



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

5814/H

ICTR-98-42-A

05 April 2013

{5814/H - 5804/H}

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Patrick Robinson  
Judge Liu Daqun  
Judge Carmel Agius  
Judge Bakhtiyar Tuzmukhamedov

**Registrar:** Mr. Bongani Majola

**Decision of:** 5 April 2013

**THE PROSECUTOR**

v.

**Pauline NYIRAMASUHUKO  
Arsène Shalom NTAHOBALI  
Sylvain NSABIMANA  
Alphonse NTEZIRYAYO  
Joseph KANYABASHI  
Élie NDAYAMBAJE**

Case No. ICTR-98-42-A

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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DATE: 05/04/13

**DECISION ON ÉLIE NDAYAMBAJE'S MOTION  
TO AMEND HIS NOTICE OF APPEAL**

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ICTR Appeals Chamber  
05 APR 2013  
Date: [Signature]  
Action: Chambers, defence  
Copied To: DTP-ALD, JPAI-CAS.

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 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of a motion filed by Mr. Élie Ndayambaje on 14 March 2013, in which he requests leave to amend his notice of appeal.<sup>1</sup>

#### A. Procedural Background

2. On 24 June 2011, Trial Chamber II of the Tribunal ("Trial Chamber") convicted Mr. Ndayambaje of genocide, direct and public incitement to commit genocide, extermination and persecution as crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>2</sup> The Trial Chamber sentenced him to life imprisonment.<sup>3</sup>

3. On 25 July 2011, the Pre-Appeal Judge granted in part Mr. Ndayambaje's request for an extension of time for the filing of his appeal submissions.<sup>4</sup> The Pre-Appeal Judge ordered that Mr. Ndayambaje's notice of appeal be filed no later than 17 October 2011, and his appeal brief no later than 60 days from the date on which he was served with the French translation of the Trial Judgement.<sup>5</sup>

4. On 17 October 2011, Mr. Ndayambaje filed his Initial Notice of Appeal,<sup>6</sup> which he corrected on 4 January 2012.<sup>7</sup>

5. On 2 July 2012, Mr. Ndayambaje was served with an informal working copy of the French translation of the Trial Judgement.<sup>8</sup> On 5 February 2013, Mr. Ndayambaje was served with the official French translation of the Trial Judgement.<sup>9</sup>

<sup>1</sup> Élie Ndayambaje's Extremely Urgent Motion to Amend his Notice of Appeal, 25 March 2013 (original French version filed on 14 March 2013) ("Motion").

<sup>2</sup> *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgement and Sentence, pronounced on 24 June 2011, issued in writing on 14 July 2011 ("Trial Judgement"), para. 6186. *See also ibid.*, para. 6257.

<sup>3</sup> Trial Judgement, para. 6271.

<sup>4</sup> Decision on Motions for Extension of Time for the Filing of Appeal Submissions, 25 July 2011 ("25 July 2011 Decision"), para. 16.

<sup>5</sup> 25 July 2011 Decision, para. 16.

<sup>6</sup> *Acte d'appel*, 17 October 2011 ("Initial Notice of Appeal").

<sup>7</sup> *Corrigendum* to Élie Ndayambaje's Notice of Appeal, 13 February 2012 (original French version filed on 4 January 2012) ("Notice of Appeal").

<sup>8</sup> *See* E-mail from Other Registry Services Unit, Appeals Chamber Support Section, dated 2 July 2012.

<sup>9</sup> The French translation of the Trial Judgement was filed on 1 February 2013 and was distributed to the parties on 5 February 2013. *See* Motion, para. 5.

6. On 5 March 2013, Mr. Ndayambaje filed a motion seeking to amend his Notice of Appeal,<sup>10</sup> to which he attached as annexes a document purporting to highlight all proposed amendments and a proposed amended notice of appeal.<sup>11</sup>

7. On 14 March 2013, following a motion filed by the Prosecution on 12 March 2013,<sup>12</sup> the Pre-Appeal Judge ordered Mr. Ndayambaje to re-file his motion and the corresponding annexes by 18 March 2013.<sup>13</sup> The same day, Mr. Ndayambaje filed the Motion, to which he attached corrected versions of Annex A ("Proposed Amended Notice of Appeal")<sup>14</sup> and Annex B ("Annotated Notice of Appeal").<sup>15</sup>

8. On 19 March 2013, the Prosecution filed a response objecting in part to the Motion.<sup>16</sup> Mr. Ndayambaje filed his reply on 20 March 2013.<sup>17</sup>

