgement para. 90 (“Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes. Where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.”), *Vasiljević* Appeal Judgement para. 102, *Tadić* Appeal Judgement para. 229.

<sup>558</sup> *Nsengimana* Trial Judgement para. 803, citing *Brđanin* Appeal Judgement para. 365; *Simba* Trial Judgement para. 388, citing *Ntakirutimana* Appeal Judgement para. 467, *Vasiljević* Appeal Judgement para. 101, *Krnjelac* Appeal Judgement para. 32.

<sup>559</sup> *Nsengimana* Trial Judgement para. 803, citing *Brđanin* Appeal Judgement para. 365.

<sup>560</sup> *Simba* Trial Judgement para. 388, citing *Kvočka et al.* Appeal Judgement paras. 109-110.

<sup>561</sup> Paragraph 20 of the Indictment contains an extensive list of participants: “At all times relevant to this Amended Indictment, Ephrem Setako participated in the joint criminal enterprise with a plurality of persons, including military, political and civilian authorities, leaders of militia groups and businessmen groups, notably: Augustin Bizimana, Colonel Théoneste Bagosora, Colonel Anatole Nsengiyumva, Colonel Tharcisse Renzaho, Colonel Marcel Bivugabagabo, Colonel Ntubitura, Major Bizabarimana, Captain Hasengeza, Joseph Nzirorera, Casimir Bizimungu, Juvénal Kajelijeli, Dominique Gatsimbanyi, Jean Damascene Niyoyita, Jonathan Bambonye, General Augustin Bizimungu, Major Patrice Bivamvagara, Warrant Officer Karorero, Jean Baptiste Nyabusore, Esdras Baheza, Fabien Maniragaba, Basile Nsabumugisha, Mathias Mpiranya, Shadrack Sendugu, Gabriel Mbyariyehe, Assiel Ndisetse, Michel Niyigaba, Bernard Maniragaba, Gervais Harerimana, Iyakaremye, Anastase Kabutura, Augustin Habiyaambere, and other known and unknown participants. These persons are collectively hereinafter referred to, variously, by name or as ‘co-perpetrators’”.

<sup>562</sup> Indictment para. 17. See also Prosecution Pre-Trial Brief para. 86.

456. In the Chamber's view, the evidence of Setako's role in the killings at the camp is insufficient to demonstrate, as the only reasonable conclusion, his participation in a joint criminal enterprise which encompassed all of the alleged crimes charged in the Indictment, in particular those which occurred before the 25 April meeting or in other parts of the country such as Kigali. Consequently, the Chamber will discuss in its legal findings only whether Setako participated in a joint criminal enterprise to kill Tutsis at Mukamira camp.

457. The Prosecution has not proved beyond reasonable doubt that Setako participated in the joint criminal enterprise with respect to any other crimes referred to in the Indictment.

## 1.2 Article 6 (3) of the Statute

### 1.2.1 Legal Principles

458. The following three elements must be proved to hold a civilian or a military superior criminally responsible pursuant to Article 6 (3) of the Statute for crimes committed by subordinates: (a) the existence of a superior-subordinate relationship; (b) the superior's knowledge or reason to know that the criminal acts were about to be or had been committed by his subordinates; and (c) the superior's failure to take necessary and reasonable measures to prevent such criminal acts or to punish the perpetrators.<sup>563</sup>

459. A superior-subordinate relationship is established by showing a formal or informal hierarchical relationship. The superior must have possessed the power or the authority, *de jure* or *de facto*, to prevent or punish an offence committed by his subordinates. The superior must have had effective control over the subordinates at the time the offence was committed. Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders. This requirement is not satisfied by a showing of general influence on the part of the accused.<sup>564</sup>

### 1.2.2 Superior – Subordinate Relationship

460. Paragraph 25 of the Indictment pleads that Setako exercised effective control over soldiers of the Rwandan army, the local Hutu civilian population, including Prosecution Witness SAA, and members of militia groups.<sup>565</sup>

461. In 1994, Setako held the rank of lieutenant colonel in the Rwandan army and served as the head of the division of legal affairs in the Ministry of Defence in Kigali. It is clear that his rank and professional situation indicates that he was a person of influence and an authority figure in the general sense. This alone is insufficient to demonstrate that he was a superior. There is also no evidence that this position entitled him to any particular legal

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<sup>563</sup> *Bagosora et al.* Trial Judgement para. 2011, citing *Orić* Appeal Judgement para. 18, *Nahimana et al.* Appeal Judgement para. 484, *Gacumbitsi* Appeal Judgement para. 143, *Ntagerura et al.* Trial Judgement para. 627, *Semanza* Trial Judgement para. 400.

<sup>564</sup> *Bagosora et al.* Trial Judgement para. 2012, citing *Halilović* Appeal Judgement para. 59, *Gacumbitsi* Appeal Judgement para. 143, *Kajelijeli* Appeal Judgement para. 85, *Ntagerura et al.* Appeal Judgement paras. 341-342, *Ntagerura et al.* Trial Judgement para. 628, *Semanza* Trial Judgement paras. 402, 415.

<sup>565</sup> Paragraph 25 of the Indictment also refers to Setako's effective control over a "known communal policeman". This reference is repeated in paragraph 48 of the Indictment which charges Setako with ordering the killing of Bernard Bajyagaha (II.2). It follows from the Prosecution Pre-Trial Brief, Annex A p. 1 as well as the evidence that the policeman is Prosecution Witness SAA. The Chamber did not find this allegation established.

authority over members of the armed forces, apart from his section at the Ministry. Similarly, it has not been established that he exercised authority over militia groups or members of the population.<sup>566</sup>

462. The main basis for asserting that Setako had control over the alleged groups of his subordinates follows from the evidence of him ordering various killings and the looting of property in Ruhengeri prefecture and Kigali and the perpetrators' execution of these instructions.<sup>567</sup> The Chamber only found that he instructed soldiers and militiamen to kill Tutsis at Mukamira camp on 25 April and 11 May 1994, respectively, but not that he gave any other orders to assailants.

463. In the Chamber's view, these two incidents at the camp are not sufficient to demonstrate that Setako exercised effective control over the perpetrators of the other crimes alleged in his Indictment. In this respect, the Chamber notes that there is limited credible and admissible evidence with respect to his interactions with the assailants of these crimes. The Chamber will only discuss in its legal findings, to the extent necessary, whether his instructions of 25 April and 11 May 1994 demonstrate his superior responsibility over these assailants at Mukamira camp.

464. The Prosecution has not proved beyond reasonable doubt that Setako was the superior of any other category of alleged subordinates referred to in the Indictment.

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<sup>566</sup> As discussed in the factual findings, the Prosecution did not prove that he acted as the liaison officer with the *Interahamwe* in Kigali (II.6.1).

<sup>567</sup> Prosecution Closing Brief paras. 149-151.

## 2. GENOCIDE (COUNTS 1 AND 2)

465. Count 1 of the Indictment charges Setako with genocide under Article 2 (3)(a) of the Statute. In support of this count, the Prosecution points to the killings of 30 to 40 Tutsis at Mukamira camp on 25 April and of nine or 10 others on 11 May 1994 (II.4). These crimes are also charged in the alternative under Count 2 as complicity in genocide. The other allegations in support of these counts have not been established. To the extent that the Chamber finds Setako responsible under Count 1, it will not discuss his liability under Count 2.

