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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

APPEALS CHAMBER I

Before: Judge Patrick Robinson, presiding

Registrar: Mr. Adama Dieng

Date: July 20, 2010

EPHREM SETAKO

v.

THE PROSECUTOR

ICTR-04-81-A

Motion for Leave to Amend Notice of Appeal

Counsel for the Accused:

Prof. Lennox Hinds
Juliette Chinaud
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Office of the Prosecutor:

Hassan Bubacar Jallow
Alex Obote-Odora
Deborah Wilkinson

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INTRODUCTION

1. The Appellant Lt. Col. Ephrem Setako files this motion requesting leave to amend his Notice of Appeal in the proceedings *Ephrem Setako v. The Prosecutor*, Case No. ICTR-04-81-A, in accordance with Article 108 of the Rules of Procedure and Evidence ("Rules").
2. The Appellant requests leave to vary his grounds of appeal based on recently acquired evidence, in the possession of the Prosecutor, which was not disclosed to the Appellant at trial, and that had it been disclosed, would have led to the Appellant's acquittal.

BACKGROUND

3. Between 25 August 2008 and 26 June 2009, the Appellant stood trial before Trial Chamber I on charges set out in the Amended Indictment dated 23 June 2008.
4. The Trial Chamber pronounced oral judgement in *The Prosecutor v. Ephrem Setako* on 25 February 2010, and filed its authoritative written Judgement and Sentence in English on 1 March 2010.
5. On 31 March 2010, the Appellant submitted his Notice of Appeal to the Registry, where it was filed on 12 April 2010.
6. On 2 July 2010, the Appeals Chamber granted the Appellant's request for an extension of time within which to file his Appeal Brief, to within 40 days of being served the French translation of the Trial Judgement. The certified translation is expected by 31 July 2010.

LAW AND DISCUSSION

7. Pursuant to Article 108 of the Rules, the Appeals Chamber "may, on good cause being shown by motion, authorize a variation of the grounds of appeal" contained in the notice of appeal. Such motions should be submitted "as soon as possible after identifying the new alleged error" of the Trial Chamber to be included in the notice of appeal or after discovering any other basis for seeking a variation to the notice of appeal.[1]
8. The concept of "good cause" under this provision encompasses both good reason for including the new or amended grounds of appeal sought and good reason showing why those grounds were not included in the original notice of appeal. Generally, the motion

[1] *Nahimana et al v Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal, and to Correct His Appellant's Brief, 17 August 2006, para. 9 [*Nahimana*].

must explain precisely what amendments are being sought and show with respect to each amendment that the good cause requirement is satisfied.[2]

9. Factors the Appeals Chamber has found relevant in determining whether "good cause" exists, include (i) the 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 appellant's brief: (iv) the variation does 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.[3]
10. Good cause can be established even where an appellant seeks a substantive amendment, broadening the scope of the appeal. The Appeals Chamber has ruled that each substantive amendment is to be considered in light of the particular circumstances of the case. There is no cumulative list of requirements that must be met for a substantive amendment to be granted.[4]
11. The Appellant seeks to vary his Notice of Appeal on the basis that it has now come to his attention that there is exculpatory evidence, which is new to the Appellant, but which the Prosecutor has had in its possession since before the Appellant's Trial hearing, that could have established reasonable doubt as to the Appellant's guilt.
12. The Appellant was convicted based on the testimony of two witnesses, witnesses SLA and SAT, for killings at Mukamira Camp in April and May 1994. The Defense's position at Trial was that witnesses SLA and SAT were not credible, that Defendant did not order any killings at Mukamira Camp, and that in fact, no killings took place at Mukamira Camp during that time. The Prosecutor had in his possession evidence that 1) no killings took place at Mukamira Camp from April to July 1994, and 2) Witnesses SLA and SAT were not credible. The Appellant's contention is that had this evidence been available at Trial, viewed in light of all the other inconsistencies in the Prosecution's case, it would have raised reasonable doubt as to the Appellant's guilt. The Appellant requests leave to amend his Notice of Appeal to include the newly discovered evidence as a ground of appeal.
13. The following specific amendments are sought:

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[2] *Ibid.*, para. 10.
[3] *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, para. 4.
[4] *Nahimana,* para.10; *The Prosecutor v. Vidoje Blagojevic,* Case No. IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokic's Appeal, 24 November 2005, para. 7.

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1) Evidence that No Massacres Occurred at Mukamira Camp in April and May 1994

A) Document entitled "PRELIMINARY REPORT ON IDENTIFICATION OF SITES OF THE GENOCIDE AND MASSACRES THAT TOOK PLACE FROM APRIL TO JULY 1994," prepared by the Commission for the Memorial of the Genocide and Massacres in Rwanda, appointed by the Ministry of Higher Education, Scientific Research and Culture of the Rwandan government, February 1996.

