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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding  
Judge G. Gustave Kam  
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 19 August 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

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JOSEPH NZIRORERA'S FIFTH RULE 66(B) MOTION:  
SELECTIVE PROSECUTION DOCUMENTS

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The Office of the Prosecutor:

Mr. Don Webster  
Ms. Allayne Frankson-Wallace  
Mr. Iain Morley  
Ms. Gerda Visser  
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson  
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera  
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera hereby moves, pursuant to Rule 66(B), for an order directing the prosecution to allow him to inspect the following items which are material to the preparation of his defence:

- (A) all documents from the prosecution disseminated to the government of Rwanda, United Nations, or any of its member States, non-governmental organizations, or any other ICTR organs, in which it has explained reasons for not prosecuting members of the RPF or RPA for crimes in Rwanda in 1994; and
- (B) all memoranda in the possession of the prosecution which includes reasons for not prosecuting members of the RPF or RPA for crimes in Rwanda in 1994.

2. Rule 66(B) provides that:

At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

3. The requested items are material to the preparation of Mr. Nzirorera's defence because they can be used to support a Motion to Dismiss on the grounds of selective prosecution. Mr. Nzirorera can use the items to show that the failure to prosecute RPF or RPA members was not due to lack of evidence, but due to discrimination of the part of the prosecution.

4. The Appeals Chamber has held that the phrase "material to the preparation of the defence" in Rule 66(B) is broader than materials related to the prosecution's case-in-chief.<sup>1</sup> In support of that holding, the Appeals Chamber included the following footnote:

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<sup>1</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Rules of Procedure and Evidence* (25 September 2006) at para 8

In contrast, United States Federal Rule of Criminal Procedure 16(a)(1)(E) expressly states that the government's disclosure obligation is limited to items to be used in its "case-in-chief". The United States Supreme Court in turn seized on this language to similarly restrict the category "material to preparing the defense" as well to preparations to counter the government's case-in-chief. See *United States v. Armstrong*, 517 U.S. 456, 462 (1996). It is significant that the Tribunal's Rules omit this reference in favour of a more broad formulation.<sup>2</sup>

5. Therefore, at the ICTR, inspection may be ordered of items which are material to the preparation of a motion that challenges the prosecution's right to proceed against the accused.

6. In the *Armstrong* decision cited by the Appeals Chamber in *Bagosora*, the United States Supreme Court held that a defendant asserting a claim of selective prosecution would be entitled to disclosure from the prosecution if he could make a *prima facie* showing that similarly situated defendants could have been prosecuted but were not.<sup>3</sup>

7. While the decisions in United States national courts have focused on discrimination based upon race, in the international context discrimination based upon "national, political, ethnic, racial or religious grounds" is prohibited.<sup>4</sup> Therefore, discriminating in favor of the RPF would constitute impermissible selective prosecution on political grounds.

8. Mr. Nzirorera can make such a showing in this case. Since its inception, the Tribunal has publicly indicted 78 persons—all for crimes against Tutsis or opponents of the Habyarimana regime. 77 of them have been of Hutu ethnicity.<sup>5</sup> It has not prosecuted a single RPF member or a single Tutsi.

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<sup>2</sup> Fn. 30

<sup>3</sup> *United States v. Armstrong*, 517 U.S. 456, 469 (1996)

<sup>4</sup> Article 3 of the ICTR Statute

<sup>5</sup> The other is Georges Ruggiu, a Belgian. Information obtained from [www.ictor.org](http://www.ictor.org).

9. It is undisputed that members of the RPF, RPA, and Tutsi ethnic group committed crimes within the jurisdiction of this Tribunal during 1994. The prosecution's three principal expert witnesses, Alison Des Forges, Andre Guichaoua, and Filip Reyntjens, have detailed the widespread atrocities committed by the RPA when it invaded Rwanda on 6 April 1994.

10. In her book, *Leave None to Tell the Story*, Dr. Des Forges details the crimes committed by the RPA. She summarized her findings as follows:

“In their drive for military victory and a halt to the genocide, the RPF killed thousands, including noncombatants as well as government troops and members of the militia. As RPF soldiers sought to establish their control over the local population, they also killed civilians in numerous summary executions and in massacres.”

11. Similarly, Professor Reyntjens has produced a report entitled *Disturbing Developments in Rwanda in October 1994* in which he provided first-hand evidence of crimes committed by the RPF when they took control of Rwanda.

12. In lower court cases since *Armstrong*, courts in the United States have granted disclosure on a showing less than that made in this case.

13. In *United States v Jones*,<sup>6</sup> the Sixth Circuit Court of Appeals held that disclosure of data relating to prosecutorial decision making was required where black defendants were prosecuted, but white defendants in the same alleged conspiracy were not.

14. In *United States v Tuitt*,<sup>7</sup> the United States District Court for the District of Massachusetts ordered disclosure upon a showing that in four counties in the State, black

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<sup>6</sup> 159 F.3d 969 (6th Cir. 1998)

<sup>7</sup> 1999 WL 791927 (D.Mass. 1999)

defendants were more often prosecuted in federal court for crack cocaine violations than white defendants.

15. In *United States v Glover*,<sup>8</sup> the United States District Court for Kansas ordered disclosure upon a showing that the death penalty was sought for a greater number of black defendants than for white defendants.

16. These cases support the principle that where an accused can show that persons from a different group who appear to be similarly situated are not prosecuted, he is entitled to disclosure of information from the prosecution which would reveal the reason for the disparity. He can then use this information in a Motion to Dismiss for Selective Prosecution if warranted.