### B. Applicable Law

9. In accordance with Rule 108 of the Rules of Procedure and Evidence of the Tribunal ("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. Such a motion should be submitted as soon as possible after the moving party has identified the new alleged error of the trial chamber or after discovering any other basis for seeking to vary the notice of appeal.<sup>18</sup> The motion must explain precisely what amendments are being sought and show, with respect to each amendment, that the "good cause" requirement is satisfied.<sup>19</sup> The "good cause" requirement encompasses both good

<sup>10</sup> *Requête en extrême urgence d'Élie Ndayambaje en modification de son Acte d'appel*, 5 March 2013, para. 4, pp. 10, 11. Mr. Ndayambaje was seeking to amend his Initial Notice of Appeal as corrected by a *corrigendum* purportedly filed on 28 December 2011.

<sup>11</sup> On 6 March 2013, Mr. Ndayambaje filed his *Corrigendum de l'Annexe B à la Requête en extrême urgence d'Élie Ndayambaje en modification de son Acte d'appel*.

<sup>12</sup> Prosecution Urgent Motion for an Order to Re-file, 12 March 2013.

<sup>13</sup> Decision on Prosecution's Urgent Motion for an Order to Re-file, 14 March 2013 ("Decision to Re-File"), p. 2. The Pre-Appeal Judge found that the annexes contained "numerous inconsistencies and erroneous references to [the] Notice of Appeal, and fail[ed] to reflect properly the amendments sought in the [motion] as well as to identify accurately the proposed variations between [the] Notice of Appeal and the proposed notice of appeal." See *ibid.*, p. 2.

<sup>14</sup> See Motion, Annex A "*Document exposant les modifications effectuées dans l'Acte d'appel*".

<sup>15</sup> See Motion, Annex B "*Acte d'appel amendé d'Élie Ndayambaje*".

<sup>16</sup> Prosecution Response to Ndayambaje Motion to Amend Notice of Appeal, 19 March 2013 ("Response"), paras. 2, 3, 23, 24.

<sup>17</sup> *Réplique d'Élie Ndayambaje à la Prosecution Response to Ndayambaje Motion to Amend Notice of Appeal*, 20 March 2013 ("Reply"). Mr. Ndayambaje attached a revised version of his Proposed Amended Notice of Appeal as an annex to his Reply. However, for the sake of clarity, the Appeals Chamber will only consider for the purposes of the present Decision the Proposed Amended Notice of Appeal that was filed on 14 March 2013 together with the Motion.

<sup>18</sup> See, e.g., Decision on Pauline Nyiramasuhuko's Motion to Amend her Amended Notice of Appeal, 18 February 2013 ("18 February 2013 Decision"), para. 7 and reference cited therein.

<sup>19</sup> See, e.g., 18 February 2013 Decision, para. 7 and reference cited therein.

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reason for including the proposed new or amended grounds of appeal and good reason as to why the proposed amendments were not included or correctly articulated in the original notice of appeal.<sup>20</sup>

10. In its previous determinations as to which proposed variations to a notice of appeal may be authorised within the scope of the good cause requirement, the Appeals Chamber has 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 would not unduly delay the appeal proceedings; or (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.<sup>21</sup>

### **C. Preliminary Issue**

11. The Appeals Chamber notes the Prosecution's submission that the Motion fails to comply with the directions specified in the Decision to Re-File. According to the Prosecution, Mr. Ndayambaje fails to provide appropriate references to his operative notice of appeal in his Motion, and to make all necessary corrections to his Annotated Notice of Appeal and Proposed Amended Notice of Appeal.<sup>22</sup>

12. The Appeals Chamber notes that, in his Motion, Mr. Ndayambaje indeed mistakenly refers to a *corrigendum* notice of appeal that was allegedly filed on 28 December 2011, despite the express reference in the Decision to Re-File to the Notice of Appeal filed in French on 4 January 2012 as the operative notice of appeal.<sup>23</sup> However, the Appeals Chamber notes that both the Annotated Notice of Appeal and the Proposed Amended Notice of Appeal appropriately refer to the operative notice of appeal. Moreover, the Appeals Chamber observes that the paragraph numbers mentioned in the Motion correctly correspond to those in the operative notice of appeal. In these circumstances, the Appeals Chamber does not find that the Motion fails to comply with the Decision to Re-File.