14. This report is in the Prosecutor's searchable database of evidence, the Electronic Disclosure Suite (EDS).[5] In EDS, the report is simply titled "Report on the sites where the genocide and the massacres took place from April to July 1994." The Report's exculpatory potential for the Defense is immediately apparent from the title of the document. The Report is a comprehensive survey of massacre sites by prefecture, commune, sector and cellule level, and includes sites with fewer than 25 victims. Mukamira Camp is not listed as a massacre site in Jaba cellule, which supports the Defense argument that no killings took place there, and that therefore the Appellant could not have ordered any killings at the Camp. The Prosecution knew of this document, knew of its exculpatory potential, knew that Mukamira Camp was not listed, and deliberately withheld it from the Defense.

B) Testimony of Witness SAG, a "key informant" in the Report

15. The Report was published in February 1996 after two and a half months of investigations by the Commission. The information was gathered by canvassing every prefecture and commune in Rwanda, first through contact with local officials, then through on-site visits to gather testimonial evidence from "key informants." The Prosecution deliberately omitted to inform the Defense that Prosecution witness SAG was one of the "key informants" in the Report, and that he provided investigators with information concerning killings near Mukamira Camp, in Jaba cellule, and throughout Nkuli commune. Had the Defense known of witness SAG's role in identifying massacre sites in Jaba cellule, we would have called him to the stand to question why he never mentioned killings taking

[5] *See* EDS under the following ERN: K005-9170-K005-9511.

place at Mukamira Camp, located in that cellule. Witness SAG was familiar with the Camp and with the area.[6] Given the notorious circumstances surrounding the alleged killings,[7] if those allegations were true, then Witness SAG would have heard of massacres taking place at Mukamira Camp. The fact that he did not mention any killings taking place there further supports Appellant's contention that no killings took place at Mukamira Camp.

16. There is good reason why the Report and Witness SAG's role in the report were not included in the Appellant's original Notice of Appeal. The Prosecution deliberately withheld the Report from the Defense, knowing the Defense position that no killings took place at Mukamira Camp between April and July 1994. It continued to withhold this evidence after the Appellant was convicted on the sole basis of killings taking place at Mukamira Camp. In addition, it deliberately omitted to inform the Defense that Witness SAG was a key informant for the Report. The Appellant did not become aware of this evidence until recently.
17. There is also good reason for including this evidence as a new ground of appeal, since the amendment could result in a miscarriage of justice if it were excluded. The Appeals Chamber has considered this to be a relevant factor in determining whether to grant a party leave to amend its Notice of Appeal. It is the Appellant's contention that had this evidence been considered by the Trial Chamber, and viewed in light of all the other inconsistencies in the Prosecution's case, it would have led to the Appellant's acquittal.
18. Finally, the Prosecution would not be prejudiced by the amendment since it is already in possession of this evidence and aware of its exculpatory nature.

2) Evidence that Witness SLA & SAT Brazenly Corroborated in Giving False Testimony

C) Document entitled, "UNAMIR FORCE HQ, OUTGOING FACSIMILE OF 25 APRIL 1994; SUBJECT: SPECIAL SITREP 250800B APR TO 251900B APR 94,"

[6] Although the Prosecutor presented SAG as a witness to testify that he was tortured in 1993 at Mukamira Camp, and that Lt. Col. Setako visited the camp during that time and saw the witness, the Prosecutor withheld the fact that SAG was a key informant in the Report establishing that no killings took place at Mukamira Camp (T. 23 Feb. 2009, Sealed Excerpt, pp. 4-12.)

[7] SAT and SLA testified that between 30-40 Tutsis were massacred and the corpses were left unburied to be eaten by dogs. SLA, T. 16 Sept 2008, p.48; L.13-20; 18 Sept 2008, p.23, L.7-8; p.24, L.7-10; SAT, T. 18 Sept 2008, p.82, L.32-37; p.83, L.1; p.85, L.34-35.

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prepared by J.-R. Booh-Booh, SRSG, UNAMIR, Kigali, Rwanda to Annan at United Nations, New York as information for SITUATION CENTRE, DPKO, New York[8]