17. Mr. Nzirorera made such a motion in 2004.<sup>9</sup> At that time, the prosecution opposed the motion, claiming that its investigation of RPF was ongoing.<sup>10</sup> The Trial Chamber denied the motion, holding that Mr. Nzirorera had failed to establish that the prosecutor's motives for not prosecuting RPF or RPA crimes up until that time were discriminatory in nature.<sup>11</sup>

18. In June 2008, the prosecution appears to have finally acknowledged to the United Nations Security Council that it will not be prosecuting any RPF or RPA crimes at the Tribunal. The prosecutor announced that the Rwandan government had agreed to prosecute crimes committed in Kabgayi. When addressing the completion strategy, the

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<sup>8</sup> 43 F. Supp. 2d 1217 (D. Kan. 1999)

<sup>9</sup> *Motion to Dismiss for Selective Prosecution* (24 March 2004)

<sup>10</sup> *Prosecutor's Response to Nzirorera's Motion to Dismiss for Selective Prosecution* (26 March 2004)

<sup>11</sup> *Decision on Joseph Nzirorera's Motion to Dismiss for Selective Prosecution* (22 March 2005) at para. 11

prosecution has not projected that any additional time will be needed for prosecution of RPF cases at the Tribunal.<sup>12</sup>

19. This action is consistent with comments made by former Prosecutor Carla del Ponte, and her spokesperson, Florence Hartmann, who have described the pressure brought against the ICTR Office of the Prosecutor by the United States and Rwanda not to prosecute RPF or RPA crimes.<sup>13</sup>

20. After the address of the Prosecutor to the United Nations Security Council, Mr. Nzirorera requested the prosecution to provide disclosure of material which would enable him to determine the prosecution's reasons for not prosecuting RPF and RPA members.<sup>14</sup> The prosecution has declined to do so voluntarily.<sup>15</sup>

21. Therefore, this motion is now necessary to compel the prosecution to make the items available for inspection.

22. The victor's justice being practiced at the ICTR will be a stain on the legacy of this institution forever. If there are legitimate reasons for not prosecuting RPF crimes, the prosecution should have no reason to hide them. The Trial Chamber is respectfully requested to order the requested inspection.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

<sup>12</sup> Statement by Justice Hassan B. Jallow to the United Nations Security Council (4 June 2008)

<sup>13</sup> Hartmann, *Peace and Punishment*, pp 261-76 (English translation attached as Annex "A")

<sup>14</sup> The letter to the prosecution is attached as Annex "B".

<sup>15</sup> The prosecution's response is attached as Annex "C". Follow-up e-mails are attached as Annex "D".

**ANNEX "A"**

FLORENCE HARTMANN

**PEACE AND PUNISHMENT**

**THE SECRET CONFLICT  
BETWEEN POLITICS AND  
INTERNATIONAL JUSTICE**

Flammarion

Extracts translated into English from the original French

Numbers on the left hand side of the page refer to the original pagination in the French text

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As for the ICTR, American interests were different, as was the environment. The United States wanted to ensure it had the support of its Rwandan allies for closing down the Tribunal in Arusha, even though it was far from having finished judging the high ups of the former Hutu administration, which instigated the genocide of 1994 in which nearly a million Tutsis and moderate Hutu perished in a hundred days. When it was made known, in November 2001, that the Tribunal would soon be closing, the Rwandan authorities protested, considering that the idea was premature. But President Paul Kagame was not difficult to convince. Carla Del Ponte, in December 1999, had opened investigations into Tutsi officers of the army of the Rwandan Patriotic Front (RPF) under Kagame's command. These investigations, known as "special investigations", did not relate to the genocide of Tutsis, the primary mandate of the ICTR, but to the massacres of the genocidaires and ordinary Hutu civilians who fled Rwanda in large numbers before the advance of the RPF. By virtue of their military victory, which put an end to the genocide, the President-General reckoned that his men were not to be held accountable to the justice of an international community which had allowed the Tutsis to be massacred. Prosper promised that the closing of the ICTR would put an end to these disturbing investigations. It would make it possible, at the same time, to short circuit the inclination of Judge Jean-Louis Bruguiere to have President Kagame indicted by the ICTR. Since 1998, the French judge had been in charge of the inquiry into the attack on the plane of Rwandan president Juvénal Habyarimana, which was shot down on

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April 6, 1994, a few hours before the genocide began. His inquiry was initiated by the families of the three French members of the crew who perished together with the Rwandan president and his Burundian counterpart. The Judge was convinced that Paul Kagame was the instigator of this attack. However, even though his investigations had reached the conclusion that the current Rwandan Président was involved, the immunity granted in France to Heads of State in situ prevented any prosecution there. Rather he would have to ask the UN to make the ICTR, or its prosecutor, use their power to begin a prosecution<sup>16</sup>. In November 2001, the Americans were interested in Judge Bruguiere's progress at the ICTR and questioned Del Ponte on what she knew about Kagame. But

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<sup>16</sup> On 17 November 2006 Judge Bruguiere officially delivered the conclusions of his inquiry, which had finished in 2004. He named Paul Kagame as having presumptively ordered the attack which was the event which caused the genocide to begin. Nine international arrest warrants were issued for "complicity in assassination" against those close to the Rwandan president, among them James Kabarebe, Chief of the General Staff of the Rwandan Defence Forces and Charles Kayonga, Chief of the General Staff of the Army. Rwanda immediately broke off diplomatic relations with France, accusing it of genocide denial and of wishing to hide its role in training Rwandan soldiers implicated in the massacres. France was an ally of the Hutu regime which prepared and put into action the genocide of 1994. On 19 April 2007 Rwanda began an action against France before the International Court of Justice (ICJ), accusing it of infringing international law in seeking to prosecute President Paul Kagame and some of those close to him.

they did not at this time make known their opposition to any proceedings against their ally in the area of the Great Lakes, or against his entourage. For the time being, the American strategy to precipitate the closure of the ICTR consisted in exerting pressures on African governments to give up the Rwandans who had fled and taken refuge on their territory. These steps were offered as proof of American support for the two International Tribunals and led to three arrests out of the twenty-two Rwandans indicted in their absence.

