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UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Carmel Agius

Registrar: **Mr. Adama Dieng**

Decision of: **23 March 2011**

Ephrem SETAKO

v.

THE PROSECUTOR

Case No. ICTR-04-81-A

PUBLIC REDACTED VERSION

DECISION ON EPHREM SETAKO'S MOTION TO AMEND HIS NOTICE OF APPEAL AND MOTION TO ADMIT EVIDENCE

Counsel for Ephrem Setako
Prof. Lennox Hinds

Office of the Prosecutor
Mr. Hassan Bubacar Jallow
Ms. Deborah Wilkinson

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 the "Motion for Leave to Amend Notice of Appeal", filed by Ephrem Setako ("Setako") on 21 July 2010 ("Motion to Amend the Notice of Appeal"),[1] and the "Appellant's Motion Pursuant to Rule 68 and Rule 115 of the R.P.E[.]", filed confidentially by Setako on 8 September 2010 ("Motion to Admit Evidence") (collectively, "Motions"). The briefing relating to the Motions is complete.[2] As the issues raised in the Motions are intertwined, the Appeals Chamber will consider them both in the present decision.

I. BACKGROUND

2. On 25 February 2010, Trial Chamber I of the Tribunal ("Trial Chamber") convicted Setako of genocide, extermination as a crime against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, and sentenced him to 25 years of imprisonment.[3]

3. Setako's convictions are based on the Trial Chamber's findings that: (i) on 25 April 1994, he addressed a gathering of soldiers and militiamen at Mukamira military camp, in Ruhengeri prefecture, and ordered the killing of the Tutsis who had sought refuge there ("Mukamira camp" and "25 April Meeting", respectively), and that, as a result, 30 to 40 refugees were killed;[4] and (ii) on 11 May 1994, Setako brought nine or ten Tutsis to Mukamira camp and ordered their killing, which followed.[5] In reaching these findings, the Trial Chamber relied on the testimony of Prosecution Witnesses SLA and SAT.[6]

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[1] Along with the Motion to Amend the Notice of Appeal, Setako filed a proposed Amended Notice of Appeal ("Proposed Amended Notice of Appeal"). *See* Motion to Amend the Notice of Appeal, Annex 1.
[2] *See* Prosecutor's Response to Defendant's Motion for Leave to Amend Notice of Appeal (including Annexes I and II), 2 August 2010 (confidential) ("Prosecution Response to Motion to Amend the Notice of Appeal"); Reply to the Prosecutor's Opposition to the Appellant's Motion for Leave to Amend Notice of Appeal, 5 August 2010 (confidential); Prosecutor's Response to Appellant's Motion Pursuant to Rule 68 and Rule 115 of the R.P.E., 23 September 2010 (confidential) ("Prosecution Response to Motion to Admit Evidence"); Reply to Prosecutor's Repsonse [*sic*] to Appellant's Motion Pursuant to Rule 68 and Rule 115 of the R.P.E[.], 28 September 2010 (confidential) ("Setako's Reply"). *See also* Order Relating to Setako's Rules 68 and 115 Motion, 16 September 2010, Disposition.
[3] *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, T. 25 February 2010 pp. 4, 5; *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Judgement and Sentence, 25 February 2010 ("Trial Judgement"), p. 131, para. 509.
[4] Trial Judgement, paras. 368, 474, 482, 491.
[5] Trial Judgement, paras. 368, 474.
[6] Trial Judgement, paras. 322-330, 367.

4. The Prosecution and Setako both appealed the Trial Judgement.[7] The briefing relating to their appeals is complete.[8]

II. ALLEGED RECENT DISCOVERY OF NEW EVIDENCE

5. In the Motions, Setako submits that he discovered new evidence supporting his contention at trial that no killings took place at Mukamira camp and that Witnesses SLA and SAT are not credible.[9]

6. The new evidence consists of two documents. The first is the "*Rapport préliminaire d'identification des sites du génocide et des massacres d'avril-juillet 1994 au Rwanda*", prepared by the Commission for the Memorial of the Genocide and Massacres in Rwanda, under the direction of the Ministry of Higher Education, Scientific Research and Culture of the Rwandan Government and published in February 1996 ("Report on Genocide Sites" or "Report", and "Commission", respectively).[10] The second is the "UNAMIR Force HQ, Outgoing Facsimile of 25 April 1994; Subject: Special Sitrep 250800B APR to 251900B APR 94", from J.-R. Booh-Booh, SRSG, UNAMIR, Kigali, Rwanda addressed to Annan, United Nations, New York, Situation Centre, DPKO, New York ("UNAMIR Situation Report")[11] (collectively, "New Evidence").[12]

7. The Report on Genocide Sites refers, *inter alia*, to killings which occurred in Mukamira sector and mass grave sites located there.[13] The Report is mainly based on the testimonies of people who lived through the events or were present in the relevant areas during the genocide.[14] It does not mention any killings at Mukamira camp.

8. The UNAMIR Situation Report indicates that, on the morning of 25 April 1994, the Chief of Staff of the Rwandan Government Forces, who at that time was General Augustin Bizimungu ("General Bizimungu"),[15] met with UNAMIR's Force Commander, General Dallaire, and the

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[7] *See* Notice of Appeal, 29 March 2010 (filed by the Prosecution); Corrigendum to Prosecutor's Notice of Appeal, 31 March 2010; Notice of Appeal, 12 April 2010 (filed by Setako) ("Notice of Appeal").
[8] *See* Prosecutor's Appellant's Brief, 14 June 2010; Corrigendum to Prosecutor's Appellant's Brief, 6 July 2010; Ephrem Setako's Respondent's Brief, 18 August 2010; Corrigendum to Ephrem Setako's Respondent's Brief, 20 August 2010. The Prosecution did not reply. Ephrem Setako's Appellant's Brief, 8 September 2010 (confidential) ("Appellant's Brief"); Prosecutor's Respondent's Brief, 18 October 2010 (confidential); Appellant's Brief-in-Reply, 2 November 2010 (confidential) ("Setako Reply Brief"). *See also* Corrigendum to Appellant's Brief-in-Reply, 3 November 2010 (confidential).
[9] Motion to Admit Evidence, paras. 2, 5, 6; Motion to Amend the Notice of Appeal, paras. 2, 12.
[10] Motion to Admit Evidence, Annex 1. *See also* Motion to Admit Evidence, paras. 10-15.
[11] UNAMIR stands for United Nations Assistance Mission for Rwanda.
[12] Motion to Admit Evidence, Annex 2.
[13] *See* Motion to Admit Evidence, Annex 1, Report on Genocide Sites, pp. 225, 226.
[14] Motion to Admit Evidence, Annex 1, Report on Genocide Sites, p. 4.
[15] *See* Trial Judgement, fn. 394. *See also The Prosecutor v. Augustin Bizimungu et al.*, Case No. ICTR-00-56-I, Amended Indictment, 23 August 2004, para. 2; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence, 18 December 2008, fn. 238, *referring to The Prosecutor v. Théoneste Bagosora et al.*, Case

Prefect of Kigali.[16] According to Setako, the UNAMIR Situation Report casts doubt on the credibility of Witnesses SLA and SAT as they both testified that General Bizimungu was at the 25 April Meeting in the morning.[17]

9. Setako submits, and the Prosecution does not dispute,[18] that during the trial both the Report on Genocide Sites and the UNAMIR Situation Report were included in the Prosecution Electronic Disclosure Suite ("EDS").[19] However, no specific information is provided about when Setako learned of their presence in the EDS, or the manner in which he ultimately retrieved the documents.[20]

III. MOTION TO ADMIT EVIDENCE

10. In the Motion to Admit Evidence, Setako submits that the New Evidence is exculpatory and that the Prosecution failed to disclose it in violation of Rule 68(A) of the Rules of Procedure and Evidence of the Tribunal ("Rules").[21] As a remedy for this violation, Setako requests the admission of the New Evidence on appeal pursuant to Rule 115 of the Rules.[22] Alternatively, if no violation of Rule 68 of the Rules is found, Setako seeks the admission of the New Evidence pursuant to Rule 115 of the Rules as a stand-alone request.[23]

11. The Prosecution opposes the Motion to Admit Evidence, arguing that: (i) no violation of Rule 68(A) of the Rules occurred because the New Evidence is not exculpatory, and that, in any case, Setako has not shown any prejudice;[24] and (ii) the requirements under Rule 115 of the Rules are not met.[25]

No. ICTR-98-41-T, T. 18 September 2002 p. 114 (Prosecution Expert Witness Alison Des Forges, who stated that "[...] until the weekend of April 16th to 17th, when the government [...] changed the commander- the chief of staff of the army from Gatsinzi to Bizimungu."); *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, T. 26 October 2005 p. 53 (Bagosora).

[16] *See* Motion to Admit Evidence, Annex 2, UNAMIR Situation Report, para. 3. In the UNAMIR Situation Report, the Chief of Staff is referred to as "COS", the Rwandan Government Forces are referred to as "RGF", and UNAMIR's Force Commander, General Dallaire, is referred to as "FC".

[17] Motion to Admit Evidence, para. 22. *See* Trial Judgement, paras. 323, 328.

[18] *See* Prosecution Response to Motion to Admit Evidence, paras. 20, 21; Prosecution Response to Motion to Amend the Notice of Appeal, para. 8.

[19] Motion to Admit Evidence, paras. 6, 14, 25. Setako submits that the Report on Genocide Sites was in the Prosecution's possession since at least 2003, when it was tendered as exhibit in the *Casimir Bizimungu et al.* case. *See* Motion to Admit Evidence, para. 14.

[20] *See* Setako's Reply, para. 3.

[21] Motion to Admit Evidence, para. 2.

[22] Motion to Admit Evidence, paras. 1, 2, 29-31, *referring to Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement"), para. 187.

[23] Motion to Admit Evidence, paras. 3, 32-38.

[24] Prosecution Response to Motion to Admit Evidence, paras. 2, 12, 36.

[25] Prosecution Response to Motion to Admit Evidence, paras. 2, 36.

A. Applicable Law

1. Prosecution Obligation to Disclose Exculpatory Evidence under Rule 68 of the Rules

12. Rule 68(A) of the Rules imposes an obligation on the Prosecution to disclose to the Defence, as soon as practicable, any material in the actual knowledge of the Prosecution, which may suggest the innocence or mitigate the guilt of an accused or affect the credibility of the evidence led by the Prosecution in that particular case.[26] The Appeals Chamber recalls that the Prosecution's obligation to disclose exculpatory material is essential to a fair trial,[27] and notes that this obligation has always been interpreted broadly.[28]

13. The determination of which materials are subject to disclosure under this provision is a fact-based enquiry undertaken by the Prosecution.[29] The standard for assessing whether material is considered to be exculpatory within the meaning of Rule 68(A) of the Rules is whether there is any possibility, in light of the submissions of the parties, that the given information could be relevant to the defence of the accused.[30] Rule 68 of the Rules *prima facie* obliges the Prosecution to monitor the testimony of witnesses and to disclose material relevant to their impeachment, during or after testimony.[31]

14. If the Defence wishes to show that the Prosecution is in breach of its disclosure obligation, it must: (i) identify specifically the material sought; (ii) present a *prima facie* showing of its probable exculpatory nature; and (iii) prove that the material requested is in the custody or under the control

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[26] *See Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement"), para. 18; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion", 14 May 2008 ("*Karemera et al.* Appeal Decision of 14 May 2008"), para. 9; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 ("*Karemera et al.* Appeal Decision of 30 June 2006"), para. 9. *See also Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), paras. 265, 266; *Krstić* Appeal Judgement, para. 180.

[27] *Kalimanzira* Appeal Judgement, para. 18; *Karemera et al.* Appeal Decision of 30 June 2006, para. 9; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006 ("*Karemera et al.* Appeal Decision of 28 April 2006"), para. 7; *The Prosecutor v. Théoneste Bagosora et al.*, Case Nos. ICTR-98-41-AR73, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 44; *Krstić* Appeal Judgement, para. 180.

[28] *Kalimanzira* Appeal Judgement, para. 18; *Karemera et al.* Appeal Decision of 30 June 2006, para. 9. *See also Blaškić* Appeal Judgement, paras. 265, 266; *Krstić* Appeal Judgement, para. 180.

[29] *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006 ("*Nahimana et al.* Appeal Decision of 8 December 2006"), para. 34, *referring to, inter alia, Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza Be Expunged from the Record, 30 October 2006, para. 6; *Karemera et al.* Appeal Decision of 14 May 2008, para. 9; *Karemera et al.* Appeal Decision of 28 April 2006, para. 16; *Blaškić* Appeal Judgement, para. 264.

[30] *Karemera et al.* Appeal Decision of 14 May 2008, para. 12.

[31] *Krstić* Appeal Judgement, para. 206.

of the Prosecution.[32] If the Defence satisfies the Chamber that the Prosecution has failed to comply with its Rule 68 obligations, the Chamber must examine whether the Defence has been prejudiced by that failure before considering whether a remedy is appropriate.[33]

15. The Appeals Chamber recalls that the Prosecution may be relieved of its obligations under Rule 68 of the Rules "if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the appellant, as the appellant would not be prejudiced materially by this violation."[34]

16. The Appeals Chamber recalls that, where it is found at the appeal stage of the proceedings that an accused has been prejudiced by a breach of Rule 68 of the Rules, that prejudice may be remedied, where appropriate, through the application of Rule 115 of the Rules to establish whether the material is admissible as additional evidence on appeal.[35]

2. Admission of Additional Evidence under Rule 115 of the Rules

17. Rule 115 of the Rules provides a mechanism for the admission of additional evidence on appeal where a party is in possession of material that was not before the Trial Chamber and which relates to a fact or issue litigated at trial.[36] This must be done no later than 30 days from the date of filing of the brief in reply unless good cause is shown for a delay.[37] The applicant must demonstrate that the additional evidence tendered on appeal was not available at trial in any form, or discoverable through the exercise of due diligence.[38] The applicant must also show that the additional evidence is relevant and credible.[39]

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[32] *Karemera et al.* Appeal Decision of 14 May 2008, para. 9; *Nahimana et al.* Appeal Decision of 8 December 2006, para. 34. *See also Kalimanzira* Appeal Judgement, para. 18; *Karemera et al.* Appeal Decision of 28 April 2006, para. 13; *Blaškić* Appeal Judgement, para. 268.

[33] *See Kalimanzira* Appeal Judgement, para. 18; *Nahimana et al.* Appeal Decision of 8 December 2006, para. 34; *Blaškić* Appeal Judgement, para. 268; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 262; *Krstić* Appeal Judgement, para. 153.

[34] *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 ("*Bralo* Appeal Decision of 30 August 2006"), para. 30, *quoting Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006, para. 51.

[35] *Krstić* Appeal Judgement, para. 187.

[36] *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Decision on Tharcisse Renzaho's Motions for Admission of Additional Evidence and Investigation on Appeal, 27 September 2010 ("*Renzaho* Rule 115 Decision"), para. 3; *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-01-70-A, Decision on Rukundo's Motion for the Admission of Additional Evidence on Appeal, 4 June 2010 ("*Rukundo* Rule 115 Decision"), para. 5.

[37] Rule 115(A) of the Rules. *See also Renzaho* Rule 115 Decision, para. 3; *Rukundo* Rule 115 Decision, para. 5; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić's Second Motion to Admit Additional Evidence on Appeal, 29 April 2010 ("*Šainović et al.* Rule 115 Decision"), para. 5.

[38] Rule 115(B) of the Rules. *See also Šainović et al.* Rule 115 Decision, para. 6.

[39] Rule 115(B) of the Rules. *See also Renzaho* Rule 115 Decision, para. 3; *Rukundo* Rule 115 Decision, para. 5; *Šainović et al.* Rule 115 Decision, para. 7.

18. When determining the availability of evidence at trial, the Appeals Chamber will consider whether the party tendering the evidence has shown that it sought to make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the [...] Tribunal to bring evidence [...] before the Trial Chamber."[40] The applicant is therefore expected to apprise the Trial Chamber of all difficulties encountered in obtaining the evidence in question.[41] Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine whether it *could* have been a decisive factor in reaching the decision at trial.[42]

19. Furthermore, in accordance with established jurisprudence, where the evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party can establish that the exclusion of it *would* amount to a miscarriage of justice.[43] That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.[44]

20. In both cases, the applicant bears the burden of identifying with precision the specific finding of fact made by the Trial Chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the Trial Chamber's verdict.[45] A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.[46]

21. Finally, the Appeals Chamber has repeatedly recognised that the significance and potential impact of the tendered material is not to be assessed in isolation, but in the context of the evidence presented at trial.[47]

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[40] *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9 (internal citations omitted). *See Renzaho* Rule 115 Decision, para. 4; *Rukundo* Rule 115 Decision, para. 6.
[41] *Renzaho* Rule 115 Decision, para. 4; *Rukundo* Rule 115 Decision, para. 6. *See also Šainović et al.* Rule 115 Decision, para. 6.
[42] *Renzaho* Rule 115 Decision, para. 4; *Rukundo* Rule 115 Decision, para. 6.
[43] *Renzaho* Rule 115 Decision, para. 5; *Rukundo* Rule 115 Decision, para. 7.
[44] *Renzaho* Rule 115 Decision, para. 5; *Rukundo* Rule 115 Decision, para. 7.
[45] Rule 115(A) of the Rules. *See also Renzaho* Rule 115 Decision, paras. 3, 6; *Rukundo* Rule 115 Decision, paras. 5, 8; *Šainović et al.* Rule 115 Decision, para. 10.
[46] *Renzaho* Rule 115 Decision, para. 6; *Rukundo* Rule 115 Decision, para. 8; *Šainović et al.* Rule 115 Decision, para. 10.
[47] *Renzaho* Rule 115 Decision, para. 7; *Rukundo* Rule 115 Decision, para. 9; *Šainović et al.* Rule 115 Decision, para. 11.

B. Discussion

1. Report on Genocide Sites

(a) Alleged Violation of Rule 68 of the Rules

22. According to Setako, the Report on Genocide Sites documents the sites of massacres in every prefecture, commune, sector, and cellule of Rwanda.[48] Setako submits that the Report is exculpatory because it does not list Mukamira camp as a massacre site.[49] He contends that this fact corroborates his claim at trial that no killings of Tutsis occurred at Mukamira camp in April or May 1994, and contradicts the testimony of Witnesses SLA and SAT, as well as the Trial Chamber's findings, that Setako had ordered killings there.[50] Setako claims that, by failing to disclose the Report, the Prosecution violated Rule 68 of the Rules.[51] Setako adds that he was prejudiced by this failure because, had the document been available at trial, it would have undermined the testimony of Witnesses SLA and SAT and raised reasonable doubt as to his guilt.[52]

23. **[Redacted]**,[53] **[Redacted]**.[54] **[Redacted]**.[55] **[Redacted]**.[56]

24. The Prosecution opposes Setako's arguments and objects to the admission of the Report.[57] It asserts that the Report is not exculpatory,[58] that it does not contradict the evidence upon which Setako's convictions are based,[59] and that it does not undermine the testimony of Witnesses SLA and SAT.[60] **[Redacted]**.[61]

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[48] Motion to Admit Evidence, paras. 11, 12.
[49] Motion to Admit Evidence, para. 12. *See also* Setako's Reply, para. 5. Setako submits that while the Report on Genocide Sites identifies three mass graves in Jaba cellule, it does not refer to Mukamira camp as a location where killings occurred or where mass graves were found. *See* Motion to Admit Evidence, para. 13.
[50] Motion to Admit Evidence, para. 12. *See also* Setako's Reply, paras. 5-7.
[51] Motion to Admit Evidence, paras. 2, 6, 15, 29.
[52] Motion to Admit Evidence, para. 15.
[53] Motion to Admit Evidence, para. 16. *See* Motion to Admit Evidence, Annex 1, Report on Genocide Sites, **[Redacted]**.
[54] Motion to Admit Evidence, para. 18.
[55] Motion to Admit Evidence, para. 18. *See also* Setako's Reply, para. 10.
[56] Motion to Admit Evidence, para. 20.
[57] Prosecution Response to Motion to Admit Evidence, paras. 2, 38.
[58] Prosecution Response to Motion to Admit Evidence, para. 6 (under the sub-heading "Preliminary Report"), pointing, *inter alia*, to the "interim" and "imperfect" nature of the Report.
[59] Prosecution Response to Motion to Admit Evidence, para. 6 (under the sub-heading "Preliminary Report").
[60] Prosecution Response to Motion to Admit Evidence, para. 7 (under the sub-heading "Preliminary Report").
[61] Prosecution Response to Motion to Admit Evidence, para. 8 **[Redacted]**. *See also* Prosecution Response to Motion to Admit Evidence, para. 34.

25. The Appeals Chamber notes that Setako argued at trial that no killings took place at Mukamira camp[62] based on the testimony of Defence witnesses who lived at Mukamira camp during the relevant time and stated that they were unaware of their occurrence.[63] He also argued at trial that, had the killings occurred, the facts would have been reported in national proceedings in Rwanda.[64] These contentions were addressed in the Trial Judgement.[65] The Trial Chamber found these arguments to be either speculative or insufficient to call into question the convincing and corroborated eye witness evidence that the killings occurred at Mukamira camp.[66]

26. The Appeals Chamber is not convinced that Setako has demonstrated that the material contained in the Report on Genocide Sites is *prima facie* exculpatory. Although the Report identifies sites of massacres throughout Rwanda in the various prefectures, communes, sectors, and cellules, it does not purport to be comprehensive. The Commission concentrated its investigations on some, but not all, of the sites of massacres in the territory of Rwanda.[67] Furthermore, it conducted its investigations over a limited period of two and a half months in 1995.[68] The Commission gathered its information from a limited number of informants, local authorities, and people who were present during the events.[69] There is no indication, on the face of the Report, that the Commission's intention was to conduct comprehensive research on all massacres sites. Therefore, the result of its work cannot be regarded as an exhaustive list of all the killings that took place in Rwanda during the genocide. In view of the widespread nature of the crimes committed in Rwanda between April and July 1994,[70] and of the limited nature of the investigations conducted by the Commission, the lack of reference in the Report to the massacres at Mukamira camp does not render it *prima facie* exculpatory in relation to Setako's convictions.

27. **[Redacted]**,[71] **[Redacted]**.[72] **[Redacted]**.

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[62] *See The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Defence Closing Brief, 2 October 2009 (confidential) ("Defence Closing Brief"), paras. 387, 392; T. 5 November 2009 pp. 46, 47. *See also* Trial Judgement, para. 101.
[63] *See* Trial Judgement, paras. 333-337.
[64] *See* Defence Closing Brief, paras. 387-392; T. 5 November 2009 pp. 46, 47.
[65] Trial Judgement, paras. 360-365.
[66] Trial Judgement, paras. 360-365. *See also* Trial Judgement, para. 85.
[67] *See* Motion to Admit Evidence, Annex 1, Report on Genocide Sites, p. 3, which states: "*Monsieur le Ministre de l'Enseignement Supérieur, de la Recherche Scientifique et de la Culture a exprimé sa volonté de mettre sur pied une équipe qui commencerait le plus tôt possible l'investigation sur les sites importants du génocide et des massacres.*" *See also* Motion to Admit Evidence, Annex 1, Report on Genocide Sites, *Avant Propos*.
[68] *See* Motion to Admit Evidence, Annex 1, Report on Genocide Sites, pp. 3, 4. The Report reads: "*Pendant les deux mois et demi que l'enquête a été menée (du 25/10/1995 au 10/01/1995), la commission a essayé de recueillir le plus d'informations possible.*" Motion to Admit Evidence, Annex 1, Report on Genocide Sites, p. 4.
[69] *See* Motion to Admit Evidence, Annex 1, Report on Genocide Sites, p. 4.
[70] *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, paras. 28, 29.
[71] *See* Motion to Admit Evidence, Annex 1, Report on Genocide Sites, **[Redacted]**; Trial Judgement, para. 192.

28. Accordingly, the Appeals Chamber concludes that the Prosecution did not violate its disclosure obligations under Rule 68 of the Rules with respect to the Report on Genocide Sites **[Redacted]**.

(b) Request for Admission Pursuant to Rule 115 of the Rules

29. Setako submits that the Report on Genocide Sites and **[Redacted]** were not available at trial.[73] He claims that the presence of a document in the Prosecution's EDS does not mean that it is available to the Defence.[74] He asserts that the Report is credible and relevant.[75] Furthermore, he argues that it "could and would have had an impact on [his] verdict" because it supports his contention that no killings took place at Mukamira camp between April and July 1994 and undermines the credibility of Witnesses SLA and SAT.[76]

30. The Prosecution responds that Setako has failed to identify any factual finding to which the Report is directed.[77] It adds that Setako has failed to demonstrate its relevance[78] or unavailability at trial.[79] The Prosecution also argues that it could not have been a decisive factor in reaching the decision on Setako's guilt.[80]

31. The Appeals Chamber notes that the Report on Genocide Sites contains indicia of credibility, such as a date, the name and address of the Ministry which published it, and the names and functions of the people who produced the Report.[81] Accordingly, the Appeals Chamber finds the Report on Genocide Sites to be *prima facie* credible for the purposes of being considered admissible as additional evidence on appeal pursuant to Rule 115 of the Rules.

32. With regard to the relevance of the Report on Genocide Sites, the Appeals Chamber recalls that the evaluation of relevance at the stage of admissibility of additional evidence on appeal has been defined as a consideration of "whether the proposed evidence sought to be admitted relates to a material issue".[82] The Appeals Chamber further recalls that, although Setako argues that the Report on Genocide Sites is relevant because it shows that no killings occurred at Mukamira camp,

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[72] *See* Trial Judgement, para. 192; T. 23 February 2009 pp. 2-17 (closed session). **[Redacted]** *See* Trial Judgement, para. 192. **[Redacted]**. *See* T. 23 February 2009 pp. 4-6, 8-12 (closed session).
[73] Motion to Admit Evidence, paras. 34, 35.
[74] Motion to Admit Evidence, para. 34, *referring to Karemera et al.* Appeal Decision of 30 June 2006, para. 13.
[75] Motion to Admit Evidence, paras. 36, 37.
[76] Motion to Admit Evidence, paras. 37, 38.
[77] Prosecution Response to Motion to Admit Evidence, para. 15.
[78] Prosecution Response to Motion to Admit Evidence, para. 27.
[79] Prosecution Response to Motion to Admit Evidence, paras. 19, 21.
[80] Prosecution Response to Motion to Admit Evidence, paras. 23, 25.
[81] *See* Motion to Admit Evidence, Annex 1, Report on Genocide Sites, cover page, p. 243.

it cannot be regarded as an exhaustive list of all the killings that took place in Rwanda during the genocide. Thus, the absence of reference in the Report to the killings at Mukamira camp is devoid of probative value with regard to Setako's contention that these killings did not occur.[83] As such, it is not relevant to a material issue in this case. **[Redacted]**.

33. Considering that the requirements of Rule 115 of the Rules are cumulative, the Appeals Chamber will not consider the other requirements of this Rule. Accordingly, the Appeals Chamber denies Setako's request to admit the Report on *Genocide Sites* and **[Redacted]** as additional evidence under Rule 115 of the Rules.

2. UNAMIR Situation Report

(a) Alleged Violation of Rule 68 of the Rules

34. Setako submits that the *UNAMIR Situation Report* is *prima facie* exculpatory because it contradicts the testimony of Prosecution Witnesses SLA and SAT.[84] Both witnesses testified that General Bizimungu participated in the 25 April Meeting in the morning, at which the Trial Chamber found that Setako ordered militiamen and soldiers to kill Tutsi refugees.[85] He asserts that the UNAMIR Situation Report establishes that, on the same day, sometime after 10.15 a.m., General Bizimungu was meeting General Dallaire and the Prefect of Kigali, in Kigali.[86] He asserts that it was impossible for General Bizimungu to travel between Kigali and Mukamira camp to participate in the 25 April Meeting.[87] Setako contends that the non-disclosure of this document caused him prejudice because he was prevented from knowing that the testimony of General Dallaire, General Bizimungu, and the Prefect of Kigali could have impeached the testimony of Witnesses SLA and SAT.[88] He also submits that, had this evidence been considered along with the

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[82] *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence Pursuant to Rule 115, 12 January 2007, para. 7.
[83] *See supra*, para. 26.
[84] Motion to Admit Evidence, para. 22.
[85] Motion to Admit Evidence, para. 22. Both Witnesses SLA and SAT testified that the meeting lasted two hours. However, while Witness SLA stated that the meeting took place between 9.00 a.m. and 1.00 p.m., Witness SAT indicated that it took place at around 10.30 a.m. *See* Trial Judgement, paras. 323, 328.
[86] Motion to Admit Evidence, para. 24, *referring to* Appellant's Brief, paras. 270, 271. Setako refers to the log sheets, attached to the UNAMIR Situation Report, highlighting the major events in the period covered, and in particular to the communication given to the Rwandan Patriotic Front ("RPF"), recorded for 10.15, about the Force Commander being in "Prefecture de Kigali (near Ministry of Defence) in the down town" and requesting the RPF to stop shelling in that area. Setako submits that since the Force Commander met both the Chief of Staff and the Prefect of Kigali on 25 April 1994, and the Prefect's office is near the Ministry of Defence, it can be inferred that the meeting took place after 10.15. *See* Appellant's Brief, para. 270.
[87] Motion to Admit Evidence, para. 24.
[88] Motion to Admit Evidence, para. 27.

other inconsistencies in the Prosecution's case, no reasonable trier of fact could have found Witnesses SLA and SAT to be credible.[89]

35. The Prosecution responds that the evidence of a meeting between General Bizimungu and General Dallaire on the morning of 25 April 1994 is not *prima facie* exculpatory.[90] It submits that the UNAMIR Situation Report does not indicate the place, time, or length of the meeting.[91] It adds that Setako does not substantiate his assertion that the meeting took place in Kigali after 10.15 a.m.[92] The Prosecution also contends that Setako has known since the receipt of the Prosecution's Pre-Trial Brief about the alleged presence of General Bizimungu at Mukamira camp on 25 April 1994 and, therefore, that he could have called him to testify on this matter.[93]

36. The Trial Chamber noted that Witnesses SLA and SAT testified to the attendance of several personalities, including General Bizimungu, at the 25 April Meeting.[94] It also considered the presence of General Bizimungu at the 25 April Meeting in the context of inconsistencies between Witness SLA's testimony and his testimony in the *Ndindiliyimana et al.* case in which General Bizimungu stands accused.[95]

37. In the relevant part, the UNAMIR Situation Report, dated 25 April 1994, reads as follows:

> [The Force Commander] visited the [Chief of Staff] of [Rwandan Government Forces], Prefect of Kigali this morning to finalize the methodology of evacuation of refugees. [The Chief of Staff] has not yet received any direction from their political leaders. He is not prepared to take on militia for refugees. It will be futile to take refugees t[h]rough militia check points without clearance.[96]

38. It is undisputed that the Chief of Staff of the Rwandan Government Forces on 25 April 1994 was General Bizimungu.[97] The place of the meeting is not indicated in the UNAMIR Situation Report. However, the reference to the Force Commander General Dallaire "visiting" the Chief of Staff and the Prefect of Kigali and the fact that the log sheet indicates that at 10.15 a.m. General Dallaire was "in [the] Prefecture de Kigali (near Ministry of Defence) in the down town"[98] appears

[89] Motion to Admit Evidence, para. 28.
[90] Prosecution Response to Motion to Admit Evidence, para. 8 (under the sub-heading "UNAMIR Sitrep Facsimile").
[91] Prosecution Response to Motion to Admit Evidence, para. 8 (under the sub-heading "UNAMIR Sitrep Facsimile").
[92] Prosecution Response to Motion to Admit Evidence, para. 10. The Prosecution argues that this assumption is purely speculative.
[93] Prosecution Response to Motion to Admit Evidence, para. 9.
[94] Trial Judgement, para. 341.
[95] *See* Trial Judgement, para. 355. The Trial Chamber also considered an inconsistency concerning the date of the meeting, as it observed that in the *Ndindiliyimana et al.* trial, Witness SLA indicated that the 25 April Meeting occurred on 25 May 1994, instead of 25 April 1994. The Trial Chamber was satisfied that this was an error. *See* Trial Judgement, para. 356. *See also* Appellant's Brief, para. 186.
[96] Motion to Admit Evidence, Annex 2, UNAMIR Situation Report, para. 3.
[97] *See supra*, fn. 15 and references cited therein.
[98] *See* Motion to Admit Evidence, Annex 2, UNAMIR Situation Report, para. 3 and the attached log sheets, which indicate chronologically the "major events" during the period from 06.55 to 17.30 on 25 April 1994. The Appeals

to support the conclusion that the meeting took place around that time at the Kigali Prefecture Office, in Kigali.

39. Therefore, the UNAMIR Situation Report was relevant to Setako's defence. It had the potential to cast doubt on the credibility of Witnesses SAT and SLA, whose evidence was crucial to his convictions. It may cast doubt on their evidence of General Bizimungu's presence at the 25 April Meeting, where the Trial Chamber found that Setako ordered the killing of Tutsi refugees.[99] Thus, the UNAMIR Situation Report was *prima facie* exculpatory within the meaning of Rule 68 of the Rules, which provides that the Prosecution must disclose any material which may *inter alia* "affect the credibility of Prosecution evidence". As such, it should have been disclosed by the Prosecution as soon as practicable.

40. The Appeals Chamber notes that the Prosecution does not challenge that the UNAMIR Situation Report was in its possession during trial.[100] Furthermore, it is undisputed that the UNAMIR Situation Report was in the Prosecution's EDS during trial.[101] However, the Appeals Chamber recalls that the Prosecution's obligation under Rule 68 of the Rules "extends beyond simply making available its entire evidence collection in a searchable format."[102] In this regard, the EDS "cannot serve as a surrogate for the Prosecution's individualized consideration of the material in its possession."[103] Accordingly, the Appeals Chamber finds that the Prosecution violated its Rule 68 obligations by failing to disclose the UNAMIR Situation Report to Setako. The Appeals Chamber will therefore turn to consider whether Setako suffered prejudice from this violation.

41. It is not in contention that Setako was not in possession of the UNAMIR Situation Report prior to filing his Notice of Appeal. Accordingly, the Appeals Chamber considers that the Prosecution's violation prevented Setako from knowing, at trial, about the existence of the UNAMIR Situation Report. As a consequence, it deprived Setako of the opportunity of using this document in cross-examining Witnesses SLA and SAT or of seeking its admission into evidence at trial.

Chamber notes, however, that the log sheet does not account for General Dallaire's whereabouts throughout the day of 25 April 1994.

[99] The Trial Chamber noted that Witness SLA testified that the 25 April Meeting took place "[a]t some point between 9.00 a.m. and 1.00 p.m. on 25 April" and Witness SAT testified that it took place "[a]round 10.30 a.m. on 25 April". *See* Trial Judgement, paras. 323, 328. However, the Trial Chamber *did not* make a specific finding as to the time of the meeting beyond concluding that it took place "[o]n the morning of 25 April". *See* Trial Judgement, para. 469.

[100] *See* Prosecution Response to Motion to Admit Evidence, paras. 20, 21; Prosecution Response to Motion to Amend the Notice of Appeal, para. 8.

[101] Motion to Admit Evidence, para. 34; Prosecution Response to Motion to Admit Evidence, paras. 20, 21.

[102] *Karemera et al.* Appeal Decision of 30 June 2006, para. 10. *See also Bralo* Appeal Decision of 30 August 2006, para. 35

[103] *Karemera et al.* Appeal Decision of 30 June 2006, para. 10. *See also Bralo* Appeal Decision of 30 August 2006, para. 35.

42. Nonetheless, the Appeals Chamber considers this prejudice to be minimal. While the Prosecution's failure to disclose the UNAMIR Situation Report prevented Setako from using this document in his defence, the Appeals Chamber considers that the information contained in the UNAMIR Situation Report was available at trial[104] and therefore that there were other means open to Setako to impugn the credibility of Witnesses SLA and SAT on this particular issue.[105] Accordingly, while the Appeals Chamber reminds the Prosecution of the importance of its disclosure obligations, it finds that no further remedy is warranted in this case. The Appeals Chamber will therefore consider the Rule 115 request as a stand-alone request.

(b) Request for Admission Pursuant to Rule 115 of the Rules

43. Setako submits that the UNAMIR Situation Report was not available at trial.[106] In this regard, he recalls the *Karemera et al.* Appeal Decision of 30 June 2006, which held that the fact that a document is in the EDS does not mean that it is available to the defence.[107] He adds that the UNAMIR Situation Report is credible and relevant.[108] He argues that the UNAMIR Situation Report undermines Witnesses SLA's and SAT's testimony concerning the 25 April and 11 May 1994 events and thereby casts doubt on his convictions, which are solely based on their evidence.[109] Setako also contends that the UNAMIR Situation Report reveals that Witnesses SLA and SAT provided false testimony.[110]

44. The Prosecution responds that Setako's application does not meet the requirements under Rule 115 of the Rules.[111] Pointing to the fact that the UNAMIR Situation Report was in the EDS, it argues that it could have been discovered through the exercise of due diligence.[112] The Prosecution also submits that Setako's reference to the *Karemera et al.* Appeal Decision of 30 June 2006 "does not apply to this case because the evidence in question is not Rule 68(A) material."[113]

45. The Appeals Chamber notes that the UNAMIR Situation Report contains sufficient indicia of credibility, such as a date, stamp, and signature.[114] Accordingly, the Appeals Chamber finds the UNAMIR Situation Report to be *prima facie* credible for the purposes of being considered

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[104] *See* Defence Exhibit 51 (*The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, T. 10 May 2005 p. 65), in which Witness SLA testified that he did not see Bizimungu at Mukamira camp during the relevant period.
[105] *See Blaškić* Appeal Judgement, para. 295.
[106] Motion to Admit Evidence, para. 34.
[107] Motion to Admit Evidence, para. 34, *referring to the Karemera et al.* Appeal Decision of 30 June 2006, para. 13.
[108] Motion to Admit Evidence, para. 36.
[109] Motion to Admit Evidence, para. 37.
[110] Motion to Admit Evidence, para. 38.
[111] Prosecution Response to Motion to Admit Evidence, para. 36. *See also* Prosecution Response to Motion to Admit Evidence, paras. 16, 24, 25, 28, 31, 32.
[112] Prosecution Response to Motion to Admit Evidence, para. 20.
[113] Prosecution Response to Motion to Admit Evidence, para. 21.
[114] Motion to Admit Evidence, Annex 2, UNAMIR Situation Report, p. 1.

admissible as additional evidence on appeal pursuant to Rule 115 of the Rules. It also considers that the UNAMIR Situation Report is relevant as it has the potential to cast doubt on the credibility of Witnesses SLA and SAT whose evidence was crucial to Setako's convictions.[115]

46. With respect to the availability at trial of the proffered evidence, the Appeals Chamber recalls that the party seeking the admission of evidence pursuant to Rule 115 of the Rules bears the burden of demonstrating how it exercised due diligence.[116] Although the UNAMIR Situation Report is an internal UN document, it was in the Prosecution's EDS during trial and had already been admitted as an exhibit in another case before the Tribunal.[117] The Appeals Chamber notes that Setako does not indicate when or how he discovered the UNAMIR Situation Report. Rather, he merely claims that he discovered it only recently and that it was unavailable at trial because it was withheld by the Prosecution.[118] However, a simple assertion that Setako was unaware of the existence of the document is insufficient to demonstrate that due diligence was exercised. In these circumstances, Setako has not met his burden of establishing that the information was in fact unavailable to him at trial or was not discoverable through the exercise of due diligence.[119]

47. Therefore, for the purposes of Rule 115 of the Rules, the UNAMIR Situation Report and the information contained therein could have been discovered at trial through the exercise of due diligence. Accordingly, the Appeals Chamber will consider whether the exclusion of this evidence *would* result in a miscarriage of justice.

48. The credibility of Witnesses SLA and SAT was extensively litigated at trial and discussed in the Trial Judgement.[120] The Trial Chamber specifically considered the apparent inconsistency between Witness SLA's testimony in this case and his testimony in the *Ndindiliymana et al.* case, concerning General Bizimungu's presence at Mukamira camp during the period of Witness SLA's training.[121] It found that this discrepancy was not significant.[122] Accordingly, the Appeals Chamber

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[115] *See supra*, para. 39.
[116] *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010 (public redacted version), para. 21. *See also Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Present Additional Evidence, 20 August 2008 ("*Krajišnik* Rule 115 Decision"), para. 23. The confidential status of this decision was lifted on 23 January 2009. *See Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Order Lifting Confidentiality, 23 January 2009, p. 5.
[117] *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Exhibit DNZ 237. *See also The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, T. 28 November 2006 p. 44.
[118] Motion to Admit Evidence, paras. 2, 29, 34; Setako's Reply, para. 3.
[119] *See Krajišnik* Rule 115 Decision, para. 23.
[120] Trial Judgement, paras. 339, 341-359, 365. The Trial Chamber considered, *inter alia*, that Witnesses SLA and SAT were alleged accomplices of Setako, that there were variances between their accounts, as well as between their testimonies and their prior statements to the Tribunal. The Trial Chamber found that many of the inconsistencies could be reasonably explained or were not surprising or material. Trial Judgement, paras. 339, 341-344, 349-352, 354-356, 358.
[121] Trial Judgement, para. 355.
[122] Trial Judgement, para. 355.

finds that Setako has not demonstrated that had the UNAMIR Situation Report been adduced at trial, it would have had an impact on the verdict.

49. Therefore, the Appeals Chamber denies Setako's request to admit the UNAMIR Situation Report as additional evidence under Rule 115 of the Rules.

IV. MOTION TO AMEND THE NOTICE OF APPEAL

A. Submissions

50. Setako seeks leave to amend his Notice of Appeal pursuant to Rule 108 of the Rules, in order to introduce an additional ground of appeal ("New Ground of Appeal"),[123] based on the discovery of the New Evidence and the alleged violation the Prosecution's disclosure obligation.[124] Setako contends that the discovery of the allegedly exculpatory New Evidence constitutes good cause for allowing a variation of the Notice of Appeal, since it could lead to a miscarriage of justice if excluded.[125] In addition, he argues that the New Evidence could not originally be included in the Notice of Appeal because the Prosecution deliberately withheld it.[126] In the proposed New Ground of Appeal, Setako argues that, had the Trial Chamber considered the New Evidence, it would not have convicted him.[127]

51. The Prosecution objects to the New Ground of Appeal, arguing that Setako has not shown good cause for the variation of the Notice of Appeal.[128]

B. Applicable Law

52. In accordance with Rule 108 of the Rules, the Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal set out in the notice of appeal. Motions for variation of the notice of appeal should be submitted as soon as possible after the moving party has identified the alleged error or after discovering other bases for seeking variation.[129] Generally, the motion must explain precisely what amendments are being sought and

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[123] *See* Proposed Amended Notice of Appeal, paras. 68-75.
[124] Motion to Amend the Notice of Appeal, para. 2. *See also* Motion to Amend the Notice of Appeal, paras. 11, 12.
[125] Motion to Amend the Notice of Appeal, paras. 17, 22, 27.
[126] Motion to Amend the Notice of Appeal, paras. 16, 21.
[127] Proposed Amended Notice of Appeal, paras. 70, 73, 75.
[128] Prosecution Response to Motion to Amend the Notice of Appeal, para. 25.
[129] *See, e.g.*, *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-A, Decision on Callixte Kalimanzira's Motion for Leave to Amend His Notice of Appeal, 5 March 2010 ("*Kalimanzira* Appeal Decision of 5 March 2010"), para. 7; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motion for Leave to Amend His Notice of Appeal, 29 January 2010 ("*Bagosora et al.* Appeal Decision of 29 January 2010"), para. 10; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Decision on Protais Zigiranyirazo's Motion for Leave to Amend Notice of Appeal, 18 March 2009 ("*Zigiranyirazo* Appeal Decision of

show with respect to each amendment that the "good cause" requirement is satisfied.[130] The "good cause" requirement encompasses both good reason for including the proposed new or amended grounds of appeal and good reason as to why the proposed amendments were not included in the original notice of appeal.[131]

53. In determining whether proposed variations to a notice of appeal may be authorised within the scope of the good cause requirement, the Appeals Chamber has previously considered the following factors to be of relevance: (i) the proposed variation is minor but clarifies the notice of appeal without affecting its content; (ii) the opposing party has not opposed the variation or would not be prejudiced by it; (iii) the variation would bring the notice of appeal into conformity with the appeal brief; (iv) the variation does not unduly delay the appeal proceedings; and (v) the variation could be of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if it is excluded.[132]

C. Discussion

54. With regard to Setako's request for leave to introduce a new sub-ground of appeal relating to the Report on Genocide Sites and **[Redacted]**, the Appeals Chamber finds that Setako has not demonstrated good cause for this variation. In requesting this amendment, Setako merely relies on the arguments concerning the alleged exculpatory nature of the Report, its late discovery due to the Prosecution's alleged failure to disclose it, and its possible impact on the verdict.[133] The Appeals Chamber has already rejected these arguments in its consideration of the Motion to Admit Evidence. Accordingly, this variation could not be of substantial importance to the success of the appeal.

55. The Appeals Chamber also recalls that it has denied Setako's request to admit the UNAMIR Situation Report pursuant to Rule 115 of the Rules on the basis that it was not shown that it would have had an impact on the outcome of the Trial Judgement. Furthermore, in the requested amendment to the Notice of Appeal, Setako simply relies on the same arguments as those presented

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18 March 2009"), para. 4; *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Decision on "Accused Tharcisse Muvunyi's Motion for Leave to Amend his Grounds for Appeal and Motion to Extend Time to File his Brief on Appeal" and "Prosecutor's Motion Objecting to 'Accused Tharcisse Muvunyi's Amended Grounds for Appeal'", 19 March 2007 ("*Muvunyi* Appeal Decision of 19 March 2007"), para. 6.

[130] *See, e.g.*, *Kalimanzira* Appeal Decision of 5 March 2010, para. 7; *Bagosora et al.* Appeal Decision of 29 January 2010, para. 10; *Zigiranyirazo* Appeal Decision of 18 March 2009, para. 4; *Muvunyi* Appeal Decision of 19 March 2007, para. 6. *See also* Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, paras. 2, 3.

[131] *See, e.g.*, *Kalimanzira* Appeal Decision of 5 March 2010, para. 7; *Bagosora et al.* Appeal Decision of 29 January 2010, para. 10; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Milan Lukić's Motion to Amend his Notice of Appeal, 16 December 2009, para. 10; *Muvunyi* Appeal Decision of 19 March 2007, para. 6.

[132] *See, e.g.*, *Kalimanzira* Appeal Decision of 5 March 2010, para. 8; *Bagosora et al.* Appeal Decision of 29 January 2010, para. 11; *Zigiranyirazo* Appeal Decision of 18 March 2009, para. 4; *Muvunyi* Appeal Decision of 19 March 2007, para. 7.

in his Motion to Admit Evidence.[134] In view of the decision not to admit the document, the Appeals Chamber does not find that the variation of the Notice of Appeal could be of substantial importance to the success of the appeal.

56. For the foregoing reasons, the Appeals Chamber denies the Motion to Amend the Notice of Appeal in its entirety.

D. Appellant's Brief

57. The Appeals Chamber notes that the Appellant's Brief filed by Setako conforms to the Proposed Amended Notice of Appeal. However, in light of its conclusions concerning the amendment of the Notice of Appeal, the Appeals Chamber will not consider paragraphs 254 to 273 of the Appellant's Brief, which relate to the New Evidence.

V. DISPOSITION

58. For the foregoing reasons, the Appeals Chamber

GRANTS, in part, the Motion to Admit Evidence and **FINDS** that the Prosecution violated Rule 68 of the Rules in relation to the UNAMIR Situation Report;

DENIES the Motion to Admit Evidence in all other respects;

DENIES the Motion to Amend the Notice of Appeal; and

DECLARES that the Appeals Chamber will not consider paragraphs 254 to 273 of the Appellant's Brief.

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

Done this twenty-third day of March 2011
At The Hague,
The Netherlands.

Judge Patrick Robinson
Presiding

[Seal of the Tribunal]

[133] *Motion to Amend the Notice of Appeal*, paras. 14, 16, 17.
[134] Proposed Amended Notice of Appeal, paras. 74, 75.