19. This UNAMIR report states that COS[9] of the RGF, General Augustin Bizimungu, was meeting with UNAMIR's FC[10] General Dallaire, together with the Prefect of Kigali, to work out how to evacuate refugees in the very morning of 25 April 1994[11] when SLA and SAT falsely and brazenly placed him in Mukamira Military Camp in the company of Lt Col Setako and others in a meeting with about 170-220 members of the civil defense force and soldiers, where Setako urged the killings of Tutsis.
20. Had this UNAMIR document been disclosed, minimally, Lt Col Setako could have called General Dallaire and General Bizimungu as Defense witnesses to confirm the falsity of SLA and SAT's testimony, and thereby impeach their credibility for corroborating each other on an **impossible fact**.
21. There is good reason why the UNAMIR report was not included in Appellant's original Notice of Appeal. The Prosecution deliberately withheld the Report from the Defense, knowing that its witnesses SLA and SAT brazenly corroborated each other in providing false testimony on the presence of General Augustin Bizimungu in Mukamira Camp in the morning of 25 April 1994. The Prosecutor continued to withhold this evidence after the Appellant was convicted for the killings on 25 April 1994 on the sole basis of SLA and SAT's allegedly corroborating testimony. The Appellant did not become aware of this evidence until recently.
22. There is also good reason for including this evidence as a new ground of appeal, since the amendment could result in a miscarriage of justice if it were excluded. The Appeals Chamber has considered this to be a relevant factor in determining whether to grant a party leave to amend its Notice of Appeal. It is the Appellant's contention that had this evidence been considered by the Trial Chamber, and viewed in light of all the other inconsistencies in the Prosecution's case, no reasonable trier of fact could have found the allegedly corroborated testimony of Witnesses SAT and SLA to be credible.

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[8] *See* EDS under the following ERN: L000-5899-L000-5906.
[9] COS of RGF refers to General Augustin Bizimungu of the Rwandan Government Force. See Footnote 394 of Setako Judgment.
[10] FC refers to Force Commander Major-General Romeo A. Dallaire who served from October 1993 – August 1994; http://www.un.org/en/peacekeeping/missions/past/unamir.htm
[11] This meeting between Dallaire, Bizimungu and Prefect of Kigali to discuss the evacuation of refugees across militia lines, took place in the morning of 25 April 1994 in Kigali.

23. Finally, the Prosecution would not be prejudiced by the amendment since it is already in possession of this evidence and aware of its exculpatory nature.

24. The Appellant is aware that the proposed amendments are substantive in nature and broaden the scope of the Appeal. However, the Appeals Chamber has ruled that good cause under Rule 108 can be established even where an appellant seeks a substantive amendment. As discussed above, good cause exists to allow the additional ground of appeal considering the particular circumstances of the Appellant's case.
25. The Prosecution cannot argue that the Appellant's proposed amendments will unduly delay the Appeals proceedings, since it was the Prosecutor's decision not to disclose exculpatory evidence which has led to the present circumstances.
26. The Appellant wishes to inform the Appeals Chamber that he will be filing a Rule 68 motion concerning the non-disclosed evidence, and a Rule 115 motion to admit the additional evidence into the record.

PRAYER FOR RELIEF

27. The Appellant submits that the discovery of the above listed exculpatory evidence is good cause to allow a variation to his Notice of Appeal, since the amendments are of substantial importance to the success of the appeal, and could result in a miscarriage of justice if they were excluded.
28. WHEREFORE, Appellant prays that the Appeals Chamber grant the requested relief in its entirety.

Signed in New York on 20th July 2010

/s/Lennox Hinds
Professor Lennox S. Hinds
Lead Counsel

Attachment: Annexe 1: "Amended Notice of Appeal"

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ANNEXE 1

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AMENDED NOTICE OF APPEAL

I. HISTORICAL BACKGROUND

1. Between 25 August 2008 and 26 June 2009, the **Appellant** stood trial before Trial Chamber I on charges set out in the Amended Indictment dated 23 June 2008

2. On 25 February 2010, judgment was pronounced orally against the **Appellant** in English. On 1 March 2010, a full written judgment in English only was entered and received by **Lead Counsel** on 2 March 2010.

3. In the Judgment, the **Appellant** was found guilty of Genocide (Count 1), Extermination as a Crime Against Humanity (Count 4) and Violence to Life as a serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto (Count 5).

4. The **Appellant** was found not guilty of Complicity in Genocide (Count 2), Murder as a Crime Against Humanity (Count 3) and Pillage as a serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto (Count 6).

5. Pursuant to Article 24 of the Statute and Rule 108 of the Rules of Procedure and Evidence, the **Appellant** hereby serves Notice of Appeal against the Conviction and Sentence on Count 1, 4 and 5 of the Judgment dated 25 February, 2010.

6. The **Appellant** sets forth his grounds of appeal against conviction and sentence pursuant to Article 24(1) of the Statute of the Tribunal as follows.