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The International Tribunals were by now perceived as providing justice at too high a price, without quantifiable impact and as having a destabilising effect both in Rwanda and in ex-Yugoslavia: they were simply obstacles to the management of the post-war period. Americans and Europeans intended to allow the Tribunals to continue their case work until 2008 but instructed the prosecution to finish its investigations by the end of 2004. And, imposing their authority, they voted budgetary cuts which mainly affected the prosecution. With her back to the wall, Del Ponte had to reduce her programme of prosecutions. Standing at one hundred and fifty suspects during 2000, the list was reduced by the end of 2001 to a hundred and eight priority suspects. It would still need until 2015 to try them. At the end of 2002, the list was divided into two categories. On one side, the cases which could not be tried elsewhere than at the International Tribunals; on the other, those cases which could be given up to local jurisdictions. The teams concentrated, from this time on, on the first list. The investigations concerning around fifty of suspects on the second list were put on ice. If time allowed, they would be worked on further before being transmitted to the ex-Yugoslav prosecutors. Del Ponte did not want to give up them because, for the moment, the local courts were not able to guarantee credible justice. Through fear of deterring co-operation, she did not publicly announce the drastic cuts which she had just made. On October 30, 2002, Del Ponte endeavoured to convince the Security Council not to let the completion strategy operate to the detriment of justice. She argued that if it ordered the prosecution to narrow the focus of its prosecutions, and the judges to prepare transfers, it must at the same time equip Bosnia-Herzégovina with a jurisdiction capable of taking over. It must also exert the pressure necessary to obtain the arrest of fugitives and gain access to the files and the witnesses that Belgrade and also Zagreb refused to give. "It is imperative that the highly placed civilians in power and soldiers are arrested without delay and that a special Court is created, since without this the time limits can not be complied with... Only in these circumstances will the International Tribunal be able to plan to conclude its mission with the certainty of having rendered justice", explained Del Ponte. The Security Council had been formally requested, on October 10, by the President of the International Tribunal to intervene in the lack of co-operation by Belgrade. The Security Council refused to pass a resolution requiring Serbia to arrest the fugitives and to stop blocking the work of international justice. Meanwhile Mladic remained in Belgrade, under the protection of the army, with the complicity of the Head of the State, Kostunica. Zoran Djindjic, the Serbian Prime Minister, did not have sufficient power to be able to arrest him. A mandatory resolution of the Security Council could have helped him to convince the Serb political community. However Pierre Richard Prosper reassured Del Ponte: American financial assistance, granted each year in Belgrade, was conditional on the arrest of the

fugitives: it would not be given if Mladic was not arrested before spring 2003. He did not keep his promise.

Prosper remained deaf to the recommendations of the International Tribunal. At the beginning of 2003, he made it more obvious than ever that the Americans wished to subject the court to an entirely political management of its exit strategy. At the time of a visit in Belgrade in January, he proposed to the authorities that they should arrest four of the twenty fugitives living in Serbia: Karadzic, Mladic as well as Sljivancanin and Radic, wanted in connection with the Vukovar affair. It promised them, in return, the suspension of the investigations in progress which were likely to put in the dock a good part of the Serbian government at the time of the war in Bosnia and in Kosovo, of whom certain members were still in power. The Belgrade press took note straight away of this disengagement with the International Tribunal by the American superpower. Most of the papers were delighted and believed they could see in the American move the sign of a desire not to allow the International Tribunal to govern the destiny of ex-Yugoslavia and bind the hands of the politicians. Del Ponte asked the Americans to state that this was not the case. A few weeks later Prosper complied, during a press conference at The Hague. But in fact he continued his secret negotiations with the purpose of deterring any co-operation by the local governments with the International Tribunal, who were aware that their dilatory manoeuvres had every chance of paying off.

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The Europeans evinced indifference to this meddling which was holding up to ridicule the principle of independent justice which they had previously defended. Del Ponte had told them in mid 2003: "I have reached a standstill. There are nineteen fugitives in Serbia, among them Karadzic and Mladic, but nobody wants to hear about the International Tribunal any more. As if I should close the doors after the Milosevic case [the end of which was then envisaged by the beginning of 2005]. "But the Europeans only want to talk about one thing: the courts are expensive and "do not produce a return on investment". Some go as far as to say: "They are worth neither the time nor the money which is devoted to them." A side effect of the ICC was to drive the International Tribunal out of the Europeans' concerns; they failed to understand that this abandonment suited the American administration's crusade against international justice. The great powers from now on had no further scruples in taking the decision to close the court. Informal discussions within the Security Council for the adoption of a resolution formalizing the calendar of closure of the two International Tribunals started in spring 2003. The year 2003 was to be the high point of international justice's difficulties in maintaining its principles in the face of political powerplay. The debates on Iraq had just divided the members of the Security Council. The glasshouse was in turmoil. The International Tribunal business was sorted out, and no delay was merited on that subject. The preparation of the resolution was a simple formality. At least for France, Russia and China. Although fixated by the war in Iraq, the United States and Great Britain saw the opportunity to kill two birds with one stone. In mid-May 2003, Prosper forced a meeting between the Rwandan leaders and the prosecutor of the International Tribunals Carla del Ponte. For a year relations between Kigali and Arusha had been at a low point. In the summer of 2002, the Rwandan government had, for several weeks, paralysed the genocide trials by preventing the arrival of the witness-victims in Arusha. Del Ponte

protested in July, then again in October, to the Security Council of UN, but they considered it sufficient, in December 2002, to make a simple declaration calling States 266

