



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

868/H

DT

ICTR-00-61-A
09th October 2012
{868/H – 761/H}

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Carmel Agius

Acting Registrar: Mr. Pascal Besnier

Judgement of: 9 October 2012

Jean-Baptiste GATETE

v.

THE PROSECUTOR

Case No. ICTR-00-61-A

JUDGEMENT

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The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
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ICTR Appeals Chamber
Date: 09th October 2012
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JPU, LOs, LSS
[Signature]

International Criminal Tribunal for Rwanda
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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively) is seised of appeals by Jean-Baptiste Gatete (“Gatete”) and the Prosecution against the Judgement and Sentence pronounced by Trial Chamber III of the Tribunal (“Trial Chamber”) on 29 March 2011 in the case of *The Prosecutor v. Jean-Baptiste Gatete* (“Trial Judgement”).¹

I. INTRODUCTION

A. BACKGROUND

2. Gatete was born in 1953 in Rwankuba sector, Murambi commune, Byumba prefecture, Rwanda.² Between 1982 and 1993, he was the *bourgmestre* of Murambi commune and, in April 1994, he became a director in the Ministry of Women and Family Affairs.³

3. The Trial Chamber found Gatete responsible pursuant to Article 6(1) of the Statute of the Tribunal (“Statute”) for the killings of Tutsis in Rwankuba sector on 7 April 1994, at Kiziguro parish on 11 April 1994, and at Mukarange parish on 12 April 1994.⁴ Consequently, it convicted Gatete of genocide⁵ and extermination as a crime against humanity.⁶ The Trial Chamber sentenced Gatete to a single term of life imprisonment.⁷

B. THE APPEALS

4. Gatete presents five grounds of appeal challenging his convictions and sentence and requests that the Appeals Chamber quash all his convictions and acquit him or, alternatively, reduce his sentence.⁸ The Prosecution responds that Gatete’s appeal should be dismissed.⁹

5. The Prosecution advances a single ground of appeal. It submits that the Trial Chamber erred in law by failing to enter a conviction for conspiracy to commit genocide, and requests that the

¹ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Judgement and Sentence, pronounced on 29 March 2011, filed on 31 March 2011. For ease of reference, two annexes are appended: Annex A – Procedural History; Annex B – Cited Materials and Defined Terms.

² Trial Judgement, paras. 1, 81.

³ Trial Judgement, paras. 1, 82.

⁴ Trial Judgement, paras. 151-153, 341, 342, 417, 594, 601, 608, 640, 643, 646.

⁵ Trial Judgement, paras. 594, 601, 608, 668.

⁶ Trial Judgement, paras. 640, 643, 646, 668.

⁷ Trial Judgement, paras. 682, 683.

⁸ Gatete Notice of Appeal, paras. 3-36; Gatete Appeal Brief, paras. 7, 321.

⁹ Prosecution Response Brief, paras. 8, 212.

Appeals Chamber enter a conviction accordingly.¹⁰ Gatete responds that the Prosecution's appeal should be dismissed.¹¹

6. The Appeals Chamber heard oral submissions regarding these appeals on 7 May 2012.

¹⁰ Prosecution Notice of Appeal, paras. 3, 4; Prosecution Appeal Brief, paras. 13-41.

¹¹ Gatete Response Brief, paras. 7, 20, p. 9.

II. STANDARDS OF APPELLATE REVIEW

7. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.¹²

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

Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.¹³

9. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.¹⁴ In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.¹⁵

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

Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.¹⁶

11. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the

¹² See, e.g., *Hategekimana* Appeal Judgement, para. 6; *Kanyarukiga* Appeal Judgement, para. 7; *Ntabakuze* Appeal Judgement, para. 10. See also *Haradinaj et al.* Appeal Judgement, para. 9.

¹³ *Ntakirutimana* Appeal Judgement, para. 11 (reference omitted). See also, e.g., *Hategekimana* Appeal Judgement, para. 7; *Kanyarukiga* Appeal Judgement, para. 8; *Ntabakuze* Appeal Judgement, para. 11; *Haradinaj et al.* Appeal Judgement, para. 10.

¹⁴ See, e.g., *Hategekimana* Appeal Judgement, para. 8; *Kanyarukiga* Appeal Judgement, para. 9; *Ntabakuze* Appeal Judgement, para. 12. See also *Haradinaj et al.* Appeal Judgement, para. 11.

¹⁵ See, e.g., *Hategekimana* Appeal Judgement, para. 8; *Kanyarukiga* Appeal Judgement, para. 9; *Ntabakuze* Appeal Judgement, para. 12. See also *Haradinaj et al.* Appeal Judgement, para. 11.

¹⁶ *Krstić* Appeal Judgement, para. 40 (references omitted). See also, e.g., *Hategekimana* Appeal Judgement, para. 9; *Kanyarukiga* Appeal Judgement, para. 10; *Ntabakuze* Appeal Judgement, para. 13.

intervention of the Appeals Chamber.¹⁷ Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.¹⁸

12. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.¹⁹ Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.²⁰ Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.²¹

¹⁷ See, e.g., *Hategekimana* Appeal Judgement, para. 10; *Kanyarukiga* Appeal Judgement, para. 11; *Ntabakuze* Appeal Judgement, para. 14. See also *Haradinaj et al.* Appeal Judgement, para. 13.

¹⁸ See, e.g., *Hategekimana* Appeal Judgement, para. 10; *Kanyarukiga* Appeal Judgement, para. 11; *Ntabakuze* Appeal Judgement, para. 14. See also *Haradinaj et al.* Appeal Judgement, para. 13.

¹⁹ Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 4(b). See also, e.g., *Hategekimana* Appeal Judgement, para. 11; *Kanyarukiga* Appeal Judgement, para. 12; *Ntabakuze* Appeal Judgement, para. 15.

²⁰ See, e.g., *Hategekimana* Appeal Judgement, para. 11; *Kanyarukiga* Appeal Judgement, para. 12; *Ntabakuze* Appeal Judgement, para. 15.

²¹ See, e.g., *Hategekimana* Appeal Judgement, para. 11; *Kanyarukiga* Appeal Judgement, para. 12; *Ntabakuze* Appeal Judgement, para. 15.

III. APPEAL OF JEAN-BAPTISTE GATETE

A. ALLEGED VIOLATIONS OF FAIR TRIAL RIGHTS (GROUNDS 1 AND 2)

1. Alleged Violation of Gatete's Right to Be Tried Without Undue Delay (Ground 1)

13. Gatete was arrested in the Democratic Republic of Congo on 11 September 2002 and was transferred to the custody of the Tribunal on 13 September 2002.²² At his initial appearance on 20 September 2002, Gatete entered a plea of not guilty to all the charges against him.²³ His case was assigned to the Trial Chamber on 6 July 2009 and his trial commenced on 20 October 2009.²⁴

14. The question of whether Gatete's right to be tried without undue delay had been violated was considered in the Trial Judgement.²⁵ The Trial Chamber found that the length of Gatete's pre-trial delay was significant,²⁶ and noted instances in which the conduct of the Prosecution and the relevant authorities resulted in delay that could not be explained or justified.²⁷ However, the Trial Chamber concluded that the pre-trial delay was not undue given that: the case was complex;²⁸ the case had been selected for referral to Rwanda pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence of the Tribunal ("Rules");²⁹ any prejudice occasioned by the delay was minimal;³⁰ and, once the trial commenced, it was conducted with extreme expedition.³¹

15. Gatete submits that the Trial Chamber erred in law and fact when it found that there was no violation of his right to be tried without undue delay.³² In particular, he argues that the Trial Chamber erred in its assessment of the following factors: (i) the conduct of the parties and the relevant authorities;³³ (ii) the complexity of the Prosecution case against him,³⁴ and (iii) the minimal prejudice, if any, occasioned by the delay in the proceedings.³⁵

16. Gatete emphasises that his situation is without precedent, underscoring that he was incarcerated for 2,564 days before the start of the trial and that the Prosecution case against him

²² Trial Judgement, paras. 58, 83, Annex A, para. 2.

²³ Trial Judgement, para. 58, Annex A, para. 2. *See also* Initial Appearance, T. 20 September 2002 pp. 49-51.

²⁴ Trial Judgement, para. 58, Annex A, para. 6.

²⁵ Trial Judgement, paras. 54-64.

²⁶ Trial Judgement, paras. 59, 64.

²⁷ Trial Judgement, paras. 61, 62.

²⁸ Trial Judgement, paras. 60, 64.

²⁹ Trial Judgement, para. 64.

³⁰ Trial Judgement, paras. 63, 64.

³¹ Trial Judgement, para. 64.

³² Gatete Notice of Appeal, paras. 4-6; Gatete Appeal Brief, paras. 8-56. *See also* AT. 7 May 2012 p. 17.

³³ Gatete Appeal Brief, paras. 27, 30.

³⁴ Gatete Notice of Appeal, para. 5; Gatete Appeal Brief, paras. 15, 18.

³⁵ Gatete Notice of Appeal, para. 6; Gatete Appeal Brief, paras. 15, 42.

lasted only 13 days.³⁶ He requests that the Appeals Chamber either quash all of his convictions and enter an acquittal on all counts, or reduce his sentence in light of the prejudice arising from the lengthy pre-trial delay.³⁷

17. The Prosecution responds that the Trial Chamber correctly found no violation of Gatete's right to be tried without undue delay, arguing that no remedy is therefore warranted and that his submissions in this regard should be dismissed.³⁸

18. The Appeals Chamber will consider each of Gatete's challenges in turn. Before doing so, the Appeals Chamber recalls that the right to be tried without undue delay is enshrined in Article 20(4)(c) of the Statute and protects an accused against *undue* delay, which is determined on a case-by-case basis.³⁹ A number of factors are relevant to this assessment, including: the length of the delay; the complexity of the proceedings; the conduct of the parties; the conduct of the relevant authorities; and the prejudice to the accused, if any.⁴⁰ In this context, the Appeals Chamber also recalls that when a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the trial chamber violated a provision of the Statute and/or the Rules and that this violation caused prejudice that amounts to an error of law invalidating the trial judgement.⁴¹

(a) The Conduct of the Prosecution and the Relevant Authorities

19. The Trial Chamber noted particular instances in which the conduct of the Prosecution and the relevant authorities resulted in pre-trial delay that could not be explained or justified.⁴² Notwithstanding these findings, the Trial Chamber concluded that the length of Gatete's pre-trial detention was not undue.⁴³

20. Before turning to Gatete's submissions, the Appeals Chamber notes the Prosecution's claim that Gatete's challenge concerning the conduct of the parties and the relevant authorities in the

³⁶ Gatete Appeal Brief, para. 8. *See also* Gatete Appeal Brief, paras. 6, 17.

³⁷ Gatete Notice of Appeal, para. 7; Gatete Appeal Brief, para. 57. *See also* Gatete Appeal Brief, para. 56.

³⁸ Prosecution Response Brief, paras. 21, 53. *See also* Prosecution Response Brief, paras. 23, 25; AT. 7 May 2012 p. 25.

³⁹ *Renzaho* Appeal Judgement, para. 238; *Nahimana et al.* Appeal Judgement, para. 1074.

⁴⁰ *Renzaho* Appeal Judgement, para. 238; *Nahimana et al.* Appeal Judgement, para. 1074; *The Prosecutor v. Prosper Mugiraneza*, Case No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004, p. 3.

⁴¹ *See, e.g., Haradinaj et al.* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 28. *See also Kanyarukiga* Appeal Judgement, para. 52; *Bagosora and Nsengiyumva* Appeal Judgement, fn. 137; *Renzaho* Appeal Judgement, para. 196.

⁴² Trial Judgement, paras. 61, 62. For example, the Trial Chamber noted the time taken by Trial Chamber I of the Tribunal ("Pre-Trial Chamber") to address pre-trial motions, such as motions relating to indictment issues (*see* Trial Judgement, para. 61). It also noted the time taken by the Prosecution to file an amended indictment and a request for referral pursuant to Rule 11 *bis* of the Rules (*see* Trial Judgement, para. 62).

⁴³ Trial Judgement, para. 64.

context of pre-trial delay constitutes an impermissible expansion of his appeal.⁴⁴ The Appeals Chamber accepts the Prosecution's objection and considers that the challenges in this regard exceed the scope of Gatete's Notice of Appeal. Nevertheless, the Appeals Chamber considers that it is in the interests of justice to examine Gatete's arguments.⁴⁵ As the Prosecution responded to these contentions, the Appeals Chamber considers that there is no unfairness to the Prosecution in this respect.

21. Gatete submits that the Trial Chamber erred when it found instances in which the Prosecution delayed proceedings without justification but concluded that the delay occasioned was not undue.⁴⁶ He likewise argues that, while the Trial Chamber acknowledged numerous instances of pre-trial delay that could only be attributed to the Pre-Trial Chamber, it failed to draw the necessary conclusion, namely that the resulting delay was undue.⁴⁷

22. The Prosecution responds that the Trial Chamber reasonably concluded that the pre-trial delay was not undue, notwithstanding various instances of delay occasioned by the conduct of the Prosecution and the Pre-Trial Chamber.⁴⁸

23. The Appeals Chamber considers that the Trial Chamber erred in finding that the length of Gatete's pre-trial detention was not undue, given that it explicitly noted that the conduct of the Prosecution and the relevant authorities resulted in instances of pre-trial delay that could not be explained or justified.⁴⁹ By identifying such instances of pre-trial delay, the Appeals Chamber considers that the Trial Chamber itself *ipso facto* recognised that the conduct of the Prosecution and the relevant authorities unduly prolonged Gatete's pre-trial detention. The Trial Chamber's subsequent conclusion that "the delay was not undue" is thus incompatible with its prior acknowledgement that there were various pre-trial delays that could not be explained or justified. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in its assessment of the delays occasioned by the conduct of the Prosecution and the relevant authorities.

⁴⁴ Prosecution Response Brief, para. 24. Gatete submits that his arguments in this regard do not raise any additional errors in the Trial Judgement. See Gatete Reply Brief, paras. 17-19.

⁴⁵ See *Ntabakuze* Appeal Judgement, fn. 255; *Bagosora and Nsengiyumva* Appeal Judgement, para. 381; *Deronjic* Judgement on Sentencing Appeal, paras. 102, 103, 130.

⁴⁶ Gatete Appeal Brief, paras. 27, 29, 41. See also AT. 7 May 2012 p. 18.

⁴⁷ Gatete Appeal Brief, para. 30. See also Gatete Appeal Brief, paras. 34, 41. In this respect, Gatete asserts that the pre-trial delay was prolonged as a result of the busy work schedule of the Pre-Trial Chamber, which was not in a position to deal expeditiously with his case as a result. See Gatete Appeal Brief, para. 38.