References herein are as follows:

- *A Rule refers to the Rules of Procedure and Evidence of the ICTR,*
- *An Article refers to Articles within the Statute of the Tribunal, and*
- *The Judgment refers to the Judgment of the Tribunal in the instant case*

II. GROUNDS OF APPEAL AGAINST CONVICTION & SENTENCE

(a) ERRORS OF LAW (Article 24 (1)(a))

7. As explained in further detail in Part (b), in which the **Appellant** provides specific examples of the erroneous application of the law to the facts of the instant case, the **Appellant** here submits that the Trial Chamber erred as a matter of law in the following manner:

(1) Violations of Right to A Fair Trial

8. The Trial Chamber erred in disregarding **Appellant**'s right to trial without undue delay by granting the Prosecution's motion to amend the Indictment 3 years after its initial confirmation. (Para.2)

(2) Burden of Proof

9. The Trial Chamber erred in failing to apply the correct test to the evidence before it in connection with events at Mukamira camp, namely, that it was satisfied that the guilt of the **Appellant** had been proved by the Prosecution beyond a reasonable doubt.

10. Specifically, the **Appellant** submits that the Trial Chamber erred in shifting the burden of proof to Defense witnesses, expressly and implicitly, that the Defense had to prove its case.

11. The Trial Chamber also erred in its assumption, both expressed and implied, that the Defense had to disprove the Prosecution's case.

12. The Trial Chamber erred as a matter of law in failing to require the Prosecution to prove its case beyond a reasonable doubt.

13. The Trial Chamber erred as a matter of law in its findings that Witnesses **SLA** and **SAT** were credible.

14. The Trial Chamber erred as a matter of law in applying a higher standard of proof to evidence given by Defense witnesses than that applied to evidence given by Prosecution witnesses.

(3) Criminal Responsibility (Art. 6(1) of Statute)

15. The Trial Chamber erred as a matter of law in finding **Appellant** guilty of Genocide (Count 1) and Extermination as a Crime Against Humanity (Count 4), arising out of the same single act, i.e., for ordering under Article 6(1) the killings of 30 to 40 Tutsis at Mukamira camp on 25 April 1994.

16. The Trial Chamber erred in its findings in law that **Appellant**, a judicial officer, was liable pursuant to Article 6 (1) in ordering the killings on April 25 and May 11 in the absence of any evidence, implied or otherwise, that he had the authority to order, and that the soldiers and militia at Mukamira camp were compelled to obey his orders to kill Tutsis. (Para.449, p.120)

17. The Trial Chamber erred as a matter of law in failing to require the Prosecution to establish the existence of a superior-subordinate relationship, implied or otherwise, between Appellant and the soldiers and militia at Mukamira camp pursuant to Article 6 (1). (para 449, p. 120).

(4) Trial Chamber's Duty to Provide a "Reasoned Opinion"

18. The Trial Chamber erred as a matter of law in failing to provide "a reasoned opinion."

19. The Trial Chamber erred in its findings of fact and law that **Appellant** and the assailants committed killings in furtherance of the armed conflict or under its guise in violation of Article 4(a) of the Statute and had the requisite nexus to the armed conflict between the Rwandan Governmental Forces (FAR) and the RPF or RPA. (Para.487, p.129)

(b) ERRORS OF FACT (Article 24(1)(b))

20. This part of the **Appellant's** Notice of Appeal will deal with both the incorrect application of the law to the facts of the case and the related specific incorrect factual findings.

(1) Incorrect Application of the Law

21. The Trial Chamber erred in law and fact by mischaracterizing the Defense's assertion in its Closing Brief that no killings occurred at the Ruhengeri Court of Appeal. (Para.84, p.23)

22. The Trial Chamber erred in law and fact in using the above premise to conclude that the omission of **Appellant**'s name in a Gacaca proceeding did not itself raise doubt that he participated in a crime. (Para.85, p.23)

23. The Trial Chamber erred in law and fact in attaching any weight to Prosecution evidence that **Appellant**'s name was mentioned in Gacaca proceedings in Ruhengeri prison in 1999, since Appellant was not identified as having participated in any specific allegations or in relation to any specific event. (para 84, p.24).

24. The Trial Chamber erred, as a matter of law and fact, in basing its judgment on the inconsistent and implausible testimony of Witnesses **SLA** and **SAT**. (Para.320 thru 368, pp.83-96)

25. The Trial Chamber erred as a matter of law in basing its judgment, in whole, upon the inconsistent, contradictory and conflicting testimony of murderers, liars and looters. (Fn.393, p.83; fn.398, p.85)

26. The Trial Chamber erred in law and fact in questioning the impartiality of Defence witnesses in its conclusion that they were inclined to give favorable testimony concerning Mukamira camp because each of them survived the events based on the protection of the Rwandan military. (Para.360, p.94)

27. The Trial Chamber erred, in law and fact, in concluding that Defense Witness **NBO**'s testimony carried limited weight and lacked impartiality because her husband is related to an accused before the tribunal. (Para.360, p.94)

28. The Trial Chamber erred, as a matter of law and fact, that the Defense's documentary evidence challenging the existence of a Civil Defense program prior to April 1994 did not raise doubt about Witnesses **SLA** and **SAT**'s testimony. (Para.359, pp.93-4)

29. The Trial Chamber erred in law and fact in its finding that killings took place in Mukamira camp, without any independent or objective evidence, and based solely on the testimony of Witnesses **SLA** and **SAT**.