to give "co-operation without reserve" to international justice. Prosper further encouraged Del Ponte to benefit from her visit to Washington to reopen a dialogue with the Rwandan leaders, who happened also to be there. The prosecutor accepted readily, because Kigali's obstructionism was likely to lead to the acquittal of the genocide suspects, for lack of witnesses. Almost all the prosecution witnesses come from Rwanda. This formidable weapon available to the Rwandan capacity was a counter-attack by Kigali to prevail on Del Ponte to give up her investigations parallel to the genocide, aimed at officers of the tutsi army of the Rwandan Patriotic Front. The mandate of the ICTR is not limited to the genocide organized and directed by the Hutu extremists, but extends to all the serious infringements of international humanitarian law, perpetrated in 1994. According to independent experts, some thirty thousand Hutu had been killed on Rwandan territory, at the time the army of the FPR was advancing. The Arusha prosecution had catalogued fourteen sites of massacres and was making efforts to go up the chain of command. Officially, Kagame promised his assistance, but the General-President never intended to hand over a single one of his men to the ICTR. As a result of the pressures exerted during the summer 2002 Del Ponte was forced to order her three investigators to suspend their mission in Rwanda, but she refused to suspend, even temporarily, the work. The team had to work from Arusha on the evidence already accumulated and on the identification of witnesses who were refugees from Rwanda. Unknown to Carla Del Ponte, the American Michael Johnson, who had arrived in September 2002 in Arusha to take over temporarily the duties of the deputy prosecutor, which had remained vacant for a year, ordered the suspension of the "special investigations". Del Ponte discovered this only in December. Johnson was immediately summoned to return to The Hague. The responsibility for the investigation was then entrusted to a British substitute, Marks Moore. The Rwandan authorities knew from now on that Del Ponte would not yield. They turned to their powerful American

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and British allies. Consequently Kigali called a meeting with prosecutor, under American mediation, officially to deal with the problems of co-operation. But the outbreak of the war in Iraq pushed back the date endlessly. The arrival of Del Ponte in mid-May 2003 in Washington was the occasion for the two parties to get together. Prosper reassured the prosecutor: the United States was proposing to use their good offices and did not intend to interfere in the discussions. Del Ponte did not suspect for a moment what would occur.

On Wednesday May 14, 2003, at the end of the afternoon, in an elegant conference room at the State Department where the fate of so many countries has undoubtedly been decided, Del Ponte and her advisers took their seats around the table, opposite the Rwandan delegation<sup>17</sup>. At the end of table, Pierre Prosper played the master of

<sup>17</sup> The Rwandan delegation was composed of Gerald Gahina, Prosecutor General of Rwanda, Martin Ngoga, Rwandan liaison officer at the ICTR, and Richard Sezibera, Rwandan ambassador to the United Nations

ceremonies. He took an active role, suggesting the broad outline of the discussions. The game was skewed from the beginning. It was played according to rules pre-established by the Americans and the Rwandans. Del Ponte complained about the Rwandan manoeuvres which had paralysed the Tribunal and about the refusal to cooperate with the special investigations. The Rwandans retorted that the prosecution was far from having achieved its mandate. As proof, they had prepared a diskette comprising three hundred and fifty names of highly placed persons supposedly responsible for the genocide against whom the Tribunal had not yet begun proceedings. The completion strategy, which they denounced, risked allowing the instigators of the genocide to escape from justice. Prosper concluded this first meeting by underlining the need for arriving at an agreement on the transfer of cases to Rwanda. On Thursday May 15 at 5pm there was a further meeting in the same room of the State Department. The discussions began immediately on the subject of the special investigations. The message was clear: The ICTR cannot legitimately conduct investigations against the Tutsi soldiers when it is far from having completed its work on the genocide. The Rwandans did not deny the crimes but took issue with anybody's, and in particular with the international community's, right

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to prosecute members of its army. They said they wanted to deal with it themselves. At least so they claimed, in an effort to neutralize Del Ponte. Prosper intervened on several occasions to encourage the prosecutor to give up the special investigations to Rwanda. The magistrate, who had experienced the refusal to allow access to the sites of the massacres and to the military files, was disposed to allow the Rwandans to undertake, parallel to the ICTR, their own investigations, provided that the investigators of Arusha would have access to the Rwandan prosecution files. "I cannot rely solely on evidence collected outside Rwanda, among the Hutu diaspora, whose testimony is motivated by political interests opposed to yours. I must be able to check this information on the spot. I want to work properly with you, but I need your full co-operation", explained Del Ponte. The prosecutor was ready to grant the Kigali authorities a few months to show evidence of their desire to do justice "These crimes exist, they cannot be overlooked. To bring proceedings would be a contribution to reconciliation", she insisted. But she demanded control of these investigations. Prosper tried to dissuade her from this: "Rwanda would lead the inquiries and the proceedings". In principle, the ICTR would give up its primacy to the benefit of Rwanda if the investigations led to the inculcation of officers responsible for the massacres committed alongside the genocide. But in a Rwanda dominated by the Tutsi soldiers who had freed Rwanda from genocidaires, justice was under orders and the witnesses of their crimes condemned to silence. Del Ponte thus was unable to allow them to be in sole charge of the possible prosecutions nor give up her primacy in the trials which they would conduct, as Prosper insistently suggested. At the conclusion of the meeting, no agreement was reached. Some options had been considered which deserved further exploration. Prosper proposed that these should be summarized, in the next few days, in a document which could be used as a basis for future negotiations. A new series of talks with Kigali was envisaged in mid-July. Del Ponte encouraged the Rwandans to hold discussions in the interval with the judges and

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Registrar to settle the question of the protection of the witnesses who were coming to Arusha, and the possibility of the transfer of cases after the closing of the ICTR.