⁴⁸ Prosecution Response Brief, paras. 37-39, referring to, *inter alia*, Trial Judgement, paras. 61, 62. See also Prosecution Response Brief, para. 40. See also AT. 7 May 2012 pp. 22, 23.

⁴⁹ See Trial Judgement, paras. 61, 62.

(b) The Complexity of the Case

24. The Trial Chamber observed that this “single-accused case” could not be compared to “multi-accused trials which have run for years and involved hundreds of trial days with over a thousand exhibits and in excess of a hundred witnesses.”⁵⁰ Notwithstanding this assessment, the Trial Chamber considered that the number of counts and allegations, the nature of the crimes charged, and the modes of liability involved, indicated that the case against Gatete was complex in both fact and law.⁵¹ The Trial Chamber subsequently relied on this factor, among others, in concluding that though significant, the pre-trial delay was not undue and, therefore, did not warrant a remedy.⁵²

25. Gatete submits that the Trial Chamber erred in law and fact in finding that the pre-trial delay of over seven years was not undue, given the complexity of the Prosecution case.⁵³ He asserts that the Trial Chamber misapplied the legal standard in assessing the complexity of the case by taking into consideration the Defence case and the nature of the counts charged.⁵⁴ Gatete also submits that the Trial Chamber failed to substantiate its finding that the case against him comprised complex legal and factual issues, justifying a pre-trial delay of seven years.⁵⁵

26. In particular, Gatete submits that the Trial Chamber failed to acknowledge that the case against him was simple and small by the Tribunal’s standards.⁵⁶ In this regard, Gatete underscores that: (i) he was tried alone;⁵⁷ (ii) the Prosecution case against him was of short duration;⁵⁸ (iii) the Indictment was limited to a 24-day period;⁵⁹ (iv) no novel or complex legal issues were raised by motion or pre-trial briefing;⁶⁰ and (v) the nature of the evidence presented at trial was straightforward.⁶¹

⁵⁰ Trial Judgement, para. 60.

⁵¹ Trial Judgement, paras. 60, 64.

⁵² Trial Judgement, para. 64.

⁵³ Gatete Notice of Appeal, para. 5. *See also* AT. 7 May 2012 p. 17.

⁵⁴ Gatete Appeal Brief, paras. 18, 20.

⁵⁵ Gatete Appeal Brief, para. 24.

⁵⁶ Gatete Appeal Brief, paras. 19, 23. *See also* Gatete Reply Brief, para. 25. According to Gatete, this is evidenced by the fact that the Trial Judgement was delivered only four months and 21 days after the close of trial proceedings. *See* Gatete Appeal Brief, para. 26.

⁵⁷ Gatete Appeal Brief, para. 19. Gatete compares the duration of his own pre-trial delay with that of other accused before the Tribunal in complex, multi-accused cases, noting in particular that his pre-trial detention exceeded that of the accused in such cases. *See* Gatete Appeal Brief, paras. 12, 25, 55.

⁵⁸ Gatete Appeal Brief, para. 19.

⁵⁹ Gatete Reply Brief, para. 25. *See also* AT. 7 May 2012 p. 17. In his Appeal Brief, Gatete erroneously suggests that the period of time covered by the Indictment was limited to one week. *See* Gatete Appeal Brief, paras. 19, 55.

⁶⁰ Gatete Appeal Brief, para. 19.

⁶¹ Gatete Appeal Brief, para. 21. Gatete notes that all 22 witnesses called by the Prosecution were eye-witnesses who gave relatively short, uncomplicated testimony. *See* Gatete Appeal Brief, para. 21. *See also* Gatete Reply Brief, paras. 23, 25; AT. 7 May 2012 p. 17. Gatete also avers that of the 39 exhibits presented by the Prosecution, only one, a photograph, was anything other than a personal information sheet, prior witness statement, clinical prescription, judicial

27. The Prosecution responds that the Trial Chamber correctly assessed the complexity of the proceedings and properly considered the relevant factors in a manner consistent with established jurisprudence.⁶² The Prosecution submits that Gatete fails to appreciate that other factors may signify the complexity of a case, such as multiple crime sites, multiple theories and modes of liability, and multiple Prosecution and Defence witnesses and exhibits.⁶³ The Prosecution submits that the present case is akin to that of Tharcisse Renzaho, a single accused whose five-year pre-trial detention was deemed not to have constituted undue delay.⁶⁴

28. In reply, Gatete accepts that the nature of the Defence case has some relevance to the evaluation of the complexity of a case in the context of pre-trial delay.⁶⁵ He also argues that his case is less complex than that of Tharcisse Renzaho.⁶⁶

29. Whether a case is sufficiently complex to justify lengthy pre-trial detention is, in the view of the Appeals Chamber, a matter to be determined on a case-by-case basis.⁶⁷ In the present instance, the Trial Chamber correctly observed that the case against Gatete could not be compared to multi-accused trials, which run for years and involve hundreds of trial days, hundreds of witnesses, and over a thousand exhibits.⁶⁸ However, despite this assessment, the Trial Chamber found that the case was complex in light of the number of counts, allegations, and nature of the crimes charged.⁶⁹ The Appeals Chamber considers that the Trial Chamber erred in this regard. Although the Indictment alleges crimes pertaining to different modes of liability and several different incidents, the Prosecution was nonetheless able to present its case in 13 days.⁷⁰ Moreover, the whole trial in this single-accused case ran for only 30 days, during which 49 witnesses were called and 146 exhibits were admitted.⁷¹ Consequently, the Appeals Chamber does not consider that the allegations against

order, or list of names compiled in the course of witness testimony. *See* Gatete Appeal Brief, para. 22. *See also* AT. 7 May 2012 p. 17.

⁶² Prosecution Response Brief, paras. 28, 33, 34. According to the Prosecution, Gatete's assertions that the Trial Chamber erred by considering the scope of the Defence case and the nature of the counts are unsupported in law. *See* Prosecution Response Brief, para. 29. *See also* Prosecution Response Brief, paras. 30, 31. The Prosecution further argues that Gatete's submission that the Trial Chamber should not have considered the volume of evidence in the case as a whole but should have limited its assessment to the size of the Prosecution case, contradicts Gatete's approach at trial wherein he relied on "the case *as a whole*, including the number of Prosecution *and* Defence witnesses, and the number of Prosecution *and* Defence exhibits." The Prosecution maintains that Gatete cannot now fault the Trial Chamber for following the same approach. *See* Prosecution Response Brief, para. 32 (emphasis in original).

⁶³ Prosecution Response Brief, para. 35.

⁶⁴ Prosecution Response Brief, para. 36.

⁶⁵ Gatete Reply Brief, para. 23.

⁶⁶ Gatete Reply Brief, paras. 24, 25. *See also* Gatete Reply Brief, paras. 26, 27.

⁶⁷ *Cf. Renzaho* Appeal Judgement, paras. 238-240.

⁶⁸ Trial Judgement, para. 60.

⁶⁹ Trial Judgement, paras. 60, 64.

⁷⁰ Trial Judgement, Annex A, para. 14.

⁷¹ *See* Trial Judgement, para. 60. Moreover, the Appeals Chamber recognises that all 22 witnesses called by the Prosecution were eye-witnesses who gave relatively short, uncomplicated testimony, and that no expert witnesses were called.

Gatete justified a pre-trial delay of over seven years.⁷² Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding the case particularly complex and in relying on this as one of the factors to support its finding that the pre-trial delay was not undue.

(c) The Prejudice Occasioned by the Pre-Trial Delay

30. The Trial Chamber found that Gatete failed to demonstrate that he suffered prejudice as a result of the pre-trial delay.⁷³ It considered that Gatete had not shown that he was unable to contact specific witnesses because of the pre-trial delay, or that witnesses had died in the interval prior to the commencement of proceedings.⁷⁴ It noted that Gatete was able to present 27 witnesses at trial in response to the allegations against him.⁷⁵ The Trial Chamber also found that Gatete failed to raise the issue of delay during the pre-trial phase or in motions during the trial.⁷⁶ It concluded that Gatete's failure to inform the Trial Chamber of any difficulties he experienced in the preparation of his case until the submission of his Closing Brief indicated that there was minimal, if any, prejudice as a result of the pre-trial delay,⁷⁷ and observed that, once the trial commenced, it was conducted expeditiously.⁷⁸

31. Gatete submits that the Trial Chamber erred in law and fact in finding that he suffered minimal or no prejudice as a result of the pre-trial delay.⁷⁹ He argues that the Trial Chamber wrongly relied on his failure to object to the pre-trial delay as an indication that he suffered no prejudice.⁸⁰ He also argues that the Trial Chamber failed to consider various forms of prejudice resulting from the delay.⁸¹ The Appeals Chamber will consider these submissions in turn.

(i) Gatete's Failure to Object to the Pre-Trial Delay

32. Gatete submits that the Trial Chamber erred in finding that he failed to object to the undue delay during the pre-trial phase of proceedings.⁸² In support of this contention, he refers to a motion filed before the Pre-Trial Chamber on 25 May 2006, in which he objected to his lengthy pre-trial

⁷² The Appeals Chamber considers that, although the Trial Chamber erred in its evaluation of the complexity of the case, it took into account the correct factors, including the fact that the case had been selected for referral to Rwanda pursuant to Rule 11 *bis* of the Rules. See Trial Judgement, para. 64.

⁷³ Trial Judgement, para. 63.

⁷⁴ Trial Judgement, para. 63.

⁷⁵ Trial Judgement, para. 63.

⁷⁶ Trial Judgement, para. 63.

⁷⁷ Trial Judgement, para. 63.

⁷⁸ Trial Judgement, para. 64.

⁷⁹ Gatete Notice of Appeal, para. 6; Gatete Appeal Brief, paras. 15, 42.

⁸⁰ Gatete Appeal Brief, para. 42. See also AT. 7 May 2012 p. 18.

⁸¹ Gatete Notice of Appeal, paras. 4, 6; Gatete Appeal Brief, paras. 42, 47, 48, 51-54. See also AT. 7 May 2012 pp. 18, 20.

⁸² Gatete Notice of Appeal, para. 4; Gatete Appeal Brief, para. 42. See also AT. 7 May 2012 p. 18.

detention.⁸³ In the motion, Gatete asserted that he suffered considerable prejudice as a result of the delay, including: (i) the deprivation of his liberty; (ii) his difficulty in locating certain Defence witnesses who had either moved or died; (iii) the effect of the passage of time on the memory of Defence witnesses; (iv) his difficulty in conducting investigations due to the financial constraints imposed by the Registrar as a result of the uncertainty of the trial date; and (v) the absence of any indication from the Prosecution of its intention to proceed to trial.⁸⁴ According to Gatete, this motion was never translated or addressed and no decision was ever rendered in respect thereof.⁸⁵

33. The Prosecution responds that, in his Closing Brief, Gatete wrongly stated that he had failed to object to the delay in the pre-trial phase of proceedings, and cannot consequently fault the Trial Chamber for accepting his statement at face value.⁸⁶ It also argues that over the years the motion remained pending, Gatete never once pressed for its resolution.⁸⁷

34. Gatete replies that the error in his Closing Brief should not prejudice him and “should not relieve the Trial Chamber of its duty to know what ha[d] been filed in the case.”⁸⁸ He claims that the Trial Chamber’s failure to address his Motion of 25 May 2006 is further evidence that he suffered prejudice as a result of the passage of time and the lack of continuity occasioned by the delay.⁸⁹

35. Although Gatete mistakenly conceded at trial that he had failed to object to the pre-trial delay until the submission of his Closing Brief,⁹⁰ the Appeals Chamber notes that Gatete clearly raised an objection to the length of the pre-trial delay in his Motion of 25 May 2006.⁹¹ Accordingly, the Trial Chamber was not entitled to rely upon his failure to raise such objection as a factor in finding that Gatete suffered minimal, if any, prejudice as a result of the delay. The Appeals Chamber therefore finds that the Trial Chamber erred in this regard.

⁸³ Gatete Notice of Appeal, para. 4; Gatete Appeal Brief, paras. 33, 43, 47, referring to *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-I, *Requête de la Défense aux fins de fixation de la date d’ouverture du procès*, 25 May 2006 (“Motion of 25 May 2006”). The Appeals Chamber notes that this motion was also stamped as received by the Registry on 29 May 2006.

⁸⁴ Motion of 25 May 2006, paras. 5-7. See also Gatete Appeal Brief, para. 44.

⁸⁵ Gatete Appeal Brief, para. 33.

⁸⁶ Prosecution Response Brief, para. 42. The Prosecution further submits that the issue of pre-trial delay was only broadly raised in the Motion of 25 May 2006 and contends that Gatete failed to provide sufficient detail in support of his general allegations. See Prosecution Response Brief, para. 43.

⁸⁷ Prosecution Response Brief, para. 44.

⁸⁸ Gatete Reply Brief, para. 28.

⁸⁹ Gatete Reply Brief, para. 28.

⁹⁰ See Gatete Closing Brief, para. 1237.

⁹¹ Motion of 25 May 2006, paras. 2, 5, 8.

(ii) The Trial Chamber's Failure to Consider Various Forms of Prejudice

36. Gatete submits that the Trial Chamber erred in failing to consider various forms of prejudice he suffered as a result of the pre-trial delay.⁹² In particular, he claims that the Trial Chamber failed to consider the prejudice to: (i) his physical and psychological health;⁹³ (ii) his ability to prepare his defence and conduct the necessary investigations;⁹⁴ and (iii) his ability to meaningfully defend against the charges given the passage of time.⁹⁵

37. With respect to his physical and psychological health, Gatete claims that, since his arrest in 2002, he has suffered from a number of physical ailments, which he developed in the United Nations Detention Facility, and spent seven years deprived of an opportunity to care for his family, which was thrown into poverty.⁹⁶ Gatete further underscores that such detention is worse than incarceration imposed by sentence because the accused cannot count the days until his release.⁹⁷

38. With respect to the preparation of his defence, Gatete submits that the Trial Chamber erred in failing to analyse the impact of the Registrar's decision to withhold legal aid funding and travel authorisation in the absence of a trial date being set, an argument he had previously raised in the Motion of 25 May 2006.⁹⁸ In addition, he asserts that his inordinately long detention during the pre-trial phase, coupled with the highly accelerated pace of the trial, resulted in a serious inequality of arms in the preparation of the case: the Defence being afforded just three and a half months, in contrast to the seven-year period accorded to the Prosecution.⁹⁹ Gatete underscores that the Defence was confronted with the additional difficulty of finding evidence 15 years after the events, causing him yet further prejudice.¹⁰⁰

39. As to his ability to present his defence, Gatete maintains that the Trial Chamber failed to appreciate that the undue delay undermined his ability to effectively test the Prosecution case against him.¹⁰¹ He emphasises that the Trial Chamber repeatedly relied on the passage of time to excuse defects in Prosecution evidence, which rendered the task of meaningfully challenging witnesses impossible.¹⁰² In addition, Gatete contends that by the time the site visit took place in October 2010, the Rwankuba sector office had been destroyed, depriving him of any chance of

⁹² Gatete Notice of Appeal, para. 6; Gatete Appeal Brief, para. 42.

⁹³ Gatete Appeal Brief, para. 47.

⁹⁴ Gatete Appeal Brief, paras. 52-54. *See also* AT. 7 May 2012 p. 18.

⁹⁵ Gatete Appeal Brief, paras. 48-51. *See also* AT. 7 May 2012 p. 18.

⁹⁶ Gatete Appeal Brief, para. 47. *See also* AT. 7 May 2012 p. 20.

⁹⁷ Gatete Appeal Brief, para. 46.

⁹⁸ Gatete Appeal Brief, para. 52, referring to Motion of 25 May 2006, para. 6. *See also* Gatete Reply Brief, para. 29.

⁹⁹ Gatete Appeal Brief, paras. 53, 54.

¹⁰⁰ *See* Gatete Appeal Brief, para. 54. *See also* AT. 7 May 2012 p. 18.

¹⁰¹ Gatete Appeal Brief, paras. 49, 51. *See also* AT. 7 May 2012 p. 20.

¹⁰² Gatete Notice of Appeal, para. 6; Gatete Appeal Brief, para. 48.

confronting two Prosecution witnesses with the inconsistencies in their testimonies with regard to distance and obstructions.¹⁰³ Gatete claims that the cross-examination of the witnesses was not a complete substitute for being able to actually observe a witness's vantage point.¹⁰⁴

40. The Prosecution responds that the Trial Chamber correctly found that Gatete had failed to demonstrate prejudice resulting from the pre-trial delay.¹⁰⁵ In particular, the Prosecution asserts that, contrary to Gatete's submissions on appeal, Gatete had at least five years to prepare his case prior to the commencement of trial.¹⁰⁶ Referring to the Pre-Trial Chamber's decision issued on 2 November 2004, the Prosecution notes that on 7 July, 23 August, and 17 September 2004, the Registrar authorised work programmes for the Defence to interview more than 100 potential witnesses located in Africa.¹⁰⁷

41. With respect to the alleged prejudicial effect on his health, the Appeals Chamber notes that Gatete mentions high blood pressure and chronic diabetes, which he claims to have suffered since his arrest in 2002.¹⁰⁸ However, Gatete does not provide any medical statement in support of his allegation that the lengthy pre-trial delay caused him physical and psychological suffering. Nor does he present any argument to support his claim that these medical issues were caused by his pre-trial detention or that the Trial Chamber erred by not assessing this factor. Equally, Gatete does not substantiate his claim that his family's poverty was caused by his pre-trial detention. His arguments are accordingly dismissed.

42. The Appeals Chamber considers Gatete's submissions that the Trial Chamber erred in failing to consider the prejudice to his ability to prepare his defence and conduct necessary investigations to be without merit. Gatete has failed to demonstrate that the Trial Chamber erred in failing to consider the effect of the Registrar's decision to withhold legal aid funds and travel authorisation on his ability to prepare his defence, prior to a trial date being set. Gatete does not point to any additional investigations he would have conducted with any supplementary funding, and has failed to show how his ability to contact witnesses or identify exculpatory material was impaired by the pre-trial delay. In these circumstances, the Appeals Chamber considers that Gatete has failed to demonstrate that the Trial Chamber erred in failing to consider this factor in

¹⁰³ Gatete Appeal Brief, para. 50. *See also* AT. 7 May 2012 p. 20.

¹⁰⁴ Gatete Reply Brief, para. 33.

¹⁰⁵ Prosecution Response Brief, para. 46. *See also* Prosecution Response Brief, paras. 48-52; AT. 7 May 2012 pp. 23, 24.

¹⁰⁶ Prosecution Response Brief, para. 47.

¹⁰⁷ Prosecution Response Brief, para. 47, referring to *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-I, Decision on the Defence Request for Necessary Resources for Investigations, 2 November 2004, para. 6. *See also* AT. 7 May 2012 p. 24. The Prosecution also observes that at the time the decision was issued, one of the Defence investigators had already interviewed 24 witnesses while another had interviewed an indeterminate number of witnesses. *See* Prosecution Response Brief, para. 47.

determining whether he suffered prejudice as a result of the pre-trial delay. Consequently, the Appeals Chamber finds that Gatete has failed to show that the Trial Chamber erred in concluding that his ability to prepare his defence was not prejudiced by the pre-trial delay.

43. Contrary to Gatete's argument that the Trial Chamber failed to consider the prejudice to his ability to meaningfully present his defence, the Trial Chamber explicitly took into consideration the fact that Gatete was able to present 27 witnesses at trial in response to the allegations against him.¹⁰⁹ Moreover, the Appeals Chamber considers that Gatete has failed to substantiate his general claim that the Trial Chamber unreasonably relied on the passage of time to justify inconsistencies in Prosecution evidence and that he was unable to effectively cross-examine Prosecution witnesses.¹¹⁰ Gatete has also failed to show how the inability to observe the Rwankuba sector office during the site visit, due to its destruction, undermines the Trial Chamber's assessment of the evidence relating to the events in Rwankuba.¹¹¹ In this regard, Gatete has failed to demonstrate that his cross-examination of Prosecution witnesses was insufficient for the purposes of challenging any inconsistencies in their testimonies about the events in Rwankuba sector.¹¹² Accordingly, Gatete has not shown that his ability to present his defence was prejudiced by the pre-trial delay. Gatete's arguments in this regard are therefore dismissed.

44. Notwithstanding Gatete's failure to demonstrate that his ability to prepare or present his defence case was prejudiced by the delay, the Appeals Chamber finds that the pre-trial delay of more than seven years was undue given that the case against Gatete was not particularly complex. In the circumstances of this case, the Appeals Chamber considers that this protracted delay and the resulting prolonged pre-trial detention constitute prejudice *per se*.

(d) Conclusion

45. In light of the foregoing, the Appeals Chamber considers that the Trial Chamber erred in finding that the length of Gatete's pre-trial detention was not undue given that it explicitly noted that the conduct of the Prosecution and the relevant authorities resulted in instances of pre-trial delay that could not be explained or justified. Moreover, the Trial Chamber erred in finding that the case against Gatete was sufficiently complex to justify, in part, a pre-trial delay of more than seven years. Notwithstanding the necessary interval for pre-trial procedure, and the selection of the case for referral to Rwanda pursuant to Rule 11 *bis* of the Rules, the Appeals Chamber considers that the

¹⁰⁸ See Gatete Appeal Brief, para. 47.

¹⁰⁹ See Trial Judgement, para. 63.

¹¹⁰ The Appeals Chamber will consider below Gatete's challenges to the Trial Chamber's assessment of the Prosecution witnesses. See *infra*, Section III.B.

¹¹¹ See *infra*, Section III.A.2.(a)(i).

¹¹² See *infra*, Section III.B.1.(a).

extent of pre-trial delay disproportionately exceeded the time reasonable for a case of such a relatively limited scope and scale¹¹³ and constitutes prejudice *per se*. Consequently, the Appeals Chamber finds that Gatete's right to be tried without undue delay was violated and grants his first ground of appeal. The Appeals Chamber will take these findings into consideration in determining an appropriate remedy below.¹¹⁴

2. Alleged Errors Relating to the Site Visit (Ground 2)

46. At the status conference held on 29 March 2010, the Trial Chamber decided, *proprio motu*, that a site visit to Rwanda was appropriate in this case¹¹⁵ and subsequently invited submissions from the parties on the matter.¹¹⁶ On 17 June 2010, the Trial Chamber denied Gatete's request to postpone the site visit and issued an itinerary for the site visit as well as modalities for its conduct.¹¹⁷ The Trial Chamber conducted the site visit from 26 to 31 October 2010.¹¹⁸ Following the site visit, the Registry filed its Report on the Site Visit and the parties filed their related submissions.¹¹⁹

47. Gatete submits that the Trial Chamber failed to observe the minimum standards of fairness in the conduct of the site visit, which violated his right to a fair trial.¹²⁰ He asserts that the Trial Chamber's errors invalidate the Trial Judgement and that, as a result, the Appeals Chamber should quash his convictions.¹²¹ Gatete challenges the manner in which the site visit was conducted in

¹¹³ See *supra*, Section III.A.1.(b).

¹¹⁴ See *infra*, Section V.B.

¹¹⁵ Status Conference, T. 29 March 2010 p. 3. See also Trial Judgement, Annex A, para. 22.

¹¹⁶ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Scheduling Order for Filing of Closing Briefs, Hearing of Closing Arguments and Site Visit to Rwanda, 31 March 2010, p. 2. See also Trial Judgement, Annex A, para. 22. The Defence and the Prosecution filed submissions on the site visit on 30 April 2010 and 24 May 2010. See *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Submissions on the Site Visit, 30 April 2010 ("Gatete Submissions on the Proposed Site Visit"); *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Supplemental Submissions on the Site Visit, confidential, 24 May 2010 ("Gatete Supplemental Submissions on the Proposed Site Visit"); *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Prosecutor's Submissions Regarding Pending Site Visit, 24 May 2010. See also *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Decision on Site Visit to Rwanda, 17 June 2010 ("Decision of 17 June 2010"), para. 1, fn. 2, referring to an Interoffice Memorandum from Prosecution Counsel to the Chamber with a copy to the Defence dated 28 April 2010 which is not part of the case file.

¹¹⁷ Decision of 17 June 2010, pp. 5, 6, Annex A, confidential. See also Trial Judgement, Annex A, para. 23.

¹¹⁸ Exhibit C1 (Report on Site Visit, Gatete Case, 26 to 31 October 2010) ("Report on the Site Visit"). See also Trial Judgement, Annex A, para. 23. The Trial Judgement incorrectly lists the dates of the site visit as 16 to 31 October 2010 whereas the dates were in fact 26 to 31 October 2010.

¹¹⁹ Report on the Site Visit; *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Defence Submissions Regarding the Site Visit of 26-31 October 2010, confidential, 5 November 2010 ("Gatete Submissions on the Completed Site Visit"); *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Prosecutor's Submissions Regarding Completed Site Visit, 5 November 2010. See also Trial Judgement, Annex A, para. 23.

¹²⁰ Gatete Notice of Appeal, para. 8; Gatete Appeal Brief, paras. 6, 59, 63.

¹²¹ Gatete Notice of Appeal, para. 9; Gatete Appeal Brief, para. 88.

relation to Rwankuba sector, Mukarange parish, and Kiziguro parish.¹²² The Appeals Chamber will consider these arguments in turn.

(a) Alleged Errors Relating to Rwankuba Sector

48. Gatete submits that the Trial Chamber erred when it failed to make relevant observations on the hiding places of Prosecution Witnesses BBR and AIZ during the site visit in order to assess the reliability of their testimonies.¹²³ In particular, Gatete argues that the Trial Chamber erred by failing to: (i) include Witness BBR's hiding place in the site visit itinerary and to view the hiding places of Witnesses BBR and AIZ during the site visit;¹²⁴ (ii) hear the parties' observations during the site visit;¹²⁵ and (iii) ensure that a comprehensive report of the site visit was issued and to provide a reasoned opinion in the Trial Judgement.¹²⁶

(i) Alleged Failure to Include Witness BBR's Hiding Place in the Itinerary and to View the Hiding Places of Witnesses BBR and AIZ During the Site Visit

49. Gatete submits that the Trial Chamber erred by not including the hiding place of Witness BBR in its itinerary.¹²⁷ He further asserts that the Trial Chamber should have viewed the hiding places of both Witnesses BBR and AIZ on the site visit.¹²⁸ He argues that, although he originally opposed the site visit, once it had been ordered, he requested "observations in connection with, [*inter alia*], all locations for which convictions were entered", including the hiding places of Witnesses BBR and AIZ.¹²⁹ Gatete claims that, as a result, he was denied a fair opportunity to have the evidence objectively tested and was prejudiced by these errors.¹³⁰ According to Gatete, had the proper procedures been followed, the Trial Chamber would have discredited the evidence of Witnesses BBR and AIZ.¹³¹

50. Gatete adds that he was prejudiced by the fact that the Rwankuba sector office buildings had been destroyed prior to the site visit,¹³² which precluded the Trial Chamber from determining the

¹²² Gatete Appeal Brief, paras. 64-86.

¹²³ Gatete Appeal Brief, para. 64.

¹²⁴ Gatete Appeal Brief, paras. 65-69.

¹²⁵ Gatete Notice of Appeal, para. 8; Gatete Appeal Brief, paras. 70, 71.

¹²⁶ Gatete Appeal Brief, paras. 72-77.

¹²⁷ Gatete Appeal Brief, para. 66. *See also* AT, 7 May 2012 p. 6.

¹²⁸ Gatete Appeal Brief, para. 69. *See also* Gatete Reply Brief, para. 41; AT, 7 May 2012 p. 6.

¹²⁹ Gatete Appeal Brief, fn. 54. *See also* Gatete Appeal Brief, para. 65; Gatete Reply Brief, para. 39.

¹³⁰ Gatete Appeal Brief, paras. 59, 78.

¹³¹ Gatete Appeal Brief, paras. 63, 78. *See also* Gatete Appeal Brief, para. 64.

¹³² Gatete Appeal Brief, para. 68.

orientation of the buildings and the courtyard where the meeting of 7 April 1994 allegedly took place.¹³³

51. The Prosecution responds that Gatete exceeds the scope of his Notice of Appeal by arguing in his Appeal Brief that, had the site visit been properly conducted, the Trial Chamber would not have found the witnesses credible.¹³⁴ It submits that these additional arguments should accordingly be dismissed.¹³⁵ As to the merits of Gatete's arguments, the Prosecution asserts that Gatete fails to demonstrate any error on the part of the Trial Chamber and that, in any event, the site visit findings were neither crucial to nor determinative of the Trial Chamber's findings on his guilt.¹³⁶

52. Gatete replies that his Appeal Brief does not exceed the scope of his Notice of Appeal as his challenges to the credibility of the witnesses were introduced to demonstrate the prejudice he suffered from the unfair conduct of the site visit.¹³⁷

53. The Appeals Chamber notes that, in his Notice of Appeal, Gatete did not specifically raise any issue of witness credibility in the section on the site visit.¹³⁸ Nonetheless, Gatete's arguments relating to the credibility of Witnesses BBR and AIZ are made to demonstrate that he allegedly suffered prejudice as a result of the manner in which the site visit was conducted.¹³⁹ As such, the Appeals Chamber does not consider that Gatete's arguments in his Appeal Brief impermissibly expand those contained in his Notice of Appeal.

54. The Appeals Chamber recalls that the Trial Chamber has the discretion to decide whether a site visit is necessary or relevant in the assessment of evidence.¹⁴⁰ As such, the Appeals Chamber considers that the determination of the itinerary is also within the discretion of the Trial Chamber. The Appeals Chamber's consideration is therefore limited to determining whether the Trial Chamber abused its discretion by not including Witness BBR's hiding place in the itinerary and by not making observations on the hiding places of Witnesses BBR and AIZ.

55. The Trial Chamber's itinerary indicated that the site visit would include the location of the former Rwankuba sector office buildings but it did not include the hiding place of Witness BBR.¹⁴¹ The Appeals Chamber notes that Witness BBR's ability to observe the meeting from his hiding

¹³³ Gatete Appeal Brief, para. 68.

¹³⁴ Prosecution Response Brief, para. 55.

¹³⁵ Prosecution Response Brief, para. 55.

¹³⁶ Prosecution Response Brief, paras. 64, 65, 67, 68, 72.

¹³⁷ Gatete Reply Brief, para. 36.

¹³⁸ See Gatete Notice of Appeal, paras. 8, 9.

¹³⁹ Gatete Appeal Brief, para. 78.

¹⁴⁰ *Munyakazi* Appeal Judgement, para. 76; *Simba* Appeal Judgement, para. 16, citing *Galić* Appeal Judgement, para. 50.

¹⁴¹ See Decision of 17 June 2010, Annex A, p. 2.

place was a point of contention at trial.¹⁴² Nonetheless, the Appeals Chamber is not convinced that the Trial Chamber abused its discretion by not including Witness BBR's hiding place in the site visit itinerary. The Appeals Chamber observes that in his submissions on the proposed site visit, Gatete indicated that "a site visit is not necessary in order for the [Trial] Chamber to make a determination on the evidence heard",¹⁴³ and specifically that he did not consider that it would be appropriate for the Trial Chamber to visit Rwankuba sector.¹⁴⁴ Gatete did assert that Witness BBR's hiding place should be visited if, notwithstanding his objection, Rwankuba sector were part of the itinerary.¹⁴⁵ However, Gatete did not object to Witness BBR's hiding place not being included on the itinerary either prior to or after the site visit.¹⁴⁶ Consequently, it appears that Gatete did not consider it essential to his case that the site visit include Witness BBR's hiding place. Accordingly, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber abused its discretion by not including the hiding place of Witness BBR in the site visit itinerary. The Appeals Chamber will consider below Gatete's challenges to the Trial Chamber's evaluation of Witness BBR's evidence about his hiding place.¹⁴⁷

56. With respect to Gatete's arguments concerning Witness AIZ, the Appeals Chamber notes that Witness AIZ mentioned having hidden in two different places on 7 April 1994. The first hiding place was the spot from where he observed the meeting at the Rwankuba sector office buildings.¹⁴⁸ The second hiding place was on a sorghum farm, where Witness AIZ stayed with his family after the meeting on 7 April 1994 until 10 p.m. before fleeing to Giti commune.¹⁴⁹ The first hiding place was not included in the site visit itinerary¹⁵⁰ and Gatete did not request that the Trial Chamber

¹⁴² Witness BBR, T. 11 November 2009 pp. 21-24. *See also* Gatete Closing Brief, para. 281 (Gatete challenged whether Witness BBR could have observed the 7 April 1994 meeting from his hiding spot and stated that "the site visit will illustrate that it is not possible that [Witness] BBR was hiding behind this row of houses, and still be 20-25 metres away from the Rwankuba Secteur Office.").

¹⁴³ Gatete Submissions on the Proposed Site Visit, para. 3; Gatete Supplemental Submissions on the Proposed Site Visit, para. 2. *See also* Status Conference, T. 29 March 2010 p. 3.

¹⁴⁴ Gatete Submissions on the Proposed Site Visit, para. 15. *See also* Gatete Supplemental Submissions on the Proposed Site Visit, para. 10. Gatete listed a number of locations that, in his view, should be visited if a site visit were to be undertaken (*see* Gatete Submissions on the Proposed Site Visit, paras. 4-10; Gatete Supplemental Submissions on the Proposed Site Visit, paras. 4-8). However, Rwankuba sector was not included in this list but rather in a separate list of locations which Gatete submitted were "not appropriate" to be visited (*see* Gatete Submissions on the Proposed Site Visit, paras. 11, 14-18; Gatete Supplemental Submissions on the Proposed Site Visit, para. 10).

¹⁴⁵ Notwithstanding his objection to visiting Rwankuba sector, Gatete requested that "[s]hould the Chamber decide that it still intends to visit Rwankuba [sector] despite the destruction of the buildings of seminal relevance to the case", the Trial Chamber should note "[t]he inability to hear a conversation from within the eucalyptus plantation 20 steps from Paul NKURUNZIZA's house at the former site of the Rwankuba Secteur Office (affecting the credibility of [Witness] BBR)." *See* Gatete Submissions on the Proposed Site Visit, para. 17. *See also* Gatete Supplemental Submissions on the Proposed Site Visit, para. 10.

¹⁴⁶ *See* Gatete Submissions on the Completed Site Visit, para. 16; Gatete Closing Arguments, T. 8 November 2010 pp. 46, 47.

¹⁴⁷ *See infra*, Section III.B.1.

¹⁴⁸ Witness AIZ, T. 11 November 2009 pp. 47, 48, 51, 52, 60.

¹⁴⁹ Witness AIZ, T. 11 November 2009 pp. 62-63. *See also* Decision of 17 June 2010, Annex A, p. 2.

¹⁵⁰ *See* Decision of 17 June 2010, Annex A, p. 2.

include it.¹⁵¹ Rather, Gatete requested that the second hiding place on the sorghum farm be visited.¹⁵² The Trial Chamber duly included the second hiding place in the itinerary but did not visit it.¹⁵³ The Appeals Chamber notes that all of Gatete's arguments concerning Witness AIZ's "hiding place" are premised on the mistaken assumption that he himself requested that the Trial Chamber include the first hiding place in the site visit itinerary when in fact he only sought to visit the second hiding place. Furthermore, the Appeals Chamber notes that the first hiding place was never a point of contention at trial. Gatete did not challenge Witness AIZ's credibility on the basis of his ability to observe the meeting at the sector office from the first hiding place.¹⁵⁴ Based on the foregoing, Gatete's arguments with respect to Witness AIZ are therefore dismissed.¹⁵⁵

57. As to Gatete's argument that he was prejudiced by the fact that the Rwankuba sector office had been destroyed prior to the site visit, the Appeals Chamber recalls that, despite its destruction and his opposition to visiting it,¹⁵⁶ the Trial Chamber visited the sector office's location on the site visit.¹⁵⁷ The Trial Chamber was therefore able to note its location and gain a general perspective of the area. While the demolition of the building might have precluded the Trial Chamber from observing the specific location of the courtyard where Witness BBR placed Gatete, Gatete has failed to demonstrate how the Trial Chamber's assessment of Witness BBR's evidence could have been impacted by its observation of the courtyard. The Appeals Chamber observes that the Trial Chamber found Witness BBR's evidence to be "consistent and compelling" and that it did not have any reservations about the witness's ability to observe events in the Rwankuba sector office courtyard from his hiding place.¹⁵⁸ The Appeals Chamber recalls that it has found no error in this

¹⁵¹ See Gatete Submissions on the Proposed Site Visit, para. 17; Gatete Supplemental Submissions on the Proposed Site Visit, para. 10.

¹⁵² See Gatete Submissions on the Proposed Site Visit, para. 17(iii); Gatete Supplemental Submissions on the Proposed Site Visit, para. 10(iii).

¹⁵³ See Report on the Site Visit, fn. 9; Decision of 17 June 2010, Annex A, p. 2. The Appeals Chamber notes that Gatete did not object to the second hiding place not having been identified either during or after the site visit. See Gatete Submissions on the Completed Site Visit, para. 16; Gatete Closing Arguments, T. 8 November 2010 pp. 46, 47.

¹⁵⁴ See T. 11 November 2009 pp. 52-73; Gatete Closing Brief, paras. 270-278; Gatete Closing Arguments, T. 8 November 2010 pp. 46, 47.

¹⁵⁵ In addition to the arguments related to this section, the following arguments are dismissed on the same basis: (i) the Trial Chamber's alleged failure to hear the parties during the site visit by not allowing the parties to make observations during the site visit in relation to the identification of the hiding place of Witness AIZ (see Gatete Appeal Brief, para. 71); (ii) the alleged absence of any measurements or observations related to the identification of the hiding place of Witness AIZ in the Report of the Site Visit (see Gatete Appeal Brief para. 72); (iii) the alleged absence of explanation in the Report of the Site Visit as to why the Trial Chamber was not able to observe the locations of the hiding places of Witnesses AIZ and BBT (see Gatete Appeal Brief, para. 74); and (iv) the alleged failure to explain in the Trial Judgement why the hiding place of Witness AIZ was not viewed during the site visit (see Gatete Appeal Brief, para. 77).

¹⁵⁶ Gatete asserted that "there is no utility in this exercise, as four days after the announcement of a site visit in this case, the former Rwankuba Secteur Office buildings were destroyed. As such, the [Trial] Chamber is precluded from determining whether the Rwankuba Secteur Office building was visible from the various vantage points as alleged in this case." See Gatete Submissions on the Proposed Site Visit, para. 15.

¹⁵⁷ Report on the Site Visit, para. 10, fn. 8.

¹⁵⁸ See Trial Judgement, paras. 134, 143.

respect.¹⁵⁹ Therefore, the Appeals Chamber finds that Gatete has failed to demonstrate that he was prejudiced by the destruction of the building prior to the site visit.

58. In light of the foregoing, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred by not including the hiding place of Witness BBR in the site visit itinerary and that he was prejudiced by the destruction of the Rwankuba sector office. The Appeals Chamber also dismisses Gatete's arguments with respect to Witness AIZ.

(ii) Alleged Failure to Hear Parties' Submissions During the Site Visit

59. In his Submissions on the Proposed Site Visit, Gatete requested that the parties be given the opportunity to make submissions while on site in order to correct any errors arising from the Registry's determination of where particular sites were located and to explain the relevance of particular sites to the evidence heard in this case.¹⁶⁰ In its Decision of 17 June 2010, the Trial Chamber decided that it would not allow the parties to make oral submissions at the sites, "save where there might be an issue as to whether a site is incorrect."¹⁶¹

60. Gatete submits that the Trial Chamber's decision not to allow observations from the parties during the site visit did not conform to the Practice Direction on Site Visits¹⁶² and amounted to an abuse of discretion.¹⁶³ He asserts that this prohibition prevented the Defence from making observations during the site visit in relation to the failure to identify the hiding place of Witness BBR, and that he was thus denied his right to counsel and to confront the evidence.¹⁶⁴

61. The Prosecution responds that the Appeals Chamber should dismiss this argument because the Practice Direction on Site Visits is permissive and discretionary with respect to hearing the parties during a site visit and Gatete has failed to demonstrate that the Trial Chamber abused its discretion.¹⁶⁵

62. The Practice Direction on Site Visits states that "[w]here necessary, Counsel for the Prosecution and the Defence may make observations for the record of a strictly factual nature".¹⁶⁶ The Appeals Chamber considers that Gatete has failed to demonstrate that the Trial Chamber abused its discretion in its Decision of 17 June 2010. The Trial Chamber disallowed commentary on the events but allowed factual comments to the extent it deemed them necessary, *i.e.* where

¹⁵⁹ See *infra*, paras. 86, 87.

¹⁶⁰ Gatete Submissions on the Proposed Site Visit, para. 22.

¹⁶¹ Decision of 17 June 2010, para. 10, p. 5.

¹⁶² Practice Direction on Site Visits, 3 May 2010 ("Practice Direction on Site Visits").

¹⁶³ Gatete Appeal Brief, para. 70; Gatete Reply Brief, para. 38; AT, 7 May 2012 p. 5.

¹⁶⁴ Gatete Appeal Brief, para. 71.

¹⁶⁵ Prosecution Response Brief, paras. 58-61.

necessary to ensure that the correct sites were identified. Although the parameters set out by the Trial Chamber prevented Gatete from commenting on Witness BBR's hiding place during the site visit, given that it was not included in the itinerary, Gatete could have challenged this prior to the site visit but did not do so. In this regard, the Appeals Chamber notes that the Trial Chamber provided the parties with the opportunity to make submissions both before and after the site visit. Accordingly, the Appeals Chamber dismisses Gatete's arguments in this respect.

(iii) Alleged Failure to Provide a Reasoned Opinion Regarding the Site Visit

63. Gatete submits that the Trial Chamber failed to ensure that the Report on the Site Visit contained sufficient detail.¹⁶⁷ In particular, Gatete asserts that it did not include any measurements or observations made by the court as to the location of the hiding place of Witness BBR.¹⁶⁸ Gatete also argues that the Trial Chamber failed to explain in the Trial Judgement why the hiding place of Witness BBR was not viewed on the site visit or to address the destruction of the Rwankuba sector office or the sites requested to be visited by the parties in general.¹⁶⁹ Gatete claims that this failure to provide a reasoned opinion in connection with the site visit denied him a right to appeal.¹⁷⁰

64. The Prosecution responds that the Trial Chamber was not required to explain every finding and that it did, in any event, provide a reasoned opinion in the Report on the Site Visit and the Trial Judgement.¹⁷¹

65. With respect to the argument that the Trial Judgement failed to address the destruction of the Rwankuba sector office or the sites requested to be visited by the parties, the Appeals Chamber recalls that a trial chamber must provide a reasoned opinion in the trial judgement; however, this requirement relates to the trial judgment as a whole, not to each submission made at trial.¹⁷² As to the argument related to Witness BBR, the Appeals Chamber recalls that a detailed record of a trial chamber's site visit should normally be maintained.¹⁷³ However, in light of the fact that Witness BBR's hiding place was not included in the site visit itinerary, the Appeals Chamber finds no error in it not being noted in the Report on the Site Visit or discussed in the Trial Judgement with reference to the site visit. Accordingly, Gatete's arguments on the alleged failure to provide a reasoned opinion are dismissed.

¹⁶⁶ See Practice Direction on Site Visits, para. 5.4.

¹⁶⁷ Gatete Appeal Brief, para. 75.

¹⁶⁸ Gatete Appeal Brief, para. 72.

¹⁶⁹ Gatete Appeal Brief, para. 77.

¹⁷⁰ Gatete Appeal Brief, paras. 77, 87.

¹⁷¹ Prosecution Response Brief, paras. 76, 77.

¹⁷² See, e.g., *Nchamihigo* Appeal Judgement, para. 165; *Karera* Appeal Judgement, para. 20. See also *Krajišnik* Appeal Judgement, para. 139; *Limaj et al.* Appeal Judgement, para. 81.