(2) Specific Incorrect Factual Findings

(A) **Differences Between the Testimony of Witnesses SLA & SAT**

30. The Trial Chamber erred in its finding that the differences between the testimony of **SAT** and **SLA** are reasonably explained by their varying vantage point and passage of time. (para.341, p.89)

31. The Trial Chamber erred in its finding that the fundamental features of Witness **SLA** and Witness **SAT**'s testimony were mostly first-hand account and largely consistent. (Paras.340,344, pp.88-9)

32. The Trial Chamber erred in failing to note the differences in both content and emphasis of the alleged statements attributed to **Appellant** on 25 April 1994, by Witness **SLA** and Witness **SAT** and concluding that the differences in their accounts were not surprising or material. (Para.342, p.89)

33. The learned Chamber erred in its finding of fact that Witness **SAT**'s testimony that **Col. Marcel Bivugabagabo, Captain Hasengineza and Lt. Mburuburengero** were present among the attendants while Witness **SLA** did not list them as present, was not a significant difference. (Para.341, p.89)

34. The learned Chamber erred in its finding of fact that it was not surprising or material that Witness **SLA** indicated that only **Appellant** addressed the crowd whereas Witness **SAT** testified that **Bizimungu** and **Appellant** spoke during that incident. (Para.342, p.89)

35. The Trial Chamber erred in failing to assess the significance that although both Witnesses **SLA** and **SAT** claimed that **Appellant** addressed those in attendance, only Witness **SLA** mentioned **Appellant**'s order to establish the roadblock and that he alone discussed the killings of 30-40 Tutsis that evening who were captured at the roadblock at **Appellant**'s instruction. (Para.343, p.89)

36. The Trial Chamber erred in law and fact in failing to find that Witness **SLA**'s testimony concerning the killings at the roadblock on 25 April, the contradictions between his prior statements and that of Witnesses **SAT** were sufficient to raise reasonable doubt. (Para.367, p.96)

37. The Trial Chamber erred in its finding that there was insufficient evidence that Witnesses **SAT** and **SLA**'s testimony of September 2008 was subject to manipulation by the Rwandese authorities. (Para.339, p.88)

38. The Trial Chamber erred, as a matter of law and fact, in finding that there was not a sufficient basis to conclude that witnesses **SLA** and **SAT** colluded in their testimony without more concrete evidence. (Para.339, p.88, fn.409)

39. In its assessment of whether Witnesses **SLA** and **SAT** colluded, the Trial Chamber erred, in its factual findings, by ignoring the evidence that Witnesses **SLA** and **SAT** gave their first and second statements to the ICTR implicating **Appellant** on the same date, were both incarcerated in Ruhengeri prison and released to a solidarity camp during the same time period, were interviewed at that solidarity camp on the same date and gave their testimonies in Arusha during the same week. (Para.339, p.88)

40. The Trial Chamber mischaracterized the Defense's assertion of fabrication of evidence as limited primarily to Witness **SAA** and others implicated in attacks in Mukingo commune. (Para.339, p.88)

(B) Credibility of Witnesses SLA & SAT

41. In assessing their credibility, the Trial Chamber erred in rejecting the evidence that Witness **SLA** and Witness **SAT** failed to admit in their confessions in Rwanda to crimes they testified to before this Tribunal. (Para.347, p.90)

42. The Trial Chamber erred in law and fact in failing to consider that Witness **SLA** admitted lying before the Rwandan judicial authorities in assessing his credibility. (T. 16 September 2008 p.60, L.28; p.63, L.12-13; p.64, L.17)

43. The Trial Chamber erred in its failure to find that Witness **SLA**'s unsubstantiated claim of being tortured as an explanation for his lying before the Rwandan judicial authorities, did not affect his credibility. (Fn.417, p.90)

44. The Trial Chamber erred in its finding that it was not surprising that, because Witnesses **SLA** and **SAT** were not charged with the 25 April killings in Rwanda, neither witness would have voluntarily discussed his participation in his confessions to the Rwandan authorities. (Para.348, p.90)

45. The Trial Chamber erred in accepting Witness **SLA**'s explanation that his testimony concerned **Augustin Bizimungu** as a reasonable explanation for the omission in mentioning the alleged killings of 25 April at Mukamira camp in his October 2002 statement to the ICTR. (Para.350, p.90)