### 2.1 Law

466. To find an accused guilty of the crime of genocide, it must be established that the accused committed any of the enumerated acts in Article 2 (2) with the specific intent to destroy, in whole or in part, a group, as such, that is defined by one of the protected categories of nationality, race, ethnicity, or religion.<sup>568</sup> Although there is no numeric threshold, the perpetrator must act with the intent to destroy at least a substantial part of the group.<sup>569</sup> The perpetrator need not be solely motivated by a criminal intent to commit genocide, nor does the existence of personal motive preclude him from having the specific intent to commit genocide.<sup>570</sup>

467. In the absence of direct evidence, a perpetrator's intent to commit genocide may be inferred from relevant facts and circumstances that lead beyond any reasonable doubt to the existence of the intent. Factors that may establish the specific intent include the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a protected group, or the repetition of destructive and discriminatory acts.<sup>571</sup>

468. The Indictment charges Setako with killing and causing serious bodily or mental harm to members of the Tutsi group. It is firmly established that the Tutsi ethnicity is a protected group.<sup>572</sup> Killing members of the group requires a showing that the principal perpetrator

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<sup>568</sup> *Bagosora et al.* Trial Judgement para. 2115, citing *Nahimana et al.* Appeal Judgement paras. 492, 496, 522-523, *Niyitegeka* Appeal Judgement para. 48, *Gacumbitsi* Appeal Judgement para. 39, *Brđanin* Trial Judgement paras. 681, 695.

<sup>569</sup> *Bagosora et al.* Trial Judgement para. 2115, citing *Seromba* Appeal Judgement para. 175, *Gacumbitsi* Appeal Judgement para. 44, *Simba* Trial Judgement para. 412, *Semanza* Trial Judgement para. 316.

<sup>570</sup> *Bagosora et al.* Trial Judgement para. 2115, citing *Simba* Appeal Judgement para. 269, *Ntakirutimana* Appeal Judgement paras. 302-304, *Niyitegeka* Appeal Judgement paras. 48-54, *Krnojelac* Appeal Judgement para. 102, referring to *Jelisić* Appeal Judgement para. 49.

<sup>571</sup> *Bagosora et al.* Trial Judgement para. 2116, citing *Seromba* Appeal Judgement para. 176, referring to *Seromba* Trial Judgement para. 320, *Nahimana et al.* Appeal Judgement paras. 524-525, *Simba* Appeal Judgement para. 264, *Gacumbitsi* Appeal Judgement paras. 40-41, *Rutaganda* Appeal Judgement para. 525, *Semanza* Appeal Judgement para. 262, citing *Jelisić* Appeal Judgement para. 47, *Kayishema and Ruzindana* Appeal Judgement paras. 147-148. See also *Nsengimana* Trial Judgement para. 832.

<sup>572</sup> The Defence does not dispute that Tutsis are a protected group. See also *Bagosora et al.* Trial Judgement para. 2116 and note 2338 ("Furthermore, every judgement rendered by this Tribunal concerning genocide has recognised that the Tutsi ethnicity is a protected group."); *Semanza* Appeal Judgement para. 192.



intentionally killed one or more members of the group.<sup>573</sup> In view of the Chamber's factual findings, it is unnecessary to discuss causing serious bodily or mental harm.

## **2.2 Application**

469. Prosecution Witnesses SLA and SAT were recruited into the civil defence forces in mid-April 1994 and trained at Mukamira camp in Ruhengeri prefecture. As part of this training, they were taught that Tutsis and others who supported the RPF were the enemy. On the morning of 25 April, Setako addressed a large gathering of these recruits and other soldiers at the camp. He was accompanied by other authorities and local prominent personalities.

470. According to Witness SLA, Setako stated that Tutsis and their accomplices needed to be hunted down and called for the killing of Tutsi soldiers and their accomplices at the camp. Witness SAT testified that Setako expressed surprise that Tutsis had taken refuge at the camp since they were being killed elsewhere. These formulations are not identical, which, in the Chamber's view, results from the passage of time. Their fundamental features, however, are consistent. More importantly, the significance of Setako's words in both versions are clear: Tutsis at Mukamira camp should be killed. That night, 30 to 40 Tutsis living at the camp were shot.

471. Setako returned to the camp on the afternoon of 11 May with nine or 10 Tutsis in his vehicle. As a small crowd gathered, he spoke with some of the officers and told one of them to take the Tutsis and kill them. The individuals were killed near the armoury.

472. Considering the nature of these events, the Chamber finds that the assailants intentionally killed these two groups of Tutsis. The selection of the victims was not by chance. Setako called for the killing of Tutsis at the camp on 25 April, and among the large number of persons there only members of this group were killed. In addition, the victims of the killings on 11 May were identified as Tutsis before the instruction to kill them was given. The Chamber has also heard extensive evidence of the targeting of Tutsis in Ruhengeri prefecture (II.3.1-.5). In this context, the only reasonable conclusion is that the assailants who perpetrated the killings possessed the intent to destroy, in whole or in substantial part, the Tutsi group.

473. Turning to Setako's responsibility for these crimes, the Chamber is convinced that he instructed soldiers and militiamen at the camp on 25 April and 11 May to kill Tutsis there. As 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 he was a person in a position of authority. Thus, the Chamber finds that he ordered these crimes. The proximity of the killing to his actions at the camp on both dates shows that his instructions substantially contributed to the killings. Moreover, the content of his interventions demonstrates that he intended the killings and possessed genocidal intent.

## **2.3 Conclusion**

474. Accordingly, the Chamber finds Setako guilty of genocide (Count 1) for ordering under Article 6 (1) the killings of 30 to 40 Tutsis at Mukamira camp on 25 April 1994 and the

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<sup>573</sup> *Bagosora et al.* Trial Judgement para. 2117, citing *Simba* Trial Judgement para. 414, referring to *Kayishema and Ruzindana* Appeal Judgement para. 151.

death of nine or 10 Tutsis on 11 May 1994.<sup>574</sup> The Chamber therefore does 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.<sup>575</sup> He is therefore not guilty of the alternative charge of complicity to commit genocide (Count 2).

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<sup>574</sup> The Chamber notes that Setako's actions could equally be described as instigation or aiding and abetting. It could also amount to his participation in a joint criminal enterprise to kill Tutsis at Mukamira camp since a plurality of persons participated in the crime with shared intent. However, in the Chamber's view, the most appropriate description for Setako's actions is ordering under Article 6 (1) of the Statute.

<sup>575</sup> *Kajelijeli* Appeal Judgement para. 81.

### 3. CRIMES AGAINST HUMANITY (COUNTS 3 AND 4)

475. Counts 3 and 4 of the Indictment charge Setako with murder and extermination as crimes against humanity, respectively, under Article 3 (a) and (b) of the Statute. The Prosecution has not proved any allegation under Count 3 (murder). Therefore, the Chamber will not discuss this crime further. In support of Count 4 (extermination), the Prosecution points to the killings of 30 to 40 Tutsis at Mukamira camp on 25 April 1994. The remaining events charged under this crime were not established.

#### 3.1 Widespread and Systematic Attack

476. For an enumerated crime under Article 3 to qualify as a crime against humanity, the Prosecution must prove that there was a widespread or systematic attack against the civilian population on national, political, ethnic, racial or religious grounds.<sup>576</sup> An attack against a civilian population means the perpetration against that population of a series of acts of violence, or of the kind of mistreatment referred to in sub-paragraph (a) to (i) of Article 3.<sup>577</sup> Intended to be read as disjunctive elements, “widespread” refers to the large-scale nature of the attack and the number of targeted persons, while “systematic” describes the organised nature of the acts of violence and the improbability of their random occurrence.<sup>578</sup>

477. With respect to the *mens rea*, the perpetrator must have acted with knowledge of the broader context and knowledge that his acts formed part of the attack, but need not share the purpose or goals of the broader attack.<sup>579</sup> The additional requirement that crimes against humanity have to be committed “on national, political, ethnic, racial or religious grounds” does not mean that a discriminatory *mens rea* must be established.<sup>580</sup>

478. The Chamber has considered the totality of the evidence, in particular concerning the ethnic composition of the individuals who were killed during the events in this case. Tutsi victims were singled out and targeted in areas where Hutus were also present. The Chamber is therefore convinced that there was a widespread and systematic attack against the civilian population on ethnic grounds. Bearing in mind the specific nature of the killings, as well as Setako’s rank, position in the military and statements, it is inconceivable that he and the principal perpetrators of these killings did not know that their actions formed part of this attack.

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<sup>576</sup> *Bagosora et al.* Trial Judgement para. 2165.

<sup>577</sup> *Id.*, citing *Nahimana et al.* Appeal Judgement paras. 915-918, *Kordić and Čerkez* Appeal Judgement para. 666, *Kunarac et al.* Appeal Judgement para. 89, *Kunarac et al.* Trial Judgement para. 415.

<sup>578</sup> *Bagosora et al.* Trial Judgement para. 2165, citing *Nahimana et al.* Appeal Judgement para. 920, quoting *Kordić and Čerkez* Appeal Judgement para. 94, *Ntakirutimana* Appeal Judgement para. 516, *Mpambara* Trial Judgement para. 11, *Semanza* Trial Judgement paras. 328-329, *Kunarac et al.* Trial Judgement para. 429, *Kunarac et al.* Appeal Judgement para. 94, *Gacumbitsi* Appeal Judgement para. 101, citing *Gacumbitsi* Trial Judgement para. 299, *Stakić* Appeal Judgement para. 246, *Blaškić* Appeal Judgement para. 101, *Limaj et al.* Trial Judgement para. 180, *Brdanin* Trial Judgement para. 133.

<sup>579</sup> *Bagosora et al.* Trial Judgement para. 2166, citing *Gacumbitsi* Appeal Judgement paras. 86, 103, referring to *Tadić* Appeal Judgement para. 252, *Galić* Appeal Judgement para. 142, *Semanza* Appeal Judgement paras. 268-269, *Simba* Trial Judgement para. 421, *Kordić and Čerkez* Appeal Judgement para. 99, *Kunarac et al.* Trial Judgement para. 434, *Kunarac et al.* Appeal Judgement para. 102, *Blaškić* Appeal Judgement paras. 124-127.

<sup>580</sup> *Bagosora et al.* Trial Judgement para. 2166, citing *Akayesu* Trial Judgement paras. 464-469, 595, *Bagilishema* Trial Judgement para. 81.

### **3.2 Murder (Count 3)**

479. As mentioned above, the Prosecution has not proved any of the allegations against Setako charged in support of Count 3. Accordingly, the Chamber finds him not guilty of murder as a crime against humanity.

### **3.3 Extermination (Count 4)**

#### **3.3.1 Law**

480. The crime of extermination is the act of killing on a large scale. The *actus reus* consists of any act, omission, or combination thereof which contributes directly or indirectly to the killing of a large number of individuals. Although extermination is the act of killing a large number of people, such a designation does not suggest that a numerical minimum must be reached. The *mens rea* of extermination requires that the accused intend to kill persons on a massive scale or to subject a large number of people to conditions of living that would lead to their death in a widespread or systematic manner.<sup>581</sup>

#### **3.3.2 Application**

481. The Chamber has already determined that the killing on 25 April 1994 of the 30 to 40 Tutsis at Mukamira camp amounts to genocide, and that Setako ordered it (III.2.2). On the same basis, it is clear that these killings were conducted on ethnic grounds. The Chamber is also satisfied that this number is sufficiently large to amount to extermination. Moreover, Setako's address on 25 April reflects his intention to kill on a massive scale, in particular when viewing it in the larger context of the other killings committed throughout Rwanda.

#### **3.3.3 Conclusion**

482. Accordingly, the Chamber finds Setako guilty of extermination (Count 4) as a crime against humanity for ordering under Article 6 (1) the killings of 30 to 40 Tutsis at Mukamira camp on 25 April 1994.

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<sup>581</sup> *Bagosora et al.* Trial Judgement para. 2191, citing *Seromba* Appeal Judgement para. 189, *Ntakirutimana* Appeal Judgement paras. 516, 522, *Ndindabahizi* Appeal Judgement para. 123, *Brđanin* Appeal Judgement para. 470, 476, *Gacumbitsi* Appeal Judgement para 86, *Semanza* Appeal Judgement paras. 268-269, *Stakić* Appeal Judgement paras. 259-260, *Simba* Trial Judgement para. 422.

#### 4. WAR CRIMES (COUNTS 5 AND 6)

483. Counts 5 and 6 of the Indictment charge Setako with violence to life, health and physical or mental well-being of persons and pillage as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto, respectively, under Article 4 (a) and (f) of the Statute. In support of Count 5 (violence to life, health and physical or mental well-being of persons), the Prosecution points to the killings of 30 to 40 Tutsis at Mukamira camp on 25 April 1994. The Chamber will focus its inquiry on murder, which is explicitly listed in Article 4 (a). The remaining events charged under this crime were dismissed. The Prosecution has not proved any allegation under Count 6 (pillage). Therefore, the Chamber will not discuss this crime in detail.

##### 4.1 Threshold Elements

484. In connection with crimes within the scope of Article 4 of the Statute, the Prosecution must prove, as a threshold matter, the following elements: (1) the existence of a non-international armed conflict; (2) the existence of a nexus between the alleged violation and the armed conflict; and (3) that the victims were not directly taking part in the hostilities at the time of the alleged violation.<sup>582</sup>

##### 4.1.1 Non-International Armed Conflict

485. The totality of the evidence in this case shows that there was a non-international armed conflict between the Rwandan government forces and the RPF during the relevant period covered by the Indictment. Setako acknowledged that hostilities had resumed between the Rwandan government and the RPF (RPA) after the death of President Habyarimana on 6 April 1994. This also follows from his various professional assignments as participant in the Neutral Military Observer Group, which monitored the cease fire between the belligerent parties before 1994, and his role in negotiating a cease fire in June 1994 (I.3).

##### 4.1.2 Nexus

486. As reflected in the evidence and previous case law, the ongoing armed conflict between the Rwandan government forces and the RPF (RPA), which was identified with the Tutsi ethnic minority in Rwanda and many members of the political opposition, both created the situation and provided a pretext for the extensive killings and other abuses of members of the civilian population. The killings began within hours of the death of President Habyarimana and on the same day the active hostilities resumed between the RPF (RPA) and government forces.<sup>583</sup> Notably, the killings at issue on 25 April 1994 were ordered by an army officer in a military camp and executed by soldiers and members of militia groups.

487. In the Chamber's view, Setako and the assailants who committed the killings were acting in furtherance of the armed conflict or under its guise. Accordingly, the Chamber finds it established that this alleged violation of Article 4 (a) of the Statute had the requisite nexus to the armed conflict between Rwandan government forces and the RPF (RPA).

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<sup>582</sup> *Bagosora et al.* Trial Judgement para. 2229, citing *Akayesu* Appeal Judgement para. 438, *Ntagerura et al.* Trial Judgement para. 766, *Semanza* Trial Judgement para. 512.

<sup>583</sup> *Bagosora et al.* Trial Judgement para. 2232, citing *Semanza* Trial Judgement para. 518, affirmed by *Semanza* Appeal Judgement para. 369.

### 4.1.3 Victims

488. At the time of the alleged violations, the victims included civilians who had taken refuge with family members at Mukamira camp to avoid killings elsewhere in Rwanda. Therefore, the Chamber finds beyond reasonable doubt that the victims of the alleged violation of Articles 4 (a) of the Statute were not taking active part in the hostilities.

## 4.2 Violence to Life, Health and Physical or Mental Well-Being of Persons (Count 5)

### 4.2.1 Law

489. Article 4 (a) of the Statute prescribes that the Tribunal has the power to prosecute persons who committed or ordered serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto amounting to “[v]iolence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment”. The specific violation of murder requires the unlawful, intentional killing of another person.<sup>584</sup>

### 4.2.2 Application

490. The Chamber has already determined that the killing of the 30 to 40 Tutsis at Mukamira camp amounts to genocide and that Setako ordered it (III.2.2). On the same basis, it is clear that these killings amount to intentional murder.

### 4.2.3 Conclusion

491. Accordingly, the Chamber finds Setako guilty of violence to life (Count 5) as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto for ordering under Article 6 (1) the murder of 30 to 40 Tutsis at Mukamira camp on 25 April 1994.

## 4.3 Pillage (Count 6)

492. As already mentioned, the Prosecution has not proved any of the allegations against Setako charged in support of Count 6. Accordingly, the Chamber finds him not guilty of pillage as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.

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<sup>584</sup> *Bagosora et al.* Trial Judgement para. 2242, citing *Semanza* Trial Judgement paras. 338, 373, *Ntagerura et al.* Trial Judgement para. 765.

**CHAPTER IV: VERDICT**

- Count 1: **Guilty** of Genocide
- Count 2: **Not Guilty** of Complicity in Genocide
- Count 3: **Not Guilty** of Murder as a Crime against Humanity
- Count 4: **Guilty** of Extermination as a Crime against Humanity
- Count 5: **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 Thereto
- Count 6: **Not Guilty** of Pillage as a Serious Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II Thereto

## CHAPTER V: SENTENCING

### 1. INTRODUCTION

493. Having found Setako guilty of genocide, crimes against humanity (extermination) and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto (violence to life, health and physical or mental well-being of persons), the Chamber must determine an appropriate sentence.

494. The penalty imposed should reflect the goals of retribution, deterrence, rehabilitation, and the protection of society. Pursuant to Article 23 of the Statute and Rule 101 of the Rules of Procedure and Evidence, the Chamber shall consider the general practice regarding prison sentences in Rwanda, the gravity of the offences or totality of the conduct, the individual circumstances of the accused, including aggravating and mitigating circumstances, and the extent to which any penalty imposed by a court of any State on the accused for the same act has already been served.<sup>585</sup> As pointed out by the Appeals Chamber, these considerations are not exhaustive when determining the appropriate sentence. In addition, the Trial Chamber shall credit the accused for any time spent in detention pending transfer to the Tribunal and during trial.<sup>586</sup>

### 2. SUBMISSIONS

495. The Prosecution argues that the Chamber should impose a sentence of imprisonment for the remainder of Setako's life since he played a prominent role in the crimes and abused his authority. In addition, his offences are grave and there are no mitigating factors. Finally, his crimes in Rwanda would warrant life imprisonment.<sup>587</sup>

496. The Defence submits that, in the event of a conviction, "Setako be allowed the fullest benefits of the mitigating factors as reflected in the totality of the evidence adduced throughout the trial".<sup>588</sup>

### 3. DELIBERATIONS

#### 3.1 Gravity of the Offence

497. All crimes under the Tribunal's Statute are serious violations of international humanitarian law.<sup>589</sup> When determining a sentence, a Trial Chamber has considerable, though not unlimited, discretion on account of its obligation to individualise penalties to fit the individual circumstances of an accused and to reflect the gravity of the crimes for which the accused has been convicted.<sup>590</sup>

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<sup>585</sup> *Renzaho* Trial Judgement para. 814. See also Article 23 (1)-(3) and Rule 101 (B)(i)-(iv).

<sup>586</sup> *Renzaho* Trial Judgement para. 814, citing *Kajelijeli* Appeal Judgement para. 290. See also Rule 101 (C).

<sup>587</sup> Prosecution Closing Brief pp. 69-71.

<sup>588</sup> Defence Closing Brief para. 639.

<sup>589</sup> *Bagosora et al.* Trial Judgement para. 2263, citing *Kayishema and Ruzindana* Appeal Judgement para. 367 (quoting Article 1 of the Statute).

<sup>590</sup> *Bagosora et al.* Trial Judgement para. 2263, citing *Kajelijeli* Appeal Judgement para. 291.



498. In determining an appropriate sentence, the Appeals Chamber has stated that “sentences of like individuals in like cases should be comparable”. However, it has also noted the inherent limits to this approach because “any given case contains a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual”.<sup>591</sup>

499. The Chamber has determined 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.<sup>592</sup> This is a direct form of participation. These crimes are grave and resulted in a significant toll of human suffering.

500. Under Rwandan law, similar crimes carry the possible penalties of life imprisonment, depending on the nature of the accused’s participation.<sup>593</sup> In this Tribunal, a sentence of life imprisonment is generally reserved those who planned or ordered atrocities as well as the most senior authorities.<sup>594</sup>

501. Although Setako’s crimes are grave, the Chamber is not satisfied that he is deserving of the most serious sanction available under the Statute. The evidence does not show that he was a main architect of the larger body of crimes committed in Ruhengeri prefecture or Kigali.

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<sup>591</sup> *Bagosora et al.* Trial Judgement para. 2263, citing *Kvočka et al.* Appeal Judgment para. 681.

<sup>592</sup> Paragraph 44 of the Indictment states that there were nine victims of the killings at Mukamira camp on 11 May 1994. The evidence of Witnesses SLA and SAT indicate that there were nine or 10. In the Chamber’s view, this differences in number is minor, and it is clear that both witnesses were referring to the same group as mentioned in the Indictment. Out of fairness, the Chamber will consider the number to be nine in determining the gravity of the sentence.

<sup>593</sup> *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (TC), 6 June 2008, paras. 22-25 (assessing Rwanda’s penalty structure); *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (TC), 17 November 2008, paras. 22-25. See also *Semanza* Appeal Judgement para. 377 (“The command for Trial Chambers to ‘have recourse to the general practice regarding prison sentences in the courts of Rwanda does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice.’”), quoting *Serushago* Appeal Judgement para. 30; *Dragan Nikolić* Appeal Judgement para. 69.

<sup>594</sup> *Bagosora et al.* Trial Judgement para. 2270, citing *Musema* Appeal Judgement para. 383 (noting that the leaders and planners of a particular conflict should bear heavier responsibility, with the qualification that the gravity of the offence is the primary consideration in imposing a sentence). Life sentences have been imposed against senior government and military authorities in: *Bagosora et al.* Trial Judgement paras. 2265, 2268-2269, 2277-2279 (*Directeur de cabinet* of Ministry of Defence, Commander of Para Commando Battalion, and Commander of Gisenyi Operational Sector); *Renzaho* Trial Judgement paras. 819, 826 (prefect of Kigali-Ville and colonel in the Rwandan army); *Ndindabahizi* Trial Judgement paras. 505, 508, 511 (Minister of Finance); *Niyitegeka* Trial Judgement paras. 499, 502 (Minister of Information); *Kambanda* Trial Judgement paras. 44, 61-62 (Prime Minister); *Kamuhanda* Trial Judgement paras. 6, 764, 770 (Minister of Higher Education and Scientific Research). In several other cases, lower level officials, as well as those who did not hold government positions, have received life sentences. See, for instance, *Karera* Trial Judgement para. 585 (prefect of Kigali-Rural); *Kayishema and Ruzindana* Trial Judgement (Sentence) p. 8 (Kayishema was prefect of Kibuye); *Gacumbitsi* Appeal Judgement para. 206 (*bourgmestre*); *Musema* Trial Judgement paras. 999-1008 (influential director of a tea factory who exercised control over killers); *Rutaganda* Trial Judgement paras. 466-473 (second Vice-president of *Interahamwe* at national level).

502. The Chamber finds some guidance from cases that include convictions for direct participation in genocide and extermination that did not result in life sentences. In *Simba*, the Appeals Chamber affirmed a sentence of 25 years of imprisonment of a retired colonel who participated in two massacres.<sup>595</sup> In *Semanza*, the Appeals Chamber determined 25 years of imprisonment to be the appropriate sentence for the direct perpetration of genocide and extermination at a massacre site by a former *bourgmestre*.<sup>596</sup> In *Ruzindana*, the Appeals Chamber affirmed the Accused's sentence of 25 years of imprisonment for genocide, based on his direct participation in attacks.<sup>597</sup>

503. Although the specific crimes committed by these Accused vary from those committed by Setako, they illustrate that not every conviction for direct participation in genocide requires life imprisonment.

### 3.2 Individual, Aggravating and Mitigating Factors

504. The Chamber will consider Setako's individual circumstances, including aggravating and mitigating factors. Mitigating circumstances need only be established by the balance of the probabilities, while aggravating circumstances need to be proven beyond reasonable doubt.<sup>598</sup> Any particular circumstance that is included as an element of the crime for which the Accused is convicted will not also be considered as an aggravating factor.<sup>599</sup>

505. The Appeals Chamber has held that an accused's abuse of his superior position or influence may be considered as an aggravating factor.<sup>600</sup> In the Chamber's view, Setako's abuse of his role as an influential authority in connection with those crimes for which he was convicted under Article 6 (1) of the Statute amounts to an aggravating factor.

506. The Chamber has considered Setako's background and individual circumstances (I.3). The Chamber is mindful of his lengthy public service to his country. However, it accords these mitigating circumstances limited weight in view of the gravity of his crimes. The Chamber has also taken into account 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, based on concerns that it would prolong Setako's pre-trial and trial detention (I.2.2). Although the trial proceeded rapidly, this should be taken into account in sentencing.

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<sup>595</sup> *Simba* Appeal Judgement paras. 279-288, p. 103.

<sup>596</sup> *Semanza* Appeal Judgement paras. 388-389.

<sup>597</sup> *Kayishema and Ruzindana* Appeal Judgement paras. 191, 194, 352.

<sup>598</sup> *Renzaho* Trial Judgement para. 822, citing *Nahimana et al.* Appeal Judgement para. 1038, *Kajelijeli* Appeal Judgement para. 294.

<sup>599</sup> *Renzaho* Trial Judgement para. 822, citing *Ndindabahizi* Appeal Judgement para. 137.

<sup>600</sup> *Renzaho* Trial Judgement para. 822, citing *Simba* Appeal Judgement paras. 284-285.

#### **4. CONCLUSION**

507. The Chamber has the discretion to impose a single sentence. This practice is usually appropriate where the offences may be characterised as belonging to a single criminal transaction.<sup>601</sup>

508. The killings of 25 April and 11 May 1994 occurred at Mukamira camp and were both charged under a single count of genocide (Count 1). Setako's convictions based on the incident on 25 April 1994 for crimes against humanity (Count 4) and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto (Count 5) are cumulative of his conviction under Count 1.

509. Considering all the relevant circumstances discussed above, the Chamber **SENTENCES** Ephrem Setako to:

#### **25 YEARS OF IMPRISONMENT**

#### **5. CONSEQUENTIAL ORDERS**

510. Setako shall receive credit for time served since his arrest. The above sentence shall be served in a State designated by the President of the Tribunal, in consultation with the Chamber. The Government of Rwanda and the designated State shall be notified of such designation by the Registrar.

511. Until his transfer to his designated places of imprisonment, Ephrem Setako shall be kept in detention under the present conditions.

512. Pursuant to Rule 102 (B) of the Rules, on notice of appeal, if any, enforcement of the above sentences shall be stayed until a decision has been rendered on the appeal, with the convicted person nevertheless remaining in detention.

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<sup>601</sup> *Renzaho* Trial Judgement para. 825, citing *Nahimana et al.* Appeal Judgement paras. 1042-1043, *Simba* Trial Judgement para. 445, *Ndindabahizi* Trial Judgement para. 497.

Arusha, 25 February 2010

Erik Møse  
Presiding Judge

Sergei Alekseevich Egorov  
Judge

Florence Rita Arrey  
Judge

(Seal of the Tribunal)

## ANNEX A: PROCEDURAL HISTORY

### 1. PRE-TRIAL PROCEEDINGS

513. Ephrem Setako was arrested in the Netherlands on 25 February 2004.<sup>602</sup> The following day, Judge Andréia Vaz ordered that he be transferred to the United Nations Detention Unit.<sup>603</sup>

514. On 16 March 2004, the Prosecution filed its original indictment against Setako.<sup>604</sup> A hearing was held on 22 March 2004, and Judge Sergei Alekseevich Egorov confirmed a modified indictment charging Setako with genocide, complicity in genocide, murder and extermination as crimes against humanity, as well as pillage and violence to life, health and physical or mental well-being as war crimes.<sup>605</sup> He was transferred to the Tribunal's custody on 17 November 2004.<sup>606</sup> Setako's initial appearance took place on 22 November 2004, and he pleaded not guilty to all charges.<sup>607</sup>

515. At a status conference on 7 May 2007, the Prosecution announced its intention to amend the indictment.<sup>608</sup> On 22 June 2007, Trial Chamber I granted the Defence additional time to respond to the proposed indictment.<sup>609</sup> The Chamber permitted the Prosecution to amend the indictment on 18 September 2007, but denied its request to add counts of conspiracy to commit genocide and direct and public incitement to commit genocide. On the same day, the Chamber also granted the Prosecution motion for protective measures.<sup>610</sup> The Prosecution filed the amended indictment on 23 September 2007.<sup>611</sup>

516. On 5 October 2007, the Chamber denied two Defence motions: one for an order compelling the Prosecution to comply with its disclosure obligations, and another seeking certification to appeal the decision on protective measures.<sup>612</sup> Four days later, the Chamber denied the Defence motion for certification to appeal the decision allowing an amended indictment.<sup>613</sup> On 7 and 8 November 2007, the Chamber granted the Defence motion to make certain filings publicly available, and denied the Defence motion for certification to appeal the decision concerning disclosure obligations, respectively.<sup>614</sup>

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<sup>602</sup> Request for Transfer and Provisional Detention under Article 40 *bis* of the Rules of Procedure and Evidence, 25 February 2004.

<sup>603</sup> Order for Transfer and Provisional Detention (TC), 26 February 2004.

<sup>604</sup> Indictment, 16 March 2004.

<sup>605</sup> Decision on Confirmation of an Indictment Against Ephrem Setako (TC), 22 March 2004; Indictment, 22 March 2004.

<sup>606</sup> Defence Closing Brief para. 35.

<sup>607</sup> T. 22 November 2004 pp. 4-5.

<sup>608</sup> T. 7 May 2007 pp. 2-3, 10, 14.

<sup>609</sup> Decision on Defence Motions Relating to Prosecution Request to Amend the Indictment (TC), 22 June 2007.

<sup>610</sup> Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007; Decision on Prosecution Motion for Protective Measures (TC), 18 September 2007.

<sup>611</sup> Amended Indictment, 23 September 2007.

<sup>612</sup> Decision on Defence Motions for Rule 68 Disclosure (TC), 5 October 2007; Decision on Defence Motion for Certification to Appeal Protective Measures (TC), 5 October 2007.

<sup>613</sup> Decision on Defence Motion for Certification to Appeal the Decision on Amendment of the Indictment (TC), 9 October 2007.

<sup>614</sup> Decision on Defence Requests to Lift Confidentiality on Filings (TC), 7 November 2007; Decision on Defence Motion for Certification to Appeal the Decision on Defence Motions for Rule 68 Disclosure (TC), 8 November 2007.

517. On 16 November 2007, the Registrar withdrew the assignment of Setako's lead counsel, Mr. Stefan Kirsch, following his request.<sup>615</sup> Six days later, Professor Lennox Hinds was appointed as lead counsel.<sup>616</sup> At the following status conference, on 14 December 2007, the Chamber granted the Defence leave to file preliminary motions by the end of January 2008.<sup>617</sup> On 8 January 2008, Mr. Cainnech Lussia-Berdou was assigned as co-counsel for the Defence.<sup>618</sup>

518. On 3 March 2008, the Chamber ordered the Prosecution to provide additional specificity to certain indictment paragraphs.<sup>619</sup> The Prosecution filed its amended indictment on 10 March 2008.<sup>620</sup>

519. The Defence filed three motions to exclude evidence, on 26 May, 22 August and 27 August 2008.<sup>621</sup> The Chamber held these motions in abeyance in order to address them in the Judgement.<sup>622</sup> They are therefore moot.

520. On 17 June 2008, the Chamber rendered three decisions concerning Defence motions. It denied a motion for reconsideration of, or certification to appeal, its decision on the confidentiality of the amended indictment;<sup>623</sup> it declined to certify for appeal its decision of 3 March 2008;<sup>624</sup> and it granted, in part, a Defence motion to modify the indictment.<sup>625</sup> The Prosecution filed the Indictment on 23 June 2008.<sup>626</sup>

521. On 30 June 2008, the Chamber scheduled the commencement of trial for 25 August 2008.<sup>627</sup> The Prosecution filed its Pre-Trial Brief on 25 July 2008.<sup>628</sup> On 4 August 2008, the Chamber ordered that eight Prosecution witnesses detained in Rwanda be transferred to the

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<sup>615</sup> Decision on Withdrawal of the Assignment of Mr. Stefan Kirsch, Lead Counsel for the Accused, 16 November 2007.

<sup>616</sup> T. 14 December 2007 p. 6. See Defence Closing Brief para. 47.

<sup>617</sup> T. 14 December 2007 pp. 5-6.

<sup>618</sup> See T. 20 March 2008 p. 5.

<sup>619</sup> Decision on Defence Motion Concerning Defects in the Indictment (TC), 3 March 2008.

<sup>620</sup> Amended Indictment Filed Pursuant to the Decision of the Trial Chamber Dated 3 March 2008, 10 March 2008.

<sup>621</sup> Motion *in limine* for Exclusion of Evidence, 26 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. The Defence also made relevant contemporaneous objections throughout trial. See, for instance, T. 25 August 2008 pp. 19-22; T. 1 September 2008 pp. 1-2, 4-7; T. 2 September 2008 pp. 2-3; T. 9 September 2008 pp. 56-58; T. 23 September 2008 pp. 62-63, 66-67; T. 25 September 2008 p. 55. See also Status Conference, T. 22 April 2009 p. 25.

<sup>622</sup> See Notice and Pre-1994 Events (I.2.2).

<sup>623</sup> Decision on Defence Motion for Reconsideration or Certification to Appeal the Chamber's Decision on Defence Requests to Lift Confidentiality of Filings (TC), 17 June 2008.

<sup>624</sup> Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 3 March 2008 on Defects in the Indictment (TC), 17 June 2008.

<sup>625</sup> Decision on Defence Motion Concerning Defects in the Amended Indictment (TC), 17 June 2008.

<sup>626</sup> Amended Indictment [pursuant to the Trial Chamber's decision on Defence motion concerning Defects in Indictment delivered on 17 June 2008], 23 June 2008.

<sup>627</sup> T. 30 June 2008 p. 17. The Chamber first announced 25 August 2008 as the likely commencement date one month earlier. T. 30 May 2008 p. 10.

<sup>628</sup> The Prosecutor's Pre-Trial Brief Pursuant to Rule 73 *bis* (B)(ii) of the Rules of Procedure and Evidence, 25 July 2008.

United Nations Detention Unit.<sup>629</sup> The President of the Tribunal, Judge Dennis C. M. Byron, assigned Judge Florence Rita Arrey to join the Bench on 21 August 2008.<sup>630</sup>

## 2. PROSECUTION CASE

522. The Prosecution case commenced on 25 August 2008 and spanned three sessions: from 25 August to 26 September 2008, from 16 to 24 February 2009, and from 20 to 22 April 2009. Over the course of 32 trial days, the Prosecution called 21 witnesses and tendered 55 exhibits.

523. On 4 February 2009, the Chamber ordered special protective measures for Prosecution Witness 006, which it subsequently modified on 24 February 2009.<sup>631</sup> On 10 February 2009, it ordered the temporary transfer of three detained witnesses.<sup>632</sup>

## 3. DEFENCE CASE

524. On 25 February 2009, the Chamber granted protective measures for Defence witnesses.<sup>633</sup> It denied, on 3 March of that year, a Defence request to admit the transcript of a Prosecution witness's testimony in another case.<sup>634</sup> On 31 March 2009, the Chamber requested that the Kingdom of Belgium assist the Defence in arranging a meeting with a witness detained there.<sup>635</sup> The Defence filed its Pre-Defence Brief and its Notice of Alibi on 7 April 2009.<sup>636</sup>

525. The Defence case was conducted during two sessions: from 4 to 27 May 2009, and from 15 to 26 June 2009. The Defence called 34 witnesses, including Setako, and tendered 82 exhibits over 28 trial days.

526. On 25 May 2009, the Chamber allowed the Defence to add four witnesses and replace one more, but declined leave to call four others.<sup>637</sup> The same day, it agreed to disclose closed session testimony in the *Military I* case to the Defence.<sup>638</sup> Three days later, the Chamber authorised video-link testimony for two Defence witnesses.<sup>639</sup>

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<sup>629</sup> Order for Transfer of Detained Witnesses (TC), 4 August 2008.

<sup>630</sup> Order Assigning a Bench for the Trial of Ephrem Setako (President), 21 August 2008. Judge Florence Rita Arrey replaced Judge Jai Ram Reddy on the Bench.

<sup>631</sup> Decision on Prosecution Motion for Special Protection Measures for Witness 006 (TC), 4 February 2009; T. 24 February 2009 p. 43.

<sup>632</sup> Order for Transfer of Detained Witnesses (TC), 10 February 2009. In March 2009, the Chamber also granted two motions by the Augustin Bizimungu Defence for the disclosure of testimony and exhibits under seal. Decision on Augustin Bizimungu Defence Motion for Disclosure of Closed Session Testimony and Exhibits (TC), 9 March 2009; Decision on Augustin Bizimungu Defence Motion for Disclosure of Closed Session Testimony and Exhibits of Witness SAA (TC), 25 March 2009.

<sup>633</sup> Decision on Defence Motion for Protective Measures (TC), 25 February 2009.

<sup>634</sup> Decision on Defence Motion for Admission of Evidence (TC), 3 March 2009 (concerning the testimony of Witness SON in *Renzaho*).

<sup>635</sup> Decision on Extremely Urgent and *Ex Parte* Defence Motion for Cooperation of the Kingdom of Belgium (TC), 31 March 2009.

<sup>636</sup> Setako Defence Pre-Defence Brief, 7 April 2009; Lt. Col Ephrem Setako's Notice of Alibi, 7 April 2009. See also Update of Annexures to Setako Defence Pre-Defence Brief, 4 May 2009.

<sup>637</sup> Decision on Defence Motion to Vary Its Witness List (TC), 25 May 2009.

<sup>638</sup> Decision on Defence Motion for Disclosure of Closed Session Testimony (TC), 25 May 2009.

<sup>639</sup> Decision on Defence Motion for Video-Link Testimony (TC), 28 May 2009.

#### 4. FURTHER PROCEEDINGS

527. On 26 June 2009, the Chamber requested that the Defence explain in writing its position on calling two additional witnesses, and that it file a motion if it wished to tender Gacaca documents into evidence. The Chamber also set 25 September 2009 as the last day to file closing briefs.<sup>640</sup>

528. The Defence request to call two more witnesses was denied on 1 September 2009.<sup>641</sup> On 24 September 2009, the Chamber extended the deadline for closing briefs.<sup>642</sup> Both parties filed their closing briefs on 2 October 2009, and the Prosecution filed a corrigendum five days later.

529. On 15 October 2009, the Chamber admitted a document that the Defence used in its cross-examination of Prosecution Witness SAA.<sup>643</sup> On 4 November 2009, it decided to admit various Rwandan judicial documents, amounting to 83 additional Defence exhibits.<sup>644</sup>

530. Closing arguments were heard on 5 and 6 November 2009. On 10 December 2009, the Defence filed a motion to contact Witness SAM.<sup>645</sup> After considering the merits of his evidence, the Chamber has not found it necessary to address this motion.<sup>646</sup> It is therefore moot. On 18 December 2009, the Registrar withdrew Mr. Cainnech Lussiaà-Berdou as co-counsel for the Defence.

531. The Chamber delivered the oral summary of its judgement on 25 February 2010, and filed the written version on 1 March 2010.

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<sup>640</sup> Status Conference, T. 26 June 2009 p. 1.

<sup>641</sup> Decision on Defence Request to Call Two Witnesses (TC), 1 September 2009.

<sup>642</sup> Decision on Defence Request for Extension of Time to File Closing Brief (TC), 24 September 2009.

<sup>643</sup> Decision on Defence Request to Admit a Document (TC), 15 October 2009; Defence Exhibit 188 (Report of the Committee for the Respect of Human Rights and Democracy in Rwanda). See also T. 27 August 2008 pp. 45-52; T. 28 August 2008 pp. 54-57.

<sup>644</sup> Decision on Defence Motion to Admit Rwandan Judicial Documents (TC), 4 November 2009; Defence Exhibits 189 to 271.

<sup>645</sup> Extremely Urgent Setako Defence Motion for Authorization to Contact a Protected Witness and Related Orders, 10 December 2009. Prosecutor's Response to Extremely Urgent Setako Defence Motion for Authorization to Contact a Protected Witness and Related Orders, 21 December 2009.

<sup>646</sup> See above para. 174 n. 234.



## **ANNEX B: CITED MATERIALS AND DEFINED TERMS**

### **1. JURISPRUDENCE**

#### **1.1 ICTR**

##### **Akayesu**

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

*The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement (AC), 1 June 2001 (“*Akayesu* Appeal Judgement”)

##### **Bagilishema**

*The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgement (TC), 7 June 2001 (“*Bagilishema* Trial Judgement”)

##### **Bagosora et al.**

*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003

*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006

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

##### **Gacumbitsi**

*The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Judgement (TC), 17 June 2004 (“*Gacumbitsi* Trial Judgement”)

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

##### **Gatete**

*The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (TC), 17 November 2008

##### **Kajelijeli**

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

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

**Kambanda**

*The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence (TC), 4 September 1998 (“*Kambanda Trial Judgement*”)

**Kamuhanda**

*The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-95-54A-T, Judgement (TC), 22 January 2004 (“*Kamuhanda Trial Judgement*”)

**Kanyarukiga**

*The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (TC), 6 June 2008

**Karera**

*The Prosecutor v. François Karera*, Case No. ICTR-01-74-T, Judgement and Sentence (TC), 7 December 2007 (“*Karera Trial Judgement*”)

**Kayishema and Ruzindana**

*The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-I-T, Judgement (TC), 21 May 1999 (“*Kayishema and Ruzindana Trial Judgement*”)

*The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-I-A, Judgement (AC), 1 June 2001 (“*Kayishema and Ruzindana Appeal Judgement*”)

**Mpambara**

*The Prosecutor v. Jean Mpambara*, Case No. ICTR-01-65-T, Judgement (TC), 11 September 2006 (“*Mpambara Trial Judgement*”)

**Muhimana**

*Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgement (AC), 21 May 2007 (“*Muhimana Appeal Judgement*”)

**Musema**

*The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement and Sentence (TC), 27 January 2000 (“*Musema Trial Judgement*”)

*Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Judgement (AC), 16 November 2001 (“*Musema Appeal Judgement*”)

**Muvunyi**

*Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Judgement (AC), 29 August 2008 (“*Muvunyi Appeal Judgement*”)

**Nahimana et al.**

*Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007 (“*Nahimana et al.* Appeal Judgement”)

**Ndindabahizi**

*The Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-2001-71-T, Judgement and Sentence (TC), 15 July 2004 (“*Ndindabahizi* Trial Judgement”)

*Emmanuel Ndindabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Judgement (AC), 16 January 2007 (“*Ndindabahizi* Appeal Judgement”)

**Niyitegeka**

*The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence (TC), 16 May 2003 (“*Niyitegeka* Trial Judgement”)

*Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004 (“*Niyitegeka* Appeal Judgement”)

*Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review (AC), 30 June 2006

**Nsengimana**

*The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-T, Judgement (TC), 17 November 2009 (“*Nsengimana* Trial Judgement”)

**Ntagerura et al.**

*The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004 (“*Ntagerura et al.* Trial Judgement”)

*The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006 (“*Ntagerura et al.* Appeal Judgement”)

**Ntakirutimana**

*The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004 (“*Ntakirutimana* Appeal Judgement”)

**Renzaho**

*The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-T, Judgement (TC), 14 July 2009 (“*Renzaho* Trial Judgement”)

**Rutaganda**

*The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence (TC), 6 December 1999 (“*Rutaganda* Trial Judgement”)

*Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003 (“*Rutaganda Appeal Judgement*”)

*Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification (AC), 8 December 2006

### **Semanza**

*The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003 (“*Semanza Trial Judgement*”)

*Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement (AC), 20 May 2005 (“*Semanza Appeal Judgement*”)

### **Seromba**

*The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-T, Judgement (TC), 13 December 2006 (“*Seromba Trial Judgement*”)

*The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement (AC), 12 March 2008 (“*Seromba Appeal Judgement*”)

### **Serushago**

*Omar Serushago v. The Prosecutor*, Case No. ICTR-98-39-A, Reasons for Judgment (AC), 6 April 2000 (“*Serushago Appeal Judgement*”)

### **Simba**

*The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68 (TC), 4 October 2004

*The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Judgement and Sentence (TC), 13 December 2005 (“*Simba Trial Judgement*”)

*Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement (AC), 27 November 2007 (“*Simba Appeal Judgement*”)

### **Zigiranyirazo**

*The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-T, Judgement (TC), 18 December 2008 (“*Zigiranyirazo Trial Judgement*”)

*Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Judgement (AC), 16 November 2009 (“*Zigiranyirazo Appeal Judgement*”)

## **1.2 ICTY**

### **Blagojević and Jokić**

*Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement (AC), 9 May 2007 (“*Blagojević and Jokić* Appeal Judgement”)

### **Blaškić**

*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004 (“*Blaškić* Appeal Judgement”)

### **Brđanin**

*Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement (TC), 1 September 2004 (“*Brđanin* Trial Judgement”)

*Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement (AC), 3 April 2007 (“*Brđanin* Appeal Judgement”)

### **Galić**

*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement (AC), 30 November 2006 (“*Galić* Appeal Judgement”)

### **Halilović**

*The Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Judgement (AC), 16 October 2007 (*Halilović* Appeal Judgement)

### **Jelisić**

*The Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement (AC), 5 July 2001 (“*Jelisić* Appeal Judgement”)

### **Kordić and Čerkez**

*The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement (AC), 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”)

### **Krnojelac**

*The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement (AC), 17 September 2003 (“*Krnojelac* Appeal Judgement”)

### **Krstić**

*The Prosecutor v. Radoslav Krstić*, Case No. IT-98-33-A, Judgement (AC), 19 April 2004 (“*Krstić* Appeal Judgement”)

**Kunarac et al.**

*The Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T and IT-96-23/1-T, Judgement (TC), 22 February 2001 (“*Kunarac et al.* Trial Judgement”)

*The Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-A and IT-96-23/1-A, Judgement (AC), 12 June 2002 (“*Kunarac et al.* Appeal Judgement”)

**Kupreškić et al.**

*Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001 (“*Kupreškić et al.* Appeal Judgement”)

**Kvočka et al.**

*The Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement (AC), 28 February 2005 (“*Kvočka et al.* Appeal Judgement”)

**Limaj et al.**

*The Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Judgement (TC), 30 November 2005 (“*Limaj et al.* Trial Judgement”)

**Dragomir Milošević**

*Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement (AC), 12 November 2009 (“*Dragomir Milošević* Appeal Judgement”)

**Naletilić and Martinović**

*Prosecutor v. Mladen Naletilić, a.k.a. “TUTA” and Vinko Martinović, a.k.a. “ŠTELA”*, Case No. IT-98-34-A, Judgement (AC), 3 May 2006 (“*Naletilić and Martinović* Appeal Judgement”)

**Dragan Nikolić**

*Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-A, Judgement on Sentencing Appeal (AC), 4 February 2005 (“*Dragan Nikolić* Appeal Judgement”)

**Orić**

*The Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgement (AC), 3 July 2008 (“*Orić* Appeal Judgement”)

**Simić**

*The Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement (AC), 28 November 2006 (“*Simić* Appeal Judgement”)

**Stakić**

*The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement (AC), 22 March 2006 (“*Stakić* Appeal Judgement”)

**Tadić**

*The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999 (“*Tadić* Appeal Judgement”)

**Vasiljević**

*The Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement (AC), 25 February 2004 (“*Vasiljević* Appeal Judgement”)

## **2. DEFINED TERMS AND ABBREVIATIONS**

### **CDR**

*Coalition pour la Défense de la République*

### **CELA**

*Centre d'étude de langues africaines*

### **Defence Closing Brief**

*The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Defence Closing Brief, 2 October 2009

### **EEC or CEE**

European Economic Community

### **ESM or Ecole supérieure militaire**

*Ecole supérieure militaire* of Kigali

### **GOMN or NMOG**

*Groupe d'observateurs militaires neutres* or Neutral Military Observers Group

### **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

### **Indictment**

*The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Amended Indictment [pursuant to the Trial Chamber's decision on Defence motion concerning Defects in Indictment delivered on 17 June 2008], 23 June 2008

### **ISAE**

*L'Institut supérieur d'agriculture et de l'élevage*



**JOC**

*Jeunesse ouvrière chrétienne*

**MDR**

*Mouvement Démocratique Républicain*

**MRND**

*Mouvement Révolutionnaire National pour la Démocratie et le Développement*

**n.**

footnote

**OMS**

*Organisation mondiale de la Santé* or World Health Organization

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**Prosecution Pre-Trial Brief**

*The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, The Prosecutor's Pre-Trial Brief Pursuant to Rule 73 *bis* (B)(ii) of the Rules of Procedure and Evidence, 25 July 2008

**Prosecution Closing Brief**

*The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Corrigendum to the Prosecutor's Closing Brief Filed on 2 October 2009, 7 October 2009, Annexure A

**RPA**

Rwandan Patriotic Army

**RPF**

Rwandan (also Rwandese) Patriotic Front

**RTL**

*Radio Télévision Libre des Mille Collines*

**Rules**

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

**Statute**

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

**T.**

Transcript

**UNAMIR**

United Nations Assistance Mission for Rwanda