### **D. Discussion**

13. Mr. Ndayambaje requests leave to amend his Notice of Appeal and to replace it with the Proposed Amended Notice of Appeal.<sup>24</sup> Specifically, Mr. Ndayambaje seeks to: (i) change the

<sup>20</sup> See, e.g., 18 February 2013 Decision, para. 7 and reference cited therein.

<sup>21</sup> See, e.g., 18 February 2013 Decision, para. 8 and reference cited therein.

<sup>22</sup> Response, paras. 4-6, 23.

<sup>23</sup> See Motion, para. 3, p. 9.

<sup>24</sup> Motion, paras. 12, 31, p. 9. See also Proposed Amended Notice of Appeal.

numbering of parts, sections, and grounds of appeal;<sup>25</sup> (ii) delete titles and merge grounds of appeal and supporting paragraphs;<sup>26</sup> (iii) reformulate titles;<sup>27</sup> (iv) make corrections;<sup>28</sup> and (v) provide clarifications.<sup>29</sup> He submits that these proposed amendments only concern the form and the structure of the Notice of Appeal.<sup>30</sup> Mr. Ndayambaje further seeks to amend his Notice of Appeal by adding a new ground of appeal ("Proposed Ground 16").<sup>31</sup>

14. Mr. Ndayambaje submits that his request for leave to amend his Notice of Appeal results from the issuance of the Decision on the Extension of Word Limits,<sup>32</sup> consultations with his Defence Team after the filing of the French translation of the Trial Judgement,<sup>33</sup> and the ongoing analysis of the materials disclosed by the Prosecution in September 2011 and April 2012 ("New Materials").<sup>34</sup>

15. The Appeals Chamber will first consider Mr. Ndayambaje's proposed amendments to the form and structure of the Notice of Appeal, before turning to the proposed amendments to the substance of the Notice of Appeal.

#### 1. Proposed Amendments to the Form and Structure of the Notice of Appeal

16. Mr. Ndayambaje requests leave to re-number parts, sections, and grounds of appeal of his Notice of Appeal, delete and reformulate titles, merge grounds of appeal and supporting paragraphs, make variations aimed at correcting the Notice of Appeal, and provide clarifications.<sup>35</sup> The Prosecution does not oppose any of these proposed amendments.<sup>36</sup>

17. As part of the clarifications he seeks to make,<sup>37</sup> Mr. Ndayambaje also requests leave to duplicate some paragraphs under different grounds of appeal given the interplay of these grounds of

<sup>25</sup> Motion, para. 27, p. 6.

<sup>26</sup> Motion, para. 27, p. 6.

<sup>27</sup> Motion, para. 27, pp. 6, 7.

<sup>28</sup> Motion, para. 27, p. 7.

<sup>29</sup> Motion, para. 27, pp. 7, 8.

<sup>30</sup> Motion, para. 27.

<sup>31</sup> Motion, paras. 25, 28, pp. 8, 9.

<sup>32</sup> Motion, paras. 20, 21, 28. See Decision on Nyiramashuko's, Ntabobali's, Kanyabashi's, and Ndayambaje's Motions for Extensions of the Word Limit for their Appeal Briefs, 13 December 2012 ("Decision on the Extension of Word Limits").

<sup>33</sup> Motion, para. 24. See also *ibid.*, para. 30.

<sup>34</sup> Motion, para. 25. See also *ibid.*, paras. 28-30. Mr. Ndayambaje specifies that following the disclosure of these alleged exculpatory materials, he filed two motions for admission of additional evidence. See Motion, para. 29, fn. 15, referring to Élie Ndayambaje's Motion on Violation of Disclosure Obligations by the Prosecutor and for Admission of Additional Evidence, 7 February 2013 (original French version filed on 29 November 2012) ("First Rule 115 Motion"); Élie Ndayambaje's Second Motion on Violation of Disclosure Obligations by the Prosecutor and for Admission of Additional Evidence, 24 January 2013 (original French version filed on 30 November 2012) ("Second Rule 115 Motion").

<sup>35</sup> Motion, pp. 6-8.

<sup>36</sup> Response, paras. 2, 3.

<sup>37</sup> See Motion, pp. 7, 8.

appeal and the fact that he may have to address these grounds more summarily in his appeal brief due to the word limit.<sup>38</sup> The Prosecution “does not object to the transposition of paragraphs already existing” in the Notice of Appeal.<sup>39</sup> However, it opposes the repetition of paragraphs 72 to 74 of the Proposed Amended Notice of Appeal in paragraphs 77 to 79 of the Proposed Amended Notice of Appeal.<sup>40</sup>

18. Mr. Ndayambaje submits that these proposed amendments are minor, that they clarify the Notice of Appeal and would bring it into conformity with the appeal brief, that they do not affect the content of the Notice of Appeal, and that they will not unduly extend the time limits as they “relate more to the form and improvement of the [appeal brief] than to the arguments raised”.<sup>41</sup> Mr. Ndayambaje further submits that the proposed amendments would benefit all parties since the appeal brief would be more intelligible and better structured.<sup>42</sup>

19. The Appeals Chamber observes that Mr. Ndayambaje submits that these proposed amendments result from the restructuring of his appeal brief following the Decision on the Extension of Word Limits,<sup>43</sup> suggesting that he had to reduce his appeal brief because of the word limitation imposed by that decision.<sup>44</sup> The Appeals Chamber does not find any merit in Mr. Ndayambaje’s reliance on the Decision on the Extension of Word Limits to justify the requested amendments. As clearly stipulated in the Practice Direction, an appeal brief shall not exceed 30,000 words.<sup>45</sup> Although a pre-appeal judge or the Appeals Chamber may authorise a party to exceed this word limit,<sup>46</sup> such an extension cannot be taken for granted when requested. Pending the Pre-Appeal Judge’s disposition of Mr. Ndayambaje’s request for an extension of the word limit, it was incumbent on Mr. Ndayambaje’s Counsel not to work under the assumption that his request for an extension of the word limit to 156,000 words would be granted.<sup>47</sup>

20. The Appeals Chamber further considers that Mr. Ndayambaje fails to explain how the reading and analysis of the French translation of the Trial Judgement, and the consultations that ensued with his Defence Team, justify his failure to include the proposed amendments in the Notice of Appeal, or why he did not move for leave to make them earlier.

<sup>38</sup> Motion, p. 7. *See also* Reply, paras. 16-18.

<sup>39</sup> Response, para. 3. *See also* *ibid.*, para. 2.

<sup>40</sup> Response, paras. 2, 24. The Prosecution submits that this duplication is unjustified and serves no purpose. *See ibid.*, para. 21.

<sup>41</sup> Motion, para. 26. *See also* Reply, paras. 13, 20, 21.

<sup>42</sup> Reply, para. 13.

<sup>43</sup> Motion, para. 27.

<sup>44</sup> Motion, paras. 20, 21, 24. *See also* Reply, para. 13.

<sup>45</sup> Practice Direction on the Length of Briefs and Motions on Appeal, 8 December 2006 (“Practice Direction”), para. C(1)(a).

<sup>46</sup> Practice Direction, para. C(5).

<sup>47</sup> *See* Decision on the Extension of Word Limits, para. 11.

21. Nevertheless, the Appeals Chamber observes that most of the amendments sought by Mr. Ndayambaje serve to correct mistakes, amend titles, improve the structure, provide further details and clarifications, or improve the legibility and comprehensibility of his Notice of Appeal, without substantially affecting its content. The Appeals Chamber also notes that the proposed duplication of paragraphs under different but intertwined grounds of appeal is likely to assist the Appeals Chamber in its examination of Mr. Ndayambaje's appeal.

22. The Appeals Chamber further considers that allowing these requested variations at the present stage of the proceedings would not affect the briefing schedule, given that Mr. Ndayambaje has not yet filed his appeal brief. In the absence of objection from the Prosecution on most of these proposed amendments, and in view of the nature of these proposed amendments, and the fact that they will not cause any delay or prejudice, the Appeals Chamber considers that it is in the interests of justice to allow them despite Mr. Ndayambaje's failure to show good cause for not including them in the Notice of Appeal or to request them earlier.

23. By contrast, the Appeals Chamber does not find that the merging of grounds 15 and 18 of the Notice of Appeal as a single ground of appeal (proposed ground 15 of the Proposed Amended Notice of Appeal) would improve the comprehensibility and clarity of the Notice of Appeal and of the forthcoming appeal brief.<sup>48</sup> Therefore, the Appeals Chamber does not authorise this requested amendment.

24. Finally, the Appeals Chamber notes Mr. Ndayambaje's clarification that the duplication of paragraphs 92 and 96 of the Notice of Appeal as paragraphs 212-213 and 229-230 of the Proposed Amended Notice of Appeal was inadvertent.<sup>49</sup> Accordingly, the Appeals Chamber orders that paragraphs 212, 213, 229, and 230 of the Proposed Amended Notice of Appeal shall be withdrawn from the revised version of the Proposed Amended Notice of Appeal to be filed by Mr. Ndayambaje.

## 2. Proposed Amendments to the Substance

25. Mr. Ndayambaje seeks leave to: (i) move the content of Part III of the Notice of Appeal into a new ground of appeal, namely Proposed Ground 16, which would allege violations of the Prosecution's disclosure obligation under Rule 68 of the Rules;<sup>50</sup> (ii) modify paragraph 182 of the Notice of Appeal and move the modified paragraph under Proposed Ground 16 as proposed

<sup>48</sup> Compare ground 15 of the Notice of Appeal with ground 18 of the Notice of Appeal. See also Motion, p. 6; Proposed Amended Notice of Appeal, paras. 124-133.

<sup>49</sup> Reply, para. 12. See also *ibid.*, para. 14.

<sup>50</sup> Motion, para. 28.

paragraph 148;<sup>51</sup> and (iii) add proposed paragraphs 137 to 147, 149 and 150.<sup>52</sup> Mr. Ndayambaje <sup>5807/H</sup> asserts that these amendments result from the Decision on the Extension of Word Limits and from the analysis of the New Materials disclosed in September 2011 and April 2012.<sup>53</sup> He explains that he only became aware of the scope of the alleged error committed by the Trial Chamber in its 13 March 2009 Decision on the disclosure and admission of exculpatory materials after analysing the New Materials.<sup>54</sup> In the alternative, Mr. Ndayambaje submits that these proposed amendments are of substantial importance to the success of his appeal such that their exclusion would lead to a miscarriage of justice.<sup>55</sup>

26. A review of the Annotated Notice of Appeal and the Proposed Amended Notice of Appeal also reflects that Mr. Ndayambaje further seeks to add, under ground 12 of the Notice of Appeal, proposed paragraph 106 and to modify paragraph 105 of the Notice of Appeal (proposed paragraph 109).<sup>56</sup>

27. The Prosecution objects to the addition of proposed paragraphs 106, 137 to 147, 149, and 150, as well as to the modification of proposed paragraph 148,<sup>57</sup> submitting that Mr. Ndayambaje does not show good cause for allowing these amendments at this stage.<sup>58</sup> In particular, it contends that Mr. Ndayambaje's request to add these paragraphs is: (i) premature as the New Materials have not been admitted into the record;<sup>59</sup> (ii) unsubstantiated as Mr. Ndayambaje fails to identify which of the New Materials would qualify as exculpatory under Rule 68 of the Rules;<sup>60</sup> and (iii) "unjustifiably late".<sup>61</sup> In its view, Mr. Ndayambaje also fails to explain why he did not include these grounds of appeals in the Notice of Appeal or why he did not move for their inclusion earlier, as eighteen and ten months, respectively, have elapsed since the New Materials were disclosed.<sup>62</sup> The Prosecution finally submits that it would be prejudiced and the briefing schedule might be delayed if these proposed amendments were to be granted.<sup>63</sup>

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<sup>51</sup> Motion, p. 7.

<sup>52</sup> Motion, pp. 8, 9. *See also* Proposed Amended Notice of Appeal, paras. 137-147, 149, 150.

<sup>53</sup> Motion, para. 28. Mr. Ndayambaje submits that most of the New Materials were disclosed after he filed the Notice of Appeal. *See ibid.*, para. 25.

<sup>54</sup> Motion, para. 29, referring to *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ndayambaje's Extremely Urgent Motion for Disclosure Under Rules 66 and 68 and for Admission into Evidence of Transcripts in the *Kalimanzira* Case, 13 March 2009 ("13 March 2009 Decision").

<sup>55</sup> Motion, para. 32.

<sup>56</sup> Proposed Amended Notice of Appeal, paras. 106, 109, referring to 13 March 2009 Decision.

<sup>57</sup> Response, paras. 2, 24.

<sup>58</sup> Response, paras. 9, 24.

<sup>59</sup> Response, paras. 11, 12. The Prosecution submits that proposed paragraph 106 relies on material that is not part of the record since it has not been admitted under Rule 115 of the Rules. *See ibid.*, para. 12. *See also ibid.*, para. 20.

<sup>60</sup> Response, paras. 11, 13, 16, 19.

<sup>61</sup> Response, paras. 11, 14, 17.

<sup>62</sup> Response, paras. 14, 17, 18.

<sup>63</sup> Response, para. 19.



28. Mr. Ndayambaje replies that, had the Prosecution disclosed the New Materials earlier, there would have been no need to seek the addition of Proposed Ground 16.<sup>64</sup> He further submits that he has been diligent in filing his Motion and that he needed time to analyse the materials following their disclosure.<sup>65</sup>

29. The Appeals Chamber observes that the addition of proposed paragraph 106 and the proposed modification of paragraph 105 of the Notice of Appeal in the form of proposed paragraph 109 are not requested in the Motion. The Appeals Chamber recalls that an appellant is not free to vary his notice of appeal in any way without prior leave of the Appeals Chamber and that all proposed variations to a notice of appeal must be indicated in the request for leave to amend the notice of appeal.<sup>66</sup> However, since the Prosecution has offered submissions with respect to these proposed amendments and since they were clearly outlined in the Annotated Notice of Appeal attached to the Motion, the Appeals Chamber will consider them despite Mr. Ndayambaje's failure to properly request their inclusion.

30. The Appeals Chamber notes that the first disclosure of the New Materials took place on 1 September 2011, more than six weeks before the filing of the Initial Notice of Appeal, and that the second disclosure occurred on 23 April 2012, more than ten months before the filing of the present Motion. The Appeals Chamber is not satisfied that Mr. Ndayambaje acted with due diligence in filing the present Motion. In the circumstances, the Appeals Chamber is not satisfied that the disclosure of the New Materials constitutes good cause for allowing the requested amendments.

31. Nonetheless, the Appeals Chamber recalls that, in certain limited circumstances, it has permitted amendments which were of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if the grounds were excluded, despite the absence of a showing of good cause.<sup>67</sup>

32. The Appeals Chamber notes that Mr. Ndayambaje alleges, in his Proposed Ground 16 as well as in proposed paragraphs 106 and 109 of the Proposed Amended Notice of Appeal, that the New Materials are exculpatory and that, had they been disclosed earlier and admitted into evidence at trial, they would have changed the outcome of the trial. The Appeals Chamber notes, however, that the New Materials are not part of the record in this case, and that Mr. Ndayambaje's motions to have them recognised as exculpatory evidence and admitted as additional evidence pursuant to

<sup>64</sup> Reply, para. 23.

<sup>65</sup> Reply, paras. 24-26. See also *ibid.*, para. 27.

<sup>66</sup> See 18 February 2013 Decision, para. 16 and references cited therein. See also Decision to Re-File, p. 2.

<sup>67</sup> 18 February 2013 Decision, para. 23 and references cited therein.

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Rule 115 of the Rules are pending before it.<sup>68</sup> In these circumstances, and without expressing any views on the merits of those motions, the Appeals Chamber finds that the requested amendments in the form of proposed paragraphs 106, 109, and Proposed Ground 16 are premature. The Appeals Chamber therefore denies Mr. Ndayambaje's request to make these proposed amendments, without prejudice for Mr. Ndayambaje to seek leave to amend his notice of appeal and file supplemental submissions should the Appeals Chamber grant the admission of the New Materials as evidence on appeal.

### 3. Conclusion

33. As a result, the Appeals Chamber:

- (i) denies the request for leave to merge grounds 15 and 18 of the Notice of Appeal under proposed ground 15 of the Proposed Amended Notice of Appeal;
- (ii) instructs Mr. Ndayambaje to withdraw paragraphs 212, 213, 229, and 230 from the revised version of the Proposed Amended Notice of Appeal to be filed;
- (iii) denies the request for leave to add Proposed Ground 16 of the Proposed Amended Notice of Appeal, including the moving of Part III of the Notice of Appeal, the modification of paragraph 182 of the Notice of Appeal, and the addition of proposed paragraphs 137 to 150;
- (iv) denies the inclusion of proposed paragraph 106 and the modification of paragraph 105 of the Notice of Appeal (proposed paragraph 109); and
- (v) authorises all of the remaining requested amendments.

### E. Disposition

34. For the foregoing reasons, the Appeals Chamber:

**GRANTS** Mr. Ndayambaje's Motion in part to the extent specified in paragraph 33 of the present Decision;

**INSTRUCTS** Mr. Ndayambaje to file a revised version of his Proposed Amended Notice of Appeal containing the amendments authorised herein no later than 8 April 2013; and

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<sup>68</sup> See First Rule 115 Motion and Second Rule 115 Motion.

~~DISMISSES~~ the Motion in all other respects.

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

Done this fifth day of April 2013,  
at The Hague,  
The Netherlands.



[Seal of the Tribunal]

  
Judge Fausto Pocar  
Presiding