46. The Trial Chamber erred as a matter of fact and law in its findings that the inconsistencies and variations between Witness **SAT**'s first statement of September 2002 and his trial testimony are explained because he initially did not trust the ICTR investigators. (Para. 351, p.91)

47. The Trial Chamber erred in its legal and factual findings that Witness **SAT**'s trial testimony was credible and consistent with his 2002 statement, that during the 3 months that he spent at Mukamira camp, that each time, Tutsi soldiers went to the front, the other soldiers exterminated their relatives at the camp. (Para.352, fn.428, p.91)

48. The Trial Chamber erred in its legal and factual finding that Witness **SLA**'s failure to testify about the 25 April meeting and subsequent killings in the *Ndindiliyimana* case could be explained because that event was not part of that case. (Para.354, pp.91-2)

49. The Trial Chamber erred in its legal and factual findings that Witness **SLA**'s contradictory statement that **Augustin Bizimungu** was not at Mukamira camp on 25 April, was not significant. (Para.355, p.92)

50. The Trial Chamber erred, in law and fact, in accepting the contradictory and conflicting testimony of Witness **SLA** in the *Ndindiliyimana* trial concerning his presence at Mukamira camp on May 11, as not affecting his overall credibility. (Paras.357-8, fn 443, p.93)

51. The Trial Chamber erred in its findings of fact and law that despite Witness **SLA** and **SAT**'s conflicting and contradictory statements concerning the event s of May 11, their testimony was credible. (Para.344, p.89)

52. The Trial Chamber erred in its failure to find that **SAT**'s testimony in the *Ndindiliyimana et al* trial in which he claimed that the 25 April meeting actually occurred on 25 May was a serious contradiction and therefore raised questions about his credibility. (Para.356, p.92)

(C) **Defense Expert's testimony**

53. The Trial Chamber erred in law and fact in attaching limited weight to Defense Expert **Bert Ingelaere**'s report and testimony in assessing **Appellant**'s responsibility for crimes at Mukamira camp. (Para.82, p.22)

54. The Trial Chamber erred in law and fact in its finding that Defense Expert **Bert Ingelaere**'s report and findings concerning the allegations at Mukamira camp were insufficient to raise reasonable doubt. (Para.365, pp.95-6)

55. The Trial Chamber erred in law in shifting the burden of proof to the Defense to prove that the Defense Expert's predictions regarding the probability of the **Appellant** being mentioned in Gacaca proceedings were correct. (Para.81, p.22)

56. The Trial Chamber erred in fact in finding that the Defense Expert did not consider the specific context of Gacaca proceedings in Kigali and Ruhengeri, where the **Appellant**'s name would appear, in making his conclusions since two of the five geographic areas in which he conducted the fieldwork upon which his report is based, were Kigali and Ruhengeri. (Para.83, p.22; T.23 June 2009, p.7; T.24 June 2009, p.5)

57. The Trial Chamber erred in law and fact in using the above false premise to diminish the weight of the Expert's conclusions. (Para 83, p.22)

58. The Trial Chamber erred as a matter of law and fact in failing to attach sufficient weight to the Defense Expert's opinion that given the sheer number and geographic range of allegations against the **Appellant**, certain predictions can be made, notwithstanding the limitations of the Gacaca proceedings to uncover truth. (Para 83, p. 22)

(D) **Defense Witnesses' testimony**

59. The Trial Chamber abused its discretion in discrediting the Defense witnesses' testimony that no massacres of Tutsis took place at Mukamira camp in April and May 1994, as due to their varying vantage points at the time of the killings and limited knowledge of camp activities. (Para.361, p.94)

60. The Trial Chamber's finding that the killings at Mukamira camp could have occurred on 25 April and 11 May 1994, without Defense witnesses hearing about them defies logic and commonsense. (Para.361, p.94)

61. The Trial Chamber erred in law and fact in failing to provide a reasoned and balanced evaluation of Defense Witness **NDI**'s testimony that she passed the site of the alleged massacres and decomposing corpses, twice a week to attend church services, in assessing reasonable doubt that any killings occurred at the camp. (Para 361, p.94)

62. The Trial Chamber erred in law and fact in its assessment of reasonable doubt by rejecting the totality of the Defense witnesses' testimony concerning whether any killings took place at Mukamira camp. (Para.361, p.94-5, see also trial transcripts of NBO at T.6 May 2009, p.36, L.31-35; NDI at T.11 May 2009, p.36, L.31-37; p.37, L.1-9; NEC at T. 19 May 2009, p.35, L.23-31; NCA at 27 May 2009, p.2, L.23-30)

63. The Trial Chamber erred in law and fact by failing to find that Defense Witnesses **NCA** and **NEC**'s specifically contradicted Witness **SAT**'s testimony concerning the death of the family members of a Tutsi soldier named **Mironko** in 25 April at Mukamira camp, thereby raising reasonable doubt whether the killings took place. (Para.362, p.95, fn.450)