Friday May 16, at 11 a.m. The Rwandans are not present. Del Ponte has gone to the State Department to discuss the ICTY. Prosper and his advisers await her in an outer office. They present a document to her entitled "Summary of the conclusions between the government of Rwanda and the ICTR" formulated like a road map. Taken by surprise, Del Ponte agrees nonetheless to look at the text. The document was a travesty of the content of the discussions of the previous day. It envisaged the abandonment of all the investigations against suspects belonging to the Rwandan Patriotic Army (APR) by the ICTR prosecution and their reference to Rwandan jurisdiction, without any guarantee of results. It required the Arusha prosecution to hand over its catalogue of the sites of massacres and also "to share all the evidence with the government of Rwanda", in spite of the prohibition on transmission of witness statements to another jurisdiction without their agreement. A further contentious point was that the document stipulated that "the prosecution will have the opportunity to review the investigations once they are finished and/or once prosecutions have begun". Del Ponte protested. She repeated the position she had expounded the previous day. Prosper invited her to modify the text and, rather than slamming the door on him, she tried to avoid a confrontation with the American representative. But it all needed to be changed. The State Department advisers noted the objections, and promised to make the necessary corrections. Del Ponte was in a hurry. Her plane for The Hague was leaving in less than three hours. In particular she wanted to escape from the ambush without having to announce to the Americans that she would not sign. When Prosper suggested sending the new version by fax to her at The Hague, she left with relief. The document arrived the following week at the office in The Hague. The Americans had not modified anything of substance. Under the terms of the alleged "agreement", the Rwandan government would be

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in sole charge of the special investigations and the possible proceedings. The prosecutor of the ICTR would no longer have any control of the investigations nor over the course of possible proceedings and would have to yield all information in her possession to the Rwandan authorities. Del Ponte rejected the document out of hand and left to her advisers the task of informing Prosper of her refusal to sign up to it. For her part, she informed Kofi Annan's office: he condemned the American manoeuvre but objected to Del Ponte having exposed herself to State pressure.

*Del Ponte ejected from the ICTR*

Prosper did not accept defeat, the more so as his government was under obligation to Kigali having already negotiated the *quid pro quo*. In exchange for the guarantees of impunity against any prosecutions of tutsi soldiers before the TPIR, Kigali was soon to sign a bilateral agreement with the United States which protected American nationals from proceedings before the International Criminal Court. Since the beginning of 2003, the United States had tried to conclude, with as many States as possible who were signatories to the Treaty of Rome, bilateral agreements conferring immunity from jurisdiction, aimed at preventing American nationals from being handed over to the ICC. After signing, Kigali would have the benefit of the lifting of the embargo on weapons which the American Congress had imposed, and of substantial military aid from the United States although the war in the neighbouring Democratic Republic of Congo was still raging, having already cost more than three million lives. Furthermore Kigali had not thus far been prevented from destabilizing the area of the Great Lakes nor had its army

been prevented from involving itself in the war in the east of Congo to exploit the mineral and natural resources in the area which are the cause of so much greed. Washington glossed over Del Ponte's refusal to sign, and Prosper let it be known that she had ratified the "agreement". Del Ponte contradicted him in vain, she laboured to convince people that Prosper was trying, in passing, to damage the reputation which she enjoyed among NGOs and the specialized journalists as the independent iron lady.

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Reprisals were not long in coming. The Americans asked the British to take the lead. A powerful supporter of the ICC, Great Britain would be more convincing as the protagonist in this trial of strength against the International Tribunals. At the end of June, Jack Straw gave to Kofi Annan, while passing through Geneva, a letter requesting the separation of the post of prosecutor, hitherto common to the ICTR and the ICTY, and the appointment of a separate prosecutor for the Arusha Tribunal. He justified this step by concentrating on issues of efficiency and a reduction of costs. As a result of rejecting the agreement concluded between Washington and Kigali, with the support of London Del Ponte was to be removed from the ICTR. Having taken up her post on September 14, 1999, the Swiss was arriving at the end of her four year mandate in a few months. She had let it be known that she wished to continue in post. For the continuity of the completion strategy of which the first stages related to the prosecution, the renewal of the Del Ponte's mandate seemed to suit everyone, with the exception of London and Washington, who wanted to put her out of the game, and with the exception of certain members of her office, who also wished her set aside. Since the autumn 2002, her assistant Graham Blewitt had been campaigning to prevent her re-election. The Australian, who wished to replace her, travelled to London, Sydney, Pretoria and Taipei and was on the point of flying to New York in order to discredit her among the leaders of the U.N. when, informed of his manoeuvring, Carla Del Ponte prevented him. Michael Johnson, whose job in Arusha she had terminated, made a trip to Washington to disparage her to the American authorities, affirming that she would never keep her word on the completion strategy. Geoffrey Nice entered the contest at the beginning of 2003. He cherished the hope of succeeding Del Ponte, but especially of getting her out before the end of the Milosevic trial. He made many visits to the Foreign Office, sometimes accompanied by Michael Johnson, and never missed to take the opportunity presented by meetings in the legal or diplomatic world to describe his boss as inefficient, a poor manager, and being more concerned with her privileges and her media cover than running her office properly. He

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claimed that she had only a vague idea of the concept of international law and that she never stopped endangering the Tribunal, while behaving like an elephant in a china shop. But, even more than wishing to sully the reputation of the Swiss from the outside, it was particularly her authority at the heart of the prosecution which the three lawyers sought to question. They wanted to have a free hand to arrange the prosecutions as it suited them, to direct the Milosevic case as they wished and to get rid of the genocide and any other hurdle which got in their way. The British and American authorities scoffed at these internal tensions which further weakened the prosecution at the time when it was having to face increased pressure from the States and needed to gather all its strength to complete its investigations into the top leaders implicated in the crimes in ex-Yugoslavia.

The negotiations between the members of the Security Council to divide Del Ponte's job, which combined the ICTR and the ICTY began in early July 2003. London and Washington skilfully prepared the ground with the assistance of Kigali. To mobilize diplomatic support, the Rwandan authorities, from the very start of June, together with the victims' organisations, got up a virulent campaign against the ICTR. Kigali was thus able to denounce a "part-time" prosecutor who was "insulting the victims of the genocide". Del Ponte attempted to counter this, but her powerful detractors moved immediately to the offensive. The Americans and the British claimed that she did not devote enough time to Arusha, that her travel was expensive, that she was too occupied with the Milosevic case and with the arrest of Karadzic and Mladic,

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and that she would not be able to head up both exit strategies. The arguments appeared convincing and the majority of the members of the Security Council received the proposal favourably. Little did they suspect a manoeuvre motivated by the desire to set aside Del Ponte in order to put an end to the "special investigations". The principle of the splitting of the post of prosecutor passed without demur. Washington then tried to arrange the dismissal of Del Ponte, but the British found this initiative too risky. They preferred to prepare a separation which would cause neither resistance nor indiscreet questions. The Americans tested out the members of the Security Council by proposing to renew the mandate of Del Ponte at the ICTY for just one year. The Americans hoped that, rebuffed in this way, the prosecutor would turn on her heel and return in her native Tessin. But the idea, described as an "absurdity", did not last. Del Ponte is often perceived as dangerous and destabilising the regions where she is involved. But the States respected her courage, and did not want to disavow this symbol of the fight against impunity while the trial of the first Head of State brought before international justice was in progress.

At the beginning of July, the draft Resolutions began to circulate, initially between the five permanent members then between the ten other non-permanent members of the Security Council. The Americans and British were pulling the strings but continued to deny their involvement. They represented to their partners that the initiative came from Kofi Annan, who was anxious to encourage a greater effectiveness of the ICTR by this splitting of the post which the Rwandans were so insistent on. Del Ponte arrived in New York on July 28, to try to thwart the plans of her detractors. She had decided to ask to be heard by the Security Council before the adoption of the resolution and to explain the dangers of the splitting of her post, and the absurdity of changing the prosecutor one year before the end of the investigations at the risk of endangering the completion strategy in "its most crucial phase". She also wanted to alert the members of the Security Council to the hidden intentions of London and Washington. She was relying on the support

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of Kofi Annan who, in May, intended to recommend her renewal in the post of prosecutor of both of the international tribunals. He knew that she had, at that time, the support of the States who perceived her as the guarantor of the maintenance of a reduced and re-centred programme, which had been secured by an international community which was concerned to see it put in place without delay. The possibility of a change of prosecutor was suspected by no-one. Carla Del Ponte, what is more, was persuaded that the Secretary-General would not be prepared to sanction a stratagem which undermined justice. But Kofi Annan was not ready for a new confrontation with the Americans. The

crisis at the Security Council about the war in Iraq had almost cost him his job. Crushed by the American machine, he dreamed of taking his revenge, but the game was not worth the candle: "That is likely to create too much instability, taking into account the tendency within the Security Council" said Del Ponte putting him to the test by asking whether she would be able to choose between the post of prosecutor in Arusha and that in the Hague. He answered: "I do not think so. You've got your hands full with Milosevic, your business is to get on with it." At the conclusion of the meeting, Del Ponte challenged him: "There will be no special investigations!" Kofi Annan answered: "Not, they will not do that. - You will see". Del Ponte retorted by handing her notes to him. "Keep them for history" Disillusioned, Iqbal Riza confided privately to Del Ponte: "Its all politics. It should not have happened like this, but everything is politicized." Del Ponte responded "It is unfair that politics undermines our work. I find it wounding to see that we have managed to ridicule the principles of international justice just because Kagamé has signed a bilateral agreement [on the ICC with the United States ] and that in exchange it has been decided to protect his soldiers". Kofi Annan's principal private secretary tried to make the best of it saying : "The principles are safe." Del Ponte replied: "No, because this separation means the end of the special investigations". And Iqbal Riza concluded: "Yes, I know. I recognize the strength of your arguments, I entirely concur, but do not quote me publicly".

The American and British manoeuvring caused a reaction in France which, since the crisis in Iraq, had no desire

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to make the slightest concession. It disapproved of the interference in the work of Del Ponte, but in particular it had a score to settle with Rwanda. Because with the arrival in power of Kagame after the genocide, Paris had lost a little more of its African back yard. Rwanda, from that time on was under Anglo-Saxon influence and France was the subject of accusations in that country of having supported the Hutu genocidal regime. This reaction, although excited by France's particular interests, had the merit of supporting the interests of justice. Paris demanded that the strict planning imposed on the International Tribunals, requiring the conclusion of investigations at the end of 2004 and of the first instance cases in 2008, should be mandatory, but not final. It fought successfully for a mention of the "special investigations" in the resolution. The final text invited Rwanda "to intensify [ its ] co-operation with the ICTR in particular on the investigations into the Rwandan Patriotic Army".

Supported by several members of the Security Council, Paris also managed to block the original Anglo-American proposal to put an end immediately to investigations at the Hague Tribunal. The draft of August 10 suggested that "any new accusations would be incompatible with the completion strategy of the ICTY". The steps taken by Del Ponte at the end of July and her appearance, in camera, on August 8 in front of the Security Council, where she enumerated all the threats menacing the two Tribunals bore fruit. London and Washington's initiative was to be emptied of its substance, except for the ousting of Del Ponte from the ICTR. While the States all agreed that the deadlines should be respected, the majority of the fifteen members of the Security Council did not want to take responsibility for demanding a dead halt to the investigations, thus giving impunity to top leaders who were already in the prosecution's sights. They preferred to tighten the mandate of the International Tribunal a little further. According to the terms of Security

Council resolution 1503 of August 28, 2003, the Tribunal from now on, was required to concentrate its activity on "those principally responsible" for the crimes committed in ex-Yugoslavia.

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Having been created in 1993 to prosecute the "authors of violations of the international humanitarian law", it had been invited by resolution 1329 of November 30, 2000 to concentrate more on the "top political and military leaders". From now on, it had to limit itself to the "those principally responsible" and was deprived, in favour of local jurisdictions, of all other investigations. The States of the region were required to hand over the fugitives and "in particular Radovan Karadzic, Ratko Mladic, and Ante Gotovina". The Europeans and Americans did not manage to overcome the Russian veto and write this into the resolution, but gave the assurance that the Tribunal would not close its doors without Radovan Karadzic and Ratko Mladic being handed over to it. The British and Americans were victorious over the splitting of the post of prosecutor. Carla Del Ponte was excluded from the ICTR prosecution with immediate effect. She was renewed in post for four years at the ICTY. Frustrated by a mixed result on the other points, Washington and London would work to get things right. To accelerate the process of delocalization, the Security Council determined to invite the establishment, as soon as possible, of a special Court in Bosnia-Herzégovina. For two years, the International Tribunal had been proposing the creation of structure to taking over this task, but the great powers had balked at putting their hands in their pockets. Under the aegis of the Americans, a conference was finally organized in the Hague, October 30, 2003, in order to raise funds. Seventeen million euros were collected to cover the first three years' costs of the mixed jurisdiction of Sarajevo. It would have to be able to conduct ten cases which would otherwise have taken place at The Hague and to conclude investigations into about fifty of the suspects that Del Ponte had been forced to freeze in 2002. The Trial Chamber for war crimes in Bosnia-Herzégovina saw the light of day at the beginning of 2005 after a reform of the Penal code, prompted by the Anglo-Saxons, who imposed a system of common law in a country, and an area, of Roman law. This choice would quickly appear as an obstacle to legal co-operation between.....

**ANNEX "B"**

**PETER ROBINSON**  
*International Criminal Law*  
**P.O. Box 1844**  
**Santa Rosa, California 95402**  
**(707) 575-0540**  
**(208) 694-6161 (fax)**  
**E-mail: [peter@peterrobinson.com](mailto:peter@peterrobinson.com)**

11 July 2008

The Honorable Hassan Jallow  
Prosecutor  
International Criminal Tribunal for Rwanda  
Arusha, Tanzania

Re: *Prosecutor v Nzirorera*  
No. ICTR-98-44-T

Dear Justice Jallow,

I hope that everything is well with you in Arusha. I am in California for a few months, preparing Joseph Nzirorera's defence case.

In that connection, I would appreciate it if your office could permit me to inspect, pursuant to Rule 66(B), as well as Rule 68, the following items in the possession of the prosecution:

1. All information concerning RPF crimes allegedly committed between 1 January 1994 and 31 December 1994.
2. All information concerning the reasons for the decision not to prosecute anyone at the ICTR for those crimes.

By "information", I mean written reports, statements, memoranda, or correspondence.

The reason I am seeking this information is to assist me in determining whether a Motion to Dismiss for Selective Prosecution should be brought on Mr. Nzirorera's behalf, now that you have publicly stated before the UN Security Council that there will be no prosecution of RPF crimes at the ICTR (subject to the satisfactory completion of Rwandan judicial proceedings).

The Honorable Hassan Jallow

--page two--

Item #1 will allow me to evaluate whether the persons not prosecuted were in similarly situated to those persons like Mr. Nzirorera who were prosecuted. Item #2 will allow me to evaluate whether the disparate treatment was discriminatory on political or ethnic grounds.

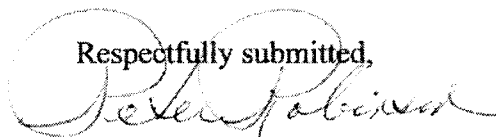
I think I am entitled to this disclosure under the rationale expressed by the United States Supreme Court in *United States v Armstrong*, 517 US 456 (1996). In the *Bagosora Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Rules of Procedure and Evidence* (25 September 2006) at fn. 30, the Appeals Chamber noted that the disclosure rules of the ICTR are even broader than those applied in the United States by the Supreme Court in *Armstrong*.

Please let me know at your earliest convenience whether you would be willing to disclose the requested material or whether you prefer I file a motion for disclosure with the Trial Chamber.

Meanwhile, I wish you all the best and hope you have time to enjoy the summer recess.

Thank you very much for your consideration of this request.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

cc: Constant Hometowu for distribution to the  
Judges and parties

**ANNEX "C"**



**International Criminal Tribunal for Rwanda**  
**Tribunal Pénal International pour le Rwanda**

Arusha International Conference Centre  
 P.O.Box 6016, Arusha, Tanzania - B.P. 6018, Arusha, Tanzania

Tel: 255 27 2504207-11 2504367-72 or 1 212 963 2850 Fax: 255 27 2504000/2504373 or 1 212 963 2848/49

**Ref: OTP/2008/P/149**

**Date: 12 August 2008**

Mr. Peter Robinson  
 Lead Counsel for NZIRORERA  
 ICTR  
 Arusha

Dear Mr. Robinson,

**Re: *Prosecutor v Nziroera* – Case No ICTR -98-44-T**

I have been directed by the Prosecutor to acknowledge receipt of your letter to him of 11<sup>th</sup> July 2008 and to advise you that he is unable to accede to your request for the following reasons:

1. The rule for inspection does not authorize blanket access to the OTP database to search for unspecified items. You have not identified the items you need to inspect with reasonable specificity and have not demonstrated in which way such items, if any, relate to the defence of your client;
2. The Prosecutor has never made a statement before the UN Security Council or anywhere else that “there will be no prosecution of RPF crimes at the ICTR...” as alleged by you. The Prosecutor is aware that Professor Erlinder, your colleague and President of the ADAD of which you are a member, has made similar allegations. A copy of the Prosecutor’s response to him is attached for your information. Under the circumstances, we are unable to provide you with any reasons for the alleged decision.

The Prosecutor wishes to seize this opportunity to wish you all the best.

Yours faithfully,

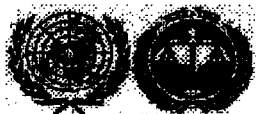
William Egbe  
 Acting Chief of Prosecution

Cc: Constant Hometowu for distribution to  
 The Judges and Parties

JUDICIAL RECORDS/ARCHIVES  
 UNIT 1111

1 2008 AUG 13 A 10:15

*William Egbe*



**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**

Arusha International Conference Centre

P.O.Box 8016, Arusha, Tanzania - S.P. 8016, Arusha, Tanzania

UNITED NATIONS  
NATIONS UNIES

Tel: 255 27 2565347 2504207-11 2504367-72 or 1 212 963 2850 Fax: 255 27 2565099 2504000/2504373 or 1 212 9632848/9

Ref: OTP/2008/P/023

Date: 8th July 2008

**PROF. PETER ERLINDER  
PRESIDENT ICTR-ADAD  
UNICTR  
ARUSHA, TANZANIA**

Dear Sir,

I have been directed by the Prosecutor to refer to your recently published article titled "The International Criminal Tribunal for Rwanda: A Model for Impunity" and to convey the following concerns to you.

Your article makes a number of unfavourable comments and allegations against diverse personalities including the Prosecutor, Judges of the UNICTR and political leaders. At this stage the Prosecutor is concerned only with your allegations concerning his office.

Under the subheading "US/UK Pressure UN Security Council ..... 2003" you write that Carla del Ponte "was replaced by Hassan Bubacar Jallow who publicly pledged not to follow-up on the prosecutorial initiative to prosecute both sides to the Rwanda war announced by his predecessor." You repeat further in the same paragraph that "Jallow publicly pledged not to prosecute members of the Kagame government and all settled back to "normal" at the ICTR."

The allegation that the Prosecutor made such a pledge is absolutely false and without any foundation whatsoever. He has never made any such pledge. The Prosecutor regards this deliberate misrepresentation as an extremely serious effort to tarnish his professional integrity. It is all the more serious in that you have never bothered to ascertain from the Prosecutor before publication whether he indeed made any such pledge.

Accordingly the Prosecutor is requesting an apology from you for this misrepresentation and a retraction of the offending portions of your article from circulation.

We look forward to your prompt action on this matter.

  
Murtaza Jaffer

Special Assistant to the Prosecutor

cc: H.E. Adama Dieng  
Registrar, ICTR, Arusha

## **ANNEX “D”**

Dear Bill,

Thank you for your response to my letter to Prosecutor Jallow. Please give him my warmest regards when you see him.

For your information, I am not a member of ADAD.

As a point of clarification, is OTP considering prosecuting any RPF or RPA officials at this point?

Yours truly,

Peter Robinson  
Lead Counsel for Joseph Nzirorera

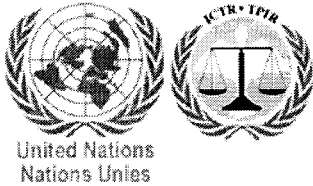
Dear Peter,

I apologise for the error in stating that you are a member of ADAD.

I am directed by the Prosecutor to advise you to refer to the several statements he made to the United Nations Security Council (UNSC) on OTP policy regarding the prosecution of RPF or RPA officials.

Best regards  
Ag Chief of Prosecution

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## 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)

<b>To:</b>	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input checked="" type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Trial Chamber III A. N'Gum
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Appeals Chamber / Arusha Chamber II F. A. Talon		<input type="checkbox"/> Appeals Chamber / The Hague K. K. A. Afandé R. Muzigo-Morrison
<b>From:</b>	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence <b>Peter Robinson</b> (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
<b>Case Name:</b>	The Prosecutor vs. <b>Joseph Nzirorera</b>		<b>Case Number:</b> ICTR-98-44-T	
<b>Dates:</b>	Transmitted: <b>19 August 2008</b>		Document's date: <b>19 August 2008</b>	
<b>No. of Pages:</b>	<b>28</b>	<b>Original Language:</b>	<input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
<b>Title of Document:</b>	<b>JOSEPH NZIRORERA'S FIFTH RULE 66(B) MOTION: SELECTIVE PROSECUTION DOCUMENTS</b>			
<b>Classification Level:</b>		<b>TRIM Document Type:</b>		
<input type="checkbox"/> Ex Parte <input type="checkbox"/> Strictly Confidential / Under Seal <input type="checkbox"/> Confidential <input checked="" type="checkbox"/> Public		<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties <input type="checkbox"/> Decision <input type="checkbox"/> Affidavit <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Submission from parties <input type="checkbox"/> Disclosure <input type="checkbox"/> Order <input type="checkbox"/> Appeal Book <input type="checkbox"/> Accused particulars <input type="checkbox"/> Judgement <input checked="" type="checkbox"/> Motion <input type="checkbox"/> 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	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> 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

**KINDLY FILL IN THE BOXES BELOW**

<input type="checkbox"/> <b>The OTP</b> is overseeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input checked="" type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	<input type="checkbox"/> <b>DEFENCE</b> 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:
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### III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	<b>COMMENTS</b>	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: