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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

APPEALS CHAMBER I

Before: Judge Patrick Robinson, presiding

Registrar: Mr. Adama Dieng

Date: 18 August 2010

THE PROSECUTOR

v.

EPHREM SETAKO

Case No. ICTR-04-81-A

EPHREM SETAKO'S RESPONDENT'S BRIEF

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421/A

TABLE OF CONTENTS

420/A

I. INTRODUCTION

1. The Respondent Lt. Col. Ephrem Setako files this Brief in *The Prosecutor v. Ephrem Setako,* Case No. ICTR-04-81-A, pursuant to Rule 112(A) of the Rules of Procedure and Evidence and in accordance with paragraph 5 of the Practice Direction on Formal Requirements for Appeals from Judgement.
2. This Brief is in response to the Prosecutor's Appellant's Brief filed on 14 June 2001.
3. The Respondent opposes the relief sought by the Prosecutor and opposes the Prosecutor's grounds of appeal for the reasons set out below.

II. RELEVANT PROCEDURAL BACKGROUND

4. Trial Chamber I issued its written Judgement and Sentence in *The Prosecutor v. Ephrem Setako* in English on 1 March 2010. On 29 March 2010 the Prosecution filed a Notice of Appeal, and on 14 June 2010 it filed its Appellant's Brief.
5. On 17 June 2010 the Respondent filed a motion for an extension of time within which to respond to the Appellant's Brief until after the French translation of the Trial Judgement, or after the French translation of the Brief, whichever was later, and was granted a 15-day extension from the date of the later translation. The Prosecutor's Appellant's Brief became available to the Respondent in French on 29 July 2010, and the certified French version of the Trial Judgement became available on 4 August 2010. The Respondent now files the current Brief, within 15 days of being served the certified French translation of the Trial Judgement.

III. RESPONSE TO THE PROSECUTOR'S GROUNDS OF APPEAL

Ground 1. The Prosecution alleges that the Trial Chamber erred in failing to make a finding on whether the Respondent was guilty of war crimes for killings at Mukamira Military Camp on 11 May 1994

6. The Respondent opposes the relief sought by the Prosecutor, in which it requests that the Appeals Chamber revise the Trial Judgement by finding the Respondent guilty of war crimes for ordering the killings of nine to ten Tutsis at Mukamira Military Camp on 11 May 1994.
7. The Respondent opposes this ground of appeal for the reasons below.

8. It is the Respondent's position, as articulated in his Appeal Brief, that the Trial Chamber erred in convicting the Respondent of the events of 11 May 1994 based on the inconsistent and contradictory testimony of witnesses SLA and SAT, and therefore the Trial Chamber's failure or not[1] to address this charge in relation to war crimes is immaterial. Furthermore, even if the Trial Chamber had found it necessary to make a finding regarding the Respondent's liability for war crimes for the events of 11 May, there was insufficient evidence to prove the existence of the requisite nexus between the alleged killings and the armed conflict between the Rwandan Governmental Forces (FAR) and the RPF or RPA.
9. The Prosecutor argues that because the Trial Chamber found that all the elements of war crimes were met as to the 25 April killings, it should have also found the Respondent guilty of war crimes for killings on 11 May because the same circumstances applied.[2] However, the Trial Chamber's finding that the 25 April killings amounted to war crimes was a legal and factual error, unsupported by the evidence, and therefore cannot be used to support the allegation that the 11 May killings constituted war crimes.
10. Under Article 4 of the Statute, the Prosecution must prove as a threshold matter that the following three elements of war crimes are met: (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 violations.[3]
11. The second threshold element of Article 4 was not met, because the Prosecution did not meet its evidentiary burden[4] to establish beyond a reasonable doubt the existence of a nexus between the alleged violations of 25 April and the non-international armed conflict in Rwanda. A nexus exists when the alleged offence is closely related to the hostilities.[5] Factors to be considered include (1) whether the perpetrator is a combatant; (2) whether the victim is a non-combatant; (3) whether the victim is a member of the opposing party;

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[1] The charge of war crimes for the events of 11 May was incorporated by reference only in the Prosecutor's Indictment. The Tribunal has previously held that a statement incorporating other paragraphs by reference into each count in an indictment is too general and must be deleted from the indictment (*Sagahutu* Decision, paras. 28-29.)
[2] Prosecutor's Appellant's Brief, para. 29.
[3] *Bagosora et al.* Trial Judgement, para. 2229, citing *Akayesu* Appeal Judgement, para. 438; *Ntagerura et al.* Trial Judgement, para. 766; *Semanza* Trial Judgement, para. 518, affirmed by *Semanza* Appeal Judgement, para. 369.
[4] *Bagilishema* Trial Judgement, para. 106.
[5] *Semanza* Trial Judgement, para. 518.

(4) whether the act can be said to serve the ultimate goal of the military campaign; (5) and whether the crime was committed as part of the perpetrator's official duties.[6]

12. In the instant case, the Trial Chamber found that the nexus was established by the single fact that:

> [T]he 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.[7]

This is insufficient evidence. The Trial Chamber made no conscious effort to define war crimes in contrast to the crimes of genocide or crimes against humanity. The genocidal attacks against the 30-40 Tutsi refugees on 25 April 1994 cannot be qualified as related to hostilities between the RPF and FAR based solely on the fact that they involved military personnel in a military setting. It is obvious that the Appellant did not participate in any military operations between the RPF and the FAR, nor can the attacks be said to have been carried out as part of the Respondent's official duties in his job as legal officer behind a desk in Kigali.

13. The Trial Chamber failed to take heed of the observation of the Trial Chamber in *Aleksovski* that: "not all unlawful acts occurring during an armed conflict are subject to international humanitarian law. Only those acts sufficiently connected with the waging of hostilities are subject to the application of this law."[8] Hence, the Trial Chamber's finding that the killing was "ordered by an army officer in a military camp and executed by soldiers and members of militia groups" to support the nexus requirement is misplaced.

14. As for the third threshold element of Article 4 of the Statute, it is not disputed by either party that the victims of the alleged offence of 25 April 1994 were Tutsi civilians and refugees who were not taking part in the armed conflict. However, Article 3 Common to the Geneva Conventions and Additional Protocol II protect non-combatants from war crimes, not genocide or certain crimes against humanity. The 25 April 1994 killings of the 30-50 Tutsi refugees in Mukamira Camp would have qualified as a war crime had it occurred in a scenario where RPF combatants had captured Mukamira Camp and mingled with Tutsi refugees and civilians in the camp and the Appellant, nevertheless, ordered the

[6] *Rutaganda* Appeal Judgement, para. 569.
[7] Judgement, para. 486.
[8] *Alexsovski* Trial Judgement, para. 45.

indiscriminate bombing of the camp in an attempt to wrest back control of the camp, fully aware that many civilians would be killed.

15. The Trial Chamber has not proved that these Tutsi refugees in question, were victims of the armed conflict between the FAR and RPF, and not of genocide and certain crimes against humanity unfolding in Rwanda during the jurisdictional period in question. It therefore erred in concluding that there was sufficient evidence to support a charge of war crimes for the 25 April killings and the same error should not be repeated in regards to the killings of 11 May.

Ground 2. The Prosecution alleges that the Trial Chamber failed to make findings on the Respondent's Article 6(3) Superior Responsibility with respect to the killings of 30 to 40 Tutsis at Mukamira Camp on 25 April 1994 and the death of 9 or 10 Tutsis on 11 May 1994.

16. The Respondent opposes the Prosecutor's request that the Appeals Chamber revise the Judgement to hold the Respondent responsible under Article 6(3) for ordering killings at Mukamira Camp on 25 April and 11 May 1994.

17. The Respondent opposes this ground of appeal on the basis that the Trial Chamber already made a finding regarding the Respondent's Article 6(3) Superior Responsibility in which it found the Respondent not guilty.

(i)

18. At trial, the Prosecution failed to lead evidence, because there was none, to prove the Respondent's Article 6(3) superior responsibility and consequently, the Trial Chamber did not find him guilty under Article 6(3) superior responsibility with respect to the killings of 30 to 40 Tutsis at Mukamira Camp on 25 April 1994 and the death of 9 or 10 Tutsis on 11 May 1994 under Count 1, Count 4 and Count 5 of the Indictment.[9]

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9 *See* Judgement, para. 461, where the Trial Chamber found that, "In 1994, Setako held the rank of Lieutenant colonel in the Rwandan army and served as head of the division of legal affairs in the Ministry of Defense 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 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."

19. Citing to case law that established that it may be unfair to convict an accused based on allegations which no longer appear to be pursued by the Prosecution,[10] the Trial Chamber in the instant case further noted that 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.[11]
20. The Trial Chamber laid down three elements that must be proven to hold a civilian or a military superior criminally responsible pursuant to Article 6(3) of the Statutes for crimes committed by subordinates, namely: (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.[12]
21. The Trial Chamber further elaborated that: "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."[13] (Emphasis ours.)
22. Apart from naked assertions in its Pre-Trial Brief that the Respondent, "being a Lieutenant Colonel was a superior officer with effective control over members of the FAR under his authority and even those not under his direct authority but junior to him, and therefore, he could order such persons to commit or refrain from committing

[10] *See* Judgement, para.69, citing to *Ntagerura et al.* Appeal Judgment, paras. 148-150, as follows: "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."
[11] Judgement, fn. 106.
[12] Judgement, para. 458.
[13] Judgement, para.459.

unlawful acts as well as discipline or punish them for unlawful acts or omissions [...]"[14] the Prosecution led no evidence to establish the three elements below to prove that the Respondent held 6(3) responsibility. The Prosecution failed to plead with specificity that he had *de jure* or *de facto* authority over the soldiers and/or members of the Civil Defense Force in Mukamira Camp. It introduced no testimony, expert or otherwise, to establish the Respondent's *de jure* or *de factor* authority over these two categories of subordinates in Mukamira Camp on 26 April 1994 or 11 May 1994.[15]

23. On the contrary, the Respondent introduced evidence that he was not the *de jure* and *de facto* commander of Mukamira Camp during the relevant jurisdictional period of April-May 1994. It was Major Laurent Bizabarimana.[16] Evidence was also produced at trial that the Civil Defense Force was set up on 25 May 1994[17] and in Ruhengeri Prefecture, it was headed by Lt. Col. (retired) Member of Parliament, Bonaventure NTIBITURA.[18]
24. The ICTR jurisprudence on Article 6(3) with respect to Kabiligi is most instructive. Like the Respondent, he was a high ranking military official of the FAR and did not exercise any actual command authority. Kabiligi's judgment details his de jure and de facto responsibility under Article 6(3) as follows:
25. With respect to *de jure* authority, Kabiligi held the position of head of the military operations bureau (G-3) on the army staff from September 1993 until leaving Rwanda in July 1994. He was promoted to brigadier general on 16 April 1994 and was one of the highest ranking officers in the Rwandan army. Prior to his appointment as G-5, he served as commander of the Byumba operational sector.[19]
26. The Prosecution did not bring a military expert to define the scope of Kabiligi's authority as head of the operations bureau (G-3). However, its own expert on Rwandan history, Filip Reyntjens, testified that Kabiligi had a reputation as an excellent operational soldier but his function as G-3 was that of a "bureaucrat" or "an office job" and that Kabiligi "would not, for instance fight a war on the front, would not command an operational unit

[14] Prosecutor's Pre-Trial Brief, paras. 93-107.
[15] Prosecutor's Closing Brief, paras. 145-146, and 149-150.
[16] Defense Witness NDI, T.11 May 2009, p.48, L.24-25; Defense Witness NEC, T. 19 May 2009, p.12 L.33-35; p.16, L.20-29
[17] Defense Exhibits D56A, D56B, D57A & B.
[18] See D100 and Witness SBI, T. 24 Feb 2009, p.26, L.3-5.
[19] *Kabiligi* Trial Judgment, para. 2044, fn.2235.

on the front. Furthermore, according to Reyntjens, Kabiligi had no ability to give orders to the Presidential Guard.[20]

27. Kabiligi brought a Belgian military expert, Lieutenant Colonel Jacques Duvivier, to testify that each of the bureaus on the army staff (G-1 to G-4) was a tool available to the chief of staff to provide the necessary information and proposals so that the chief of staff could respond to a given situation and issue orders. The role of the G-3 in this process was to provide information concerning training and military operations. Once the chief of staff made a decision and issued orders for a military operation, the G-3 transmitted them to operational commanders and oversaw their implementation. However, the G-3 did not have any direct authority over the operational commanders in the chain of command. The chief of staff maintained the responsibility for the execution of his orders.[21]
28. With respect to *de facto* authority, the Prosecutor argued that Kabiligi had *de facto* authority over various units flowing from his rank, position, reputation and charismatic influence. However, after a detailed examination of Prosecution's evidence, the Trial Chamber concluded that the Prosecution had not proven beyond reasonable doubt that Kabiligi exercised authority over the Rwandan Armed Forces, beyond his subordinates in the operations bureau (G-3) of the army staff. The evidence did not show that these subordinates committed crimes at points when Kabiligi exercised effective control over them.[22]
29. On the other hand, in the instant matter, the Respondent introduced fact witness KBX, who, by virtue of his former high position in the Rwandan Armed Forces and extensive experiences (see also Exhibit D-146), was in a position to testify to the inability of the Respondent to issue orders, with the expectation that they would be obeyed, to the soldiers and militia / civil defense force members at Mukamira Camp in the face of its *de jure* commanding officer. KBX testified as follows:

(Transcript KBX, 21 May 2009, p.19; L.21-35)

MR. PRESIDENT:

Mr. Witness, based on your experience, would – can you hear me, Mr. Witness?

[20] *Kabiligi* Trial Judgment, para. 2045.
[21] *Kabiligi* Trial Judgment, para. 2046.
[22] *Kabiligi* Trial Judgment, para. 2056.

THE WITNESS:

Yes, I can hear you. My microphone was switched off.

MR. PRESIDENT:

Yes. Based on your experience, was it, within the Rwandan army, possible for a colonel occupying a position like Setako to, during visits in a military camp, order lower-ranking officers within that camp to carry out certain functions?

THE WITNESS:

The military regulations governing the Rwandan army provided that the soldiers must – must respect their line superiors in rank, but they only obey their bosses, their supervisors. So an order has to be given through the line superior.

So an officer of the army cannot give an order to members of a unit if he doesn't have command over that unit. That was a general rule. And this is a rule that is applicable to all armies, by the way.

30. Hence, as is clear from above, the Prosecution failed to lead sufficient evidence on the Respondent's 6(3) responsibility and the Trial Chamber correctly did not find him guilty under superior or command responsibility for the killings of 30-40 Tutsis on 25 April 1994 and of 9 or 10 Tutsis on 11 May 1994 under Counts 1, 4 and 5.

(ii)

31. Furthermore, the Prosecutor failed to establish that the Respondent exercised effective control over subordinates (1) based on FAR's Rules of Discipline and (2) when it mischaracterized the investigations conducted by the Respondent as head of the division of legal affairs in the Ministry of Defense in Kigali.

(1) Failure to establish that the Respondent exercised effective control over subordinates through the FAR's Rules of Discipline.[23]

32. In asserting that the FAR's Rules of Discipline accords the Respondent effective control over subordinates, the Prosecution cites to paragraph 331 of the Judgment, which reads as follow:

> 331. Setako maintained a home in Nkuli commune about 600 to 800 meters away from the communal office and four kilometers from Mukamira camp. He returned to work at the Ministry of Defence in Kigali on 22 April 1994 after his mission to Kinshasa (11.3.6.2). On 24 April, he began an investigation into whether the commander of the

[23] Prosecutor's Appellant's Brief, para. 67, referencing paras. 89 (sic) and 331 of the Judgement.

> 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.

33. It is manifestly apparent that the Prosecution's reliance is completely misplaced. The Trial Chamber in paragraph 331 only found that the Respondent conducted an investigation and questioned individuals with respect to the activities in question of the commander of the Mutara operational sector. Nowhere did the Trial Chamber find, with respect to this event, that the Respondent exercised *de jure* or *de facto* authority over these individuals whom he questioned, nor that he had the ability to punish or prevent any crime, if any, that these individuals committed. These facts are insufficient to meet the legal requirements of Article 6(3).
34. In paragraph 9 of the Prosecution's Notice of Appeal, it argues, without more, that:

> ... "(t)he Defendant's higher rank and the Rules of Discipline of the *Forces Armees Rwandaises* gave him the *de jure* authority to order junior soldiers to desist from unlawful or wrongful activities." ...

The Prosecution's reference to said Rules of Discipline of the FAR is again misguided. Said document was never introduced into evidence nor was judicial notice taken of it pursuant to Rule 94 (B). It is, hence, not evidence in the instant case. Even had it been introduced into evidence, it is the Respondent's contention that it does not establish that the he exercised Article 6(3) authority over SLA or SAT or the Civil Defense Force that they claimed to belong to at Mukamira Camp on 25 April or May 11 1994.

(2) Mischaracterization of the investigations conducted by the Respondent as head of division of legal affairs in the Ministry of Defense in Kigali.

35. The Prosecution asserts that the Respondent's exercise of effective control over subordinates is evidenced by his ability to "initiat(e) investigations against them for collaboration and other violations of military regulations."[24] In making this assertion, the Prosecution also relied on paragraph 331 of the Judgment quoted above.

[24] Prosecutor's Appellant's Brief, para. 39, referencing para. 331 of the Judgement.

36. Once again, it is manifestly apparent that the Prosecution's reliance is misplaced. The Trial Chamber in paragraph 331 only found that the Respondent conducted an investigation and questioned individuals with respect to the activities in question of the commander of the Mutara operational sector. Nowhere did the Trial Chamber find, with respect to this event, that the Respondent exercised *de jure* or *de facto* authority over these individuals whom he questioned, nor that he had the ability to punish or prevent any crime, if any, that these individuals committed.
37. For all of the reasons above, the Appeal Chamber should and must deny the Prosecution's appeal to find Setako guilty under Article 6(3) for the alleged acts of SLA and SAT at Mukamira Camp on 25 April and 11 May 1994.

Ground 3. The Prosecutor alleges that the Trial Chamber made errors of law and fact and abused its discretion in sentencing

38. The Respondent opposes the relief sought by the Prosecutor, which if granted would increase the Respondent's sentence from 25 years to a term of life imprisonment.
39. The Respondent opposes this ground of appeal for the reasons below.

a) Errors in assessing the gravity of the offence

1) Allegation that the Trial Chamber failed to consider the Respondent's central role in the offence

40. The Prosecution claims that the Trial Chamber's findings demonstrate that the Respondent was a central and primary player in the 25 April and 11 May killings at Mukamira Military Camp, and that the Trial Chamber erred in giving insufficient weight to these findings when sentencing the Respondent.
41. It is the Respondent's assertion that no killings took place at Mukamira Camp in April and May 1994, and therefore the Respondent could not have played a central role in killings which did not occur. Furthermore, the Prosecutor falsely represents the Trial Chamber's findings regarding the Respondent's role in the events by suggesting that in addition to committing the crime of ordering under Art. 6(1), the Respondent was guilty of instigation and participation in a joint criminal enterprise.[25] The Respondent was never

[25] Prosecutor's Appellant's Brief, para. 44.

convicted of instigation,[26] and the Trial Chamber dismissed the theory of joint criminal enterprise due to insufficient evidence:

> 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.
>
> 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 [...].[27]

It is apparent from the above passage that the Trial Chamber considered, and dismissed the charge of joint criminal enterprise, finding instead that "the most appropriate description for Setako's actions is ordering under Article 6 (1) of the Statute."[28]

42. In addition, the Prosecutor asserts facts not in evidence when it claims that the Respondent had a "personal involvement in the selection of victims" he is alleged to have transported to Mukamira Camp on 11 May 1994. Prosecution witnesses did not testify that the Respondent was involved in selecting the refugees he transported to the Camp, nor did the Trial Chamber make any findings in this regard.
43. The Prosecution further claims that the Trial Chamber committed a legal error in its sentencing analysis by assessing the gravity of the Respondent's offence according to abstract categories, and failing to consider the inherent gravity of the Respondent's crimes.[29] The Prosecutor's arguments in support of this claim are illogical, and do not reflect the Judgement or the jurisprudence of the Appeals Chamber.
44. The Trial Chamber's approach to sentencing in the instant case was premised on the need to individualize penalties and to reflect the gravity of the crimes for which it convicted the Respondent.[30] It made several references to its findings regarding the nature of the 25 April and 11 May crimes and the inherent gravity of those particular offences.[31] Thus, the

[26] Judgement, paras. 474, 484, 491.
[27] Judgement, paras. 455-456.
[28] Judgement, para. 474, fn 574.
[29] Prosecutor's Appellant's Brief, paras. 46-47.
[30] Judgement para 497.
[31] Judgement, paras. 499, 503.

Prosecutor's claim that the Trial Chamber relied on a categorical rather than an individual approach to assessing gravity is not supported by the Judgement.

45. In addition, the Prosecution acknowledges that it is an established practice of the Appeals Chamber to consider the gravity of crimes according to categories, where "direct perpetration" of a crime is a higher gravity offence than complicity or aiding and abetting.[32] Yet it claims that the Trial Chamber committed a legal error in evaluating the Respondent's participation in the crimes according to whether it was "direct participation."[33] The Prosecutor does not explain how the Trial Chamber's standard of "direct participation" differs from the standard of "direct perpetration" in use by the Appeals Chamber.

46. Finally, in its request for a revision of the Respondent's sentence, the Prosecutor asks the Appeals Chamber to consider the "higher culpability" the Respondent bears for having ordered crimes (versus complicity in or aiding and abetting a crime),[34] in effect asking the Appeals Chamber to make the same categorical distinction between direct and non-direct participation that it faults the Trial Chamber for making. The Prosecutor cannot on the one hand claim that the Trial Chamber committed an error in its application of sentencing standards, and on the other hand ask the Appeals Chamber to commit the same error. The Prosecutor's analysis of the sentencing jurisprudence is flawed, and its request to the Appeals Chamber illogical, and therefore the Prosecutor's arguments on this ground offer no support for an increase in the Respondent's sentence.

2) Consideration of Tribunal's sentencing practice

47. The Prosecutor claims that the Trial Chamber relied on incorrect and irrelevant principles in determining the Respondent's sentence, and that moreover, it was inconsistent in its application of the principles it found to be significant. In support of this allegation, the Prosecution points to the Trial Chamber's use and application of the "main architect" principle. According to the Prosecution, the Trial Chamber gave primacy to this principle, above its consideration of the gravity of the Respondent's offence, and thereby

[32] Prosecutor's Appellant's Brief, para. 47.
[33] *Ibid.*
[34] Prosecutor's Appellant's Brief, para. 48.

committed an error of law. The Prosecution further argues that the Trial Chamber did not apply the "main architect" principle correctly.[35] The Judgement shows otherwise.

48. It is apparent from the Trial Chamber's deliberations that it gave primacy to the gravity of the Respondent's offence in determining the appropriate sentence. The first issue the Chamber addresses in its deliberations is the gravity of the Respondent's offence, in paragraph 499 of the Judgement. Only after observing that the crimes at Mukamira Camp were grave and resulted in a significant toll of human suffering does the Trial Chamber discuss additional factors that have contributed to sentencing decisions at the Tribunal, such as the "main architect" principle. Footnote 594 of paragraph 500 shows that the Chamber remained aware throughout its discussion that the gravity of the offence is the primary consideration in imposing a sentence.

49. It is also clear that the Trial Chamber applied the "main architect" principle in a manner which is consistent with its findings in the Judgement. The Prosecution is confused about the Trial Chamber's findings regarding the Respondent's level of authority in relation to the events of 25 April and 11 May. Far from finding him a senior authority, the Trial Chamber found that the Respondent's rank and role in the Ministry of Defence was "insufficient to demonstrate that he was a superior" and that "it has not been established that he exercised authority over militia groups or members of the population."[36]

3) Allegation of failure to take into account repetition of criminal acts in assessing gravity

50. Only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence.[37] It is the Respondent's position that the Prosecution failed to prove its case against the accused and that the Trial Chamber erred in convicting the Respondent of criminal acts, and therefore the alleged acts should not be the subject of a sentence against him.

4) Allegation of erroneous reliance on "main architect" factor

[35] Prosecutor's Appellant's Brief, paras. 49-51.
[36] Judgement, para. 461.
[37] *Simba* Trial Judgement, para. 440; *Karera* Trial Judgement, para 579; *Bagosora et al* Trial Judgement, para. 2272.

51. The Prosecutor claims that the Trial Chamber erred in finding that the Respondent did not deserve a term of life imprisonment because he was not the main architect of the larger body of crimes committed in Ruhengeri prefecture or Kigali.[38] According to the Prosecution, the standard of "main architect" is extra-legal, and there is no support in the jurisprudence reserving the most serious sanctions for architects of crimes. However, in the following sentence, the Prosecutor cites jurisprudence that calls for reserving more serious sanctions for planners and leaders of crimes.[39] The Prosecution does not explain how "architects" differ from "leaders and planners." It is once again calling on the Appeals Chamber to increase the Respondent's sentence based on criteria that differ little, if at all, from the criteria used by the Trial Chamber.
52. Even if it can be argued that there is a material difference between architects, and leaders and planners, it should be noted that the jurisprudence cited by the Prosecution does not refer simply to leaders and planners, but to "*the most senior members of a command structure*, that is, the leaders and planners of a particular conflict" [40](emphasis ours). The evidence shows that the Respondent was not part of the senior command structure at Mukamira Camp, nor was he one of those senior members alleged to be present at the camp on 25 April and 11 May 1994. The Trial Chamber accepted the testimony of Prosecution witnesses SLA and SAT placing the FAR Chief of Staff Augustin Bizimungu and the camp commander Major Laurent Bizabarimana at the camp on 25 April, and witnesses SLA and SAT placed Captain Hasengineza at the camp on 11 May.[41]
53. Furthermore, the Respondent does not fit the Prosecutor's pared down "leaders and planners" category either. The Trial Chamber found that the Respondent did not bear any superior responsibility for the events of 25 April and 11 May.[42] In addition, although the Respondent was found to be a "person of influence and an authority figure in a general sense," the Chamber found that it had not been established that he exercised authority over militia groups or members of the population.[43] It is simply illogical to conclude that someone who had no authority over militia groups could premeditate and make plans that

[38] Prosecutor's Appellant's Brief, para. 53.
[39] *Ibid.*
[40] *Musema* Appeal Judgement, para. 383.
[41] Judgement, paras. 341 and 344.
[42] See discussion under Ground 2 of this Brief.
[43] Judgement, para 461.

involved ordering militia groups to carry out killings. The Prosecutor's arguments in this regard do not carry any weight and must be disregarded.

5) Allegation of failure to take into account the fact that victims were seeking refuge in a safe haven

54. It is the Respondent's position, as articulated in his Appeal Brief, that the Trial Chamber erred in finding that Tutsi refugees were killed at Mukamira Camp between April and July 1994. Defense witnesses NBO and NDI, who were refugees and stayed inside the camp, testified that no killings occurred at the camp. Witnesses NEC and NCA, Tutsis who also resided within the camp, confirmed that no killings took place at the camp. The camp remained a safe haven for those who had sought protection there.

6) Calling for Tutsis to be hunted down

55. The Appellant has withdrawn this sub-ground of the appeal.

7) Locating victims and transporting them to execution site

56. The response to this sub-ground is discussed above in paragraph 42.

8) Failure to consider 11 May killings as war crimes

57. As discussed under Ground 1 of this Brief, it would have been an error for the Trial Chamber to find the Respondent guilty of war crimes for ordering the killings of 9 to 10 Tutsis on 11 May 1994. Therefore, the Trial Chamber was correct in not considering this charge when it weighed the gravity of the Respondent's offences and the totality of his criminal conduct.

b) Discernible errors in assessing individual, aggravating and mitigating factors

1) Failure to consider Respondent's Article 6(3) responsibility as an aggravating factor

58. The Prosecutor argues that the Trial Chamber should have considered whether the Respondent's Article 6(3) responsibility was an aggravating factor in sentencing. As discussed under Ground 2 of this Brief, the Trial Chamber found that the Respondent did

not bear any superior responsibility under Article 6 (3), and therefore the Trial Chamber was correct in not considering this charge in sentencing.[44] Furthermore, the Prosecutor failed to distinguish or was confused between an abuse of role as an influential authority under 6(1) as an aggravating factor in sentencing and an abuse of role as an influential authority under 6(3) as an aggravating factor in sentencing.

59. One of the elements for superior or command responsibility is that 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.

60. In paragraph 505 of the Judgment, the Trial Chamber cites to paragraph 822 of the *Renzaho* Trial Judgment, citing the *Simba* Appeal Judgment paragraphs 284-285, where it is stated that "The Appeals Chamber has held that an accused's abuse of his superior position or influence may be considered as an aggravating factor," and concludes that "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."

61. However, the Prosecutor in paragraph 38 of its Appellant's Brief, in relying on the above cited *Renzaho* Trial Judgment's reference to "an accused's abuse of his superior position or influence" as an aggravating factor, misconstrued the Trial Chamber's finding to suggest that it had found that the Respondent exercised superior responsibility under Article 6(3).

62. Nevertheless in paragraph 67 of the same Appellant's Brief, the Prosecutor contradicts its above statement by clearly stating that an abuse of a role as an influential authority does not correspond to the aggravating circumstances resulting from an abuse of superior or command authority under Article 6(3).

63. Hence it is clear that the Prosecutor was confused at some stage over the Trial Chamber's finding that the Respondent abused his role as an influential authority under

[44] *Simba* Trial Judgement, para. 440; *Karera* Trial Judgement, para. 579; and *Bagosora et al* Trial Judgement, para. 2272, where the Tribunal notes that only those matters which are proved beyond reasonable doubt against an accused may taken into account in aggravation of that sentence.

6(1) which is an aggravating factor in sentencing. The Prosecutor seems to have extrapolated that finding to extend to an abuse of role as an influential authority under 6(3) as an aggravating factor in sentencing.

2) Allegation that the Respondent's position as a military lawyer and legal advisor are aggravating factors

64. The Prosecution claims that the Trial Chamber erred in law by failing to take into account the Respondent's professional position as a legal advisor as an aggravating factor in sentencing. The Prosecutor's position is that the Respondent's abuse of his professional situation is separate from his abuse of his role as an influential authority, and therefore it should form the basis of an additional aggravating factor.[45] However, the Judgement shows that the Trial Chamber considered the Respondent's abuse of his professional position to be subsumed in, and not separate from, his abuse of his role as an influential figure. The Chamber found the Respondent to be an influential authority based upon his professional position: "It is clear that his rank and *professional situation* indicates that he was a person of influence and an authority figure in a general sense"[46] (emphasis ours). In other words, the Respondent's responsibilities as a military legal advisor, along with his rank, form the basis for his influence and authority. The Trial Chamber already found that the Respondent's role as an influential authority amounted to an aggravating factor, and therefore it was correct in not finding another aggravating factor on the same ground.
65. Furthermore, the Prosecution's reliance on the *Ntakirutimana* Appeals Judgement is misplaced, since it has offered no arguments to show how the cases are similar to the instant case, apart from the fact that they both involve professionals. The Appeals Chamber has twice ruled that the *Ntakirutimana* ruling cannot be used to support a finding that an accused's professional position is an aggravating factor in sentencing absent a showing of like circumstances.[47] Cases involving professionals cannot be treated interchangeably. In rejecting the applicability of *Ntakirutimana* to *Stakic* and *Simic*, two cases involving accused who were doctors, the Appeals Chamber stated that, "Caution is needed when relying as a legal basis on statements made by Trial Chambers in the

[45] Prosecutor's Appellant's Brief, para. 69.
[46] Judgement, para. 461.
[47] *Stakic* Appeal Judgement, para. 416; *Simic* Appeal Judgement, para. 272.

context of cases and circumstances that are wholly different."[48] Likewise, caution is needed in the instant case. The Respondent is a judicial officer who investigated cases of misconduct in the military; his situation cannot be compared with a doctor convicted of killing his patients.

66. For the above reasons, the Trial Chamber would have erred had it found the Respondent's professional background to be an aggravating factor in his sentence.

3) Allegation that the Trial Chamber erroneously deemed the exclusion of evidence to be a mitigating factor

67. The Prosecutor alleges that the Trial Chamber erred in taking into account in sentencing, the prolongation of the Respondent's trial detention due to the Prosecution's introduction of a substantial body of evidence relating to allegations which it had withdrawn from the indictment, or which did not form part of the indictment.[49]
68. It is the Prosecution's responsibility to lay out the theory of its case and what evidence it will adduce to support its theory.[50] The Prosecution cannot blame the Trial Chamber for its own failure to state clearly what allegations it would move forward on, and what allegations it would withdraw. Absent a clear statement of withdrawal, the Defense had to prepare a case to defend against the charges. The Prosecution always had the option of withdrawing allegations before the trial began or not opposing the Respondent's pre-trial *in limine* motions. Instead, it wanted the benefit of a possible ruling in its favor, allowing the allegations to be entertained. Now, the Prosecution argues that the Trial Chamber is to blame for granting the Prosecution deference by permitting the evidence to be introduced at trial, and reserving decision based upon the Defense making timely objections, if and when the Prosecution introduced the evidence.
69. The Prosecution cannot have it both ways. Either it should have clearly decided what evidence it would adduce going forward and what evidence it would withdraw, or it must now take responsibility for prolonging the trial and the Respondent's detention with the

[48] *Stakic* Appeal Judgement, para. 416; *Simic* Appeal Judgement, para. 273.
[49] Prosecutor's Appellant's Brief, paras. 70-71.
[50] Article 17(4) of the Statute; *Karemera* Decision, para. 16.

introduction of a dozen incidents- "a substantial body of evidence"[51]- that it later withdrew or were not admissible.

70. The Trial Chamber properly took into account the prolongation of the Respondent's trial detention as a mitigating circumstance in his sentence since the delay was unfairly prejudicial to him.

71. The Respondent's right to a fair and expeditious trial is enshrined in Article 19(1) of the Statute. The Appeals Chamber has interpreted this provision to mean that "a trial is inequitable if it is too long drawn out. Speed, in the sense of expeditiousness, is an element of an equitable trial."[52] As the Prosecutor points out, fair trial violations that result in longer detention for an accused have in the past led the Appeals Chamber to uphold a reduction in the accused's sentence as a remedy for the violations.[53]

72. Even if the prolonged trial is not found to have violated the Respondent's right to fair proceedings, the Trial Chamber did not commit an error in regarding it as a mitigating circumstance. A Trial Chamber has considerable discretion when determining a sentence,[54] and therefore it was within its authority to consider the Prosecution's role in the prolongation of the Respondent's detention to be an extenuating circumstance that required mitigation.

IV. CONCLUSION

73. The Respondent opposes all the relief sought by the Prosecutor in its Appellant's Brief, in which it requests the Appeals Chamber to revise the Trial Judgement by 1) finding the Respondent guilty of war crimes for ordering the killings of nine to ten Tutsis at Mukamira Military Camp on 11 May 1994, 2) finding the Respondent responsible under Article 6(3) for ordering killings at Mukamira Camp on 25 April and 11 May 1994, and 3) increasing the Respondent's sentence from 25 years to a term of life imprisonment.

74. For the reasons set out herein, the Respondent, by and through his Counsel, respectfully prays this Appeals Chamber to deny in its entirety the Prosecutor's appeal.

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[51] Judgement, para. 506.
[52] *Nyiramasuhuko et al.* Decision on 15bis(D), para. 24.
[53] Prosecutor's Appellant's Brief, para. 75, citing to *Kajelijeli* Appeal Judgement, paras. 324-325, and *Semanza* Appeal Judgement, paras. 324-235, 389.
[54] *Ntakirutimana* Appeal Judgement, para. 549.

401/A

Word count: 6577

Signed in New York on this 18th day of August, 2010.

/s/LENNOX S. HINDS

Professor Lennox S. Hinds
Lead Counsel

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V. ANNEX – JURISPRUDENCE AND DEFINED TERMS

A. JURISPRUDENCE

ICTY

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-T, Trial Judgement, 25 June 1999 ("Aleksovski Trial Judgement").

Prosecutor v. Blagoje Simic, Case No. IT-95-9-A, Appeal Judgement, 28 November 2006 ("*Simic* Appeal Judgement").

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

ICTR

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement").

Prosecutor v Ignace Bagilishema, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement").

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

Prosecutor v. Gratien Kabiligi, Case No. ICTR-98-41-T, Judgement and Sentence, 18 December 2008 ("*Kabiligi* Trial Judgement").

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

Prosecutor v Édouard Karemera et al, Case No. ICTR-98-44-PT, Decision on Defects in the Form of the Indictment, 5 August 2005 ("*Karemera* Decision").

Prosecutor v François Karera, Case No. ICTR-01-74-T, Judgement and Sentence, 7 December 2007 ("*Karera* Trial Judgement").

Prosecutor v. André Ntagerura et al., Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004 ("*Ntagerura et al.* Trial Judgement").

Prosecutor v Ntakirutimana, Case No. ICTR-96-10-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement").

Prosecutor v Nyiramasuhuko et al, Case No. ICTR-98-41-A15*bis*, Decision in the Matter of Proceedings Under Rule 15bis(D), 24 September 2003 ("*Nyiramasuhuko et al.* Decision on 15bis(D)").

Prosecutor v. Tharcisse Renzaho, Case No. ICTR-97-31-T, Judgement and Sentence, 14 July 2009 ("*Renzaho* Appeal Judgement").

Prosecutor v. George Rutaganda, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement").

The Prosecutor v Sagahutu, Case No. ICTR-2000-56-T, Decision on Sagahutu's Preliminary, Provisional Release, and Severance Motions, 25 September 2002 ("*Sagahutu* Decision").

Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 ("*Semanza* Trial Judgement").

Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement").

Prosecutor v Aloys Simba, Case No. ICTR-2001-76-T, Judgement and Sentence, 13 December 2005 ("*Simba* Trial Judgement").

B. DEFINED TERMS

Appellant/Prosecution	Office of the Prosecutor
Defense	The Respondent / the Respondent's Counsel
ICTR/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 violation committed in the territory of neighboring States, between 1 January and 31 December 1994
ICTY	International Criminal 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-T, Amended Indictment [pursuant to the Trial Chamber's decision on Defense motion concerning defects in the Indictment delivered on 17 June 2008]

398/A

Judgement	*The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Judgement and Sentence, 25 February 2010
L.	Line(s) of Trial Transcript
p. (pp.)	page (pages)
para. (paras.)	paragraph (paragraphs)
Prosecutor's Appellant's Brief	*The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-A, Prosecutor's Appellant's Brief [filed on 14 June 2010]
Prosecutor's 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
Prosecutor's 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
Respondent	Lt. Col. Ephrem Setako
Rules	International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence
Statute	Statute of the International Criminal Tribunal for Rwanda
T.	Trial Transcript page from hearings in *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T
Trial Chamber	Trial Chamber I

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Case Name:	The Prosecutor vs. **EPHREM SETAKO**		**Case Number:** ICTR-04-81-A	
Dates:	Transmitted: **18 AUGUST 2010**		Document's date: **18 AUGUST 2010**	
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