64. The Trial Chamber erred in law and fact by failing to find that Witness **NEC** and **NDI**'s contradiction of Witness **SLA** and **SAT**'s testimony on the presence of **Captain Hasengineza** at Mukamira camp during April and May 1994 raised reasonable doubt. (Para.363, p.95)

65. The Trial Chamber abused its discretion in requiring Witness **NEC** and **NDI** to have a basis of knowledge in matters of military deployment as a pre-requisite for accepting their eye-witness testimony on the presence of **Captain Hasengineza** at Mukamira camp during April and May 1994. (Para 363, p. 95)

66. The Trial Chamber erred in law and fact in failing to find reasonable doubt, given **SLA**'s assertion that all Tutsis in the camp were killed which contrasted with the testimony of Defense witnesses including 2 Tutsis (Witnesses **NEC** and **NCA**) who testified that the Tutsis they knew at the camp survived. (Para.364, p.95)

67. The Trial Chamber erred in law and fact in failing to give sufficient weight to the evidence that **Appellant** during the period between April 24 and May 18, 1994 was involved in judicial investigations which raised reasonable doubt as to his presence at Mukamira camp on 25 April and 11 May (Paras.331-2, p.86, fn 402, 403)

(c) NEWLY DISCOVERED EVIDENCE (Rule 68, Rule 115)

68. This part of the Notice of Appeal will deal with exculpatory evidence recently discovered by the Defense, which the Prosecution deliberately withheld, in violation of its Rule 68 duty, and which the Defense will seek to admit as additional evidence under Rule 115.

(1) Evidence that No Massacres Occurred at Mukamira Military Camp from April – July, 1994

(A) **Report on Massacre Sites**

"PRELIMINARY REPORT ON IDENTIFICATION OF SITES OF THE GENOCIDE AND MASSACRES THAT TOOK PLACE FROM APRIL TO JULY 1994," 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, February 1996 [Report].

69. The above report is a comprehensive listing of massacres sites and mass graves in Rwanda from April to July 1994. Mukamira Camp is not listed as a massacre site, which supports the Defense position that no killings took place there, and that therefore **Appellant** could not have ordered any killings at the Camp. The

Prosecution knew of this document, knew of its exculpatory potential, knew that Mukamira camp was not listed, and deliberately withheld it from the Defense.

70. Had this document been available to the Trial Chamber, it would have demonstrated the innocence of the **Appellant**.

(B) **Testimony of Witness SAG**

71. The Prosecution called Witness SAG to testify at **Appellant's** Trial regarding activities at Mukamira Camp, yet it never disclosed to the Defense that he played a key role in identifiying massacres sites in Mukamira sector in preparation of the February 1996 Report. Had the Defense known of Witness SAG's identity as a "key informant," the Defense could have interviewed him to buttress the evidence that no killings occurred at Mukamira Camp. The Prosecution withheld Witness SAG's identity because it knew he had information that would undermine the testimony of Witnesses SLA and SAT. Investigators relied on Witness SAG to identify massacres sites and mass graves in the area, yet he never mentioned Mukamira Camp as a site.

72. The fact that Witness SAG did not mention any killings taking place at Mukamira Camp, despite his familiarity with the Camp and with the area[1], raises serious doubt that any such killings occurred during the period from April to July 1994.

73. The Trial Chamber could not reasonably have convicted the Appellant for ordering killings that did not occur.

2) Evidence that Witness SLA & SAT Brazenly Corroborated in Giving False Testimony

[1] Although the Prosecutor presented SAG as a witness to testify that he was tortured in 1993 at Mukamira Camp, and that Lt. Col. Setako visited the camp during that time and saw the witness, the Prosecutor withheld the fact that SAG was a key informant in the Report establishing that no killings took place at Mukamira Camp (T. 23 Feb. 2009, sealed excerpt, pp. 4-12.)

"UNAMIR FORCE HQ, OUTGOING FACSIMILE OF 25 APRIL 1994; SUBJECT: SPECIAL SITREP 250800B APR TO 251900B APR 94," prepared by J.-R. Booh-Booh, SRSG, UNAMIR, Kigali, Rwanda to Annan at United Nations, New York as information for SITUATION CENTRE, DPKO, New York

74. This UNAMIR report states that General Augustin Bizimungu, COS of the RGF, was meeting with UNAMIR's FC General Dallaire, together with the Prefect of Kigali, to work out how to evacuate refugees in the very morning of 25 April 1994 when SLA and SAT falsely and brazenly placed him in Mukamira Military Camp in the company of Lt Col Setako and others in a meeting with about 170-220 members of the civil defense force and soldiers, where Setako urged the killings of Tutsis.

75. Based on the above document, and viewed in light of all the other inconsistencies in the Prosecution's case, no reasonable trier of fact could have found the testimony of Witnesses SLA and SAT to be "largely consistent,"[2] "convincing and corroborated first-hand evidence."[3] thereby eliminating any and all evidentiary basis for convicting the Appellant.

[2] *See* Judgment, para. 340, para. 345
[3] *See* Judgment, para. 365.

III. RELIEF REQUESTED

76. For all of the reasons outlined above, the **Appellant** submits that the findings of guilt on Counts 1, 4 and 5 of the Amended Indictment are:
    a) Wrong in law;
    b) Wrong in fact;

77. And requests that the Appeals Chamber:
    a) OVERTURN the verdicts of the Trial Chamber on Counts 1, 4 and 5 of the Amended Indictment; and
    b) SUBSTITUTE verdicts of Not Guilty on each Count; and
    c) RELEASE the **Appellant** from detention without delay.
    d) Or, in the alternative, the **Appellant** requests that the Appeals Chamber:
    e) ORDER a Retrial and Immediately Release the **Appellant** on Bail Pending Commencement of the Retrial; or, again, in the alternative;
    f) QUASH the sentence of imprisonment for 25 years; and
    g) The Defense reserves the right to apply for leave to amend or otherwise vary the Grounds of Appeal, as circumstances may dictate but in particular, after the **Appellant** has been served with and considered the Judgment in a language, which he understands;
    h) The **Appellant** reserves the right to amend and add to these Grounds of Appeal in the **Appellant's** Brief;
    i) The **Appellant** specifically reserves the right to add new grounds of appeal on the basis of new evidence not available to it at trial, and to call any such evidence (Rule 115);
    j) The **Appellant** considers that the record on appeal should consist of the whole trial record (Rule 109);

78. The **Appellant** notifies the Appeals Chamber that it will be requesting an oral hearing of the Appeal in open court (Rule 114).

Dated: New York, N.Y.

20th day of July 2010

Respectfully Submitted,

/s/Lennox S. Hinds
PROFESSOR LENNOX S. HINDS
Lead Counsel on behalf of Appellant

United Nations
Nations Unies

TRANSMISSION SHEET
FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	☒ Trial Chamber I N. M. Diallo	☐ Trial Chamber II R. N. Kouambo	☐ Trial Chamber III C. K. Hometowu	
	☒ OIC, JLSD P. Besnier	☐ OIC, JPU C. K. Hometowu	☐ F. A. Talon (Appeals/Team IV)	☐ Appeals Chamber / The Hague K. K. A. Afande R. Muzigo-Morrison
From:	☐ Chamber (names)	☒ Defence **Prof. Lennox S. Hinds** (names)	☐ Prosecutor's Office (names)	☐ Other: (names)
Case Name:	The Prosecutor vs. **Setako**		**Case Number:** ICTR-04-81-A	
Dates:	Transmitted: **July 21, 2010**		Document's date: **July 20. 2010**	
No. of Pages:	**25**	**Original Language:** ☒ English	☐ French	☐ Kinyarwanda
Title of Document:	**"Motion for Leave to Amend Notice of Appeal" with Annexe 1, "Amended Notice of Appeal."**			

Classification Level:	**TRIM Document Type:**			
☐ Ex Parte	☐ Indictment	☐ Warrant	☐ Correspondence	☐ Submission from non-parties
☐ Strictly Confidential / Under Seal	☐ Decision	☐ Affidavit	☐ Notice of Appeal	☐ Submission from parties
☐ Confidential	☐ Disclosure	☐ Order	☐ Appeal Book	☐ Accused particulars
☒ Public	☐ Judgement	☒ Motion	☐ Book of Authorities	

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

☐ Filing Party hereby submits only the original, and **will not submit** any translated version.

☐ Reference material is provided in annex to facilitate translation.

Target Language(s):
☐ English ☐ French ☐ Kinyarwanda

CMS SHALL NOT take any action regarding translation.

☐ Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	☒ English	☐ French	☐ Kinyarwanda
Translation	in	☐ English	☐ French	☐ Kinyarwanda

CMS SHALL NOT take any action regarding translation.

☐ Filing Party **will be submitting the translated version(s)** in due course in the following language(s):
☐ English ☐ French ☐ Kinyarwanda

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☐ **The OTP** is overseeing translation. The document is submitted for translation to: ☐ The Language Services Section of the ICTR / Arusha. ☐ The Language Services Section of the ICTR / The Hague. ☐ An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	☐ **DEFENCE** is overseeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:

III - TRANSLATION PRIORITISATION (For Official use ONLY)

☐ Top priority	**COMMENTS**	☐ Required date:
☐ Urgent		☐ Hearing date:
☐ Normal		☐ Other deadlines: