

ICTR-98-44-T  
19-12-2008  
(43850-43839)

43850  
A

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 December 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES  
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REPLY BRIEF:  
JOSEPH NZIRORERA'S MOTION FOR RECONSIDERATION  
OF 2 DECEMBER 2008 DECISION

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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 has moved for reconsideration of the Trial Chamber's *Decision on Joseph Nzirorera's Motions for Reconsideration of 24 October 2008 Order, for Extension of Time, Subpoenas and Video-Link and on Prosecution's Motion for an Order to Nzirorera to Reduce his Witness List* (2 December 2008)

2. On 15 December 2008, there was filed the *Prosecutor's Response to: Joseph Nzirorera's Motion for Reconsideration of 2 December 2008 Decision*. Mr. Nzirorera now replies.

**Error #1—the 24 October 2008 filing**

3. The prosecution does not dispute that the Trial Chamber erred when it found that Mr. Nzirorera's motion for extension of time was filed after the Trial Chamber's order to reduce his witness list.<sup>1</sup> The prosecution presents an alternative argument to uphold the sanctions—Mr. Nzirorera's alleged late and/or incomplete Rule 73 *ter* filings.

2. The Trial Chamber's *Decision* found the motion for extension of time abusive of the process "considering this Chamber's Order of 24 October 2008 as well as the previous orders from the Chamber regarding Joseph Nzirorera's obligations pursuant to Rule 73 *ter*".

3. It is unclear what the Trial Chamber meant when referring to its previous orders. Since the Trial Chamber had already imposed a warning for perceived violation of its previous orders,<sup>2</sup> and no further violation occurred between that warning and the Chamber's Order of 24 October 2008, the Chamber would be punishing Mr. Nzirorera's lead counsel twice for the same conduct if the prosecution's argument is accepted.

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<sup>1</sup> *Response* at para. 4

<sup>2</sup> *Order to Joseph Nzirorera on the Presentation of his Defence Evidence* (30 July 2008) at para. 11

4. It would also be useful for the Trial Chamber to recall the exact chronology with respect to Mr. Nzirorera's witness list:

05 Dec 2007	Status Conference	Trial Chamber rejects prosecution request that all defence teams file Rule 73 ter witness list before commencement of Karemera defence. <sup>3</sup>
24 Dec 2007	Scheduling Order	Karemera team to file Rule 73 ter list. Nzirorera team required only to provide estimated number of witnesses. <sup>4</sup>
07 Jan 2008	Nzirorera filing	Provides estimates as required by Trial Chamber <sup>5</sup>
27 Feb 2008	Decision	Trial Chamber changes its mind, orders Nzirorera to make Rule 73 ter filing by 10 March 2008 <sup>6</sup>
06 Mar 2008	Decision	Trial Chamber invites comments on when Rule 73 ter filings should be due
12 Mar 2008	Nzirorera filing	Informs Trial Chamber that investigations still underway to locate and identify witnesses. Offers to make preliminary filing by 31 March. <sup>7</sup>
31 Mar 2008	Nzirorera filing	Describes efforts being made by his defence team to meet its potential witnesses and convince them to testify. Provided breakdown of numbers of witnesses on "rolling witness list" by event. <sup>8</sup>
17 Apr 2008	Decision	Trial Chamber ordered Rule 73 ter filing by 24 April 2008 <sup>9</sup>
24 Apr 2008	Nzirorera filing	Not able to provide the Trial Chamber with a list of witnesses pending completion of missions to meet potential witnesses. Promises that information will be provided well in advance of the commencement

<sup>3</sup> Transcript of 5 December 2007 @ 32

<sup>4</sup> *Scheduling Order* (24 December 2007)

<sup>5</sup> *Joseph Nzirorera's Current Projections for his Defence Case* (7 January 2008)

<sup>6</sup> *Decision Sur La Requete d'Edouard Karemera Visant au Report du Commencement de la Presentation de sa Preuve et sur les Requetes du Procureur Intitulees, Prosecutor's Cross Motion for Enforcement of Rule 73 ter and Remedial and Punitive Measures, et Prosecutor's Request for Temporary Transfer of Witness AXA Pursuant to Rule 90 bis.* (27 February 2008)

<sup>7</sup> *Joseph Nzirorera's Submissions Pursuant to 6 March 2008 Order* (12 March 2008)

<sup>8</sup> *Joseph Nzirorera's First Rule 73 ter Filing* (31 March 2008)

<sup>9</sup> *Decision Relative a la Presentation des Moyens de Preuve a Decharge* (17 April 2008)

of his defence case so as not to prejudice any other party or cause any delay in the proceedings.<sup>10</sup>

- |             |                     |   |
|-------------|---------------------|---|
| 26 May 2008 | Ex Parte conference | Nzirorera team offers to identify potential witnesses to Trial Chamber. Trial Chamber requests this information be provided in writing on <i>ex parte</i> basis by 2 June 2008.         |
| 02 Jun 2008 | Nzirorera filing    | Nzirorera team files list of 240 witnesses and summaries <i>ex parte</i> . <sup>11</sup>  |
| 30 Jul 2008 | Decision            | Trial Chamber unilaterally discloses <i>ex parte</i> witness list and summaries. Issues warning to Nzirorera counsel. Orders Rule 73 <i>ter</i> filing by 13 August 2008. <sup>12</sup> |
| 13 Aug 2008 | Nzirorera filing    | Nzirorera team files list of 226 witnesses. <sup>13</sup>   |
| 27 Aug 2008 | Decision            | Trial Chamber orders updated witness summaries to be filed by 8 September 2008. <sup>14</sup>   |
| 08 Sep 2008 | Nzirorera filing    | Nzirorera team files witness summaries. <sup>15</sup>   |
| 24 Oct 2008 | Decision            | Nzirorera ordered to reduce his witness list and file Consolidated Rule 92 <i>bis</i> motion by 7 November 2008. <sup>16</sup>  |
| 06 Nov 2008 | Status Conference   | Trial Chamber unilaterally orders Nzirorera to present defence case before Ngirumpatse. <sup>17</sup>   |
| 07 Nov 2008 | Nzirorera filing    | Nzirorera motion for reconsideration in light of 6 November change in order of defence cases <sup>18</sup>  |
| 02 Dec 2008 | Decision            | Trial Chamber sanctions Nzirorera counsels. Orders filings by 8 December 2008. <sup>19</sup>  |

<sup>10</sup> *Joseph Nzirorera's Second Rule 73 ter Filing* (24 April 2008)

<sup>11</sup> *Joseph Nzirorera's Third Rule 73 ter Filing* (2 June 2008)

<sup>12</sup> *Order to Joseph Nzirorera on the Presentation of his Defence Evidence* (30 July 2008)

<sup>13</sup> *Joseph Nzirorera's Fourth Rule 73 ter Filing* (13 August 2008)

<sup>14</sup> *Decision on Joseph Nzirorera's Motion for Extension of Time* (27 August 2008)

<sup>15</sup> *Joseph Nzirorera's Fifth Rule 73 ter Filing* (8 September 2008)

<sup>16</sup> *Order to Joseph Nzirorera to Reduce His Witness List* (24 October 2008)

<sup>17</sup> Transcript of 6 November 2008 @ 4

<sup>18</sup> *Joseph Nzirorera's Motion for Reconsideration: Order to Joseph Nzirorera to Reduce his Witness List* (7 November 2008)

<sup>19</sup> *Decision on Joseph Nzirorera's Motions for Reconsideration of 24 October 2008 Order, for Extension of Time, Subpoenas and Video-Link and on Prosecution's Motion for an Order to Nzirorera to Reduce his Witness List* (2 December 2008)

08 Dec 2008 Nzirorera filing Rule 73 *ter* and 92 *bis* filings made as ordered.<sup>20</sup>

5. These events demonstrate that Mr. Nzirorera's lead counsel never missed a deadline for making a Rule 73 *ter* filing and made his best efforts to provide updated witness information as it became available. The parties knew the identity of Mr. Nzirorera's proposed witnesses at least 8 months before he will begin presentation of his defence case.

6. In contrast, the Trial Chamber never required the prosecution to provide its witness list until 3 months prior to the commencement of trial and never ordered the prosecution to reduce its list of some 200 witnesses. Therefore, it is difficult to determine on what basis sanctions could be imposed upon Mr. Nzirorera's counsels for "late and/or incomplete Rule 73 *ter* filings" as suggested by the prosecution in its response when his filings were made earlier and were more complete than those required of the prosecution.

7. The Trial Chamber issued the sanction when it believed, in error, that Mr. Nzirorera filed a motion for extension of time to respond to a motion which had already been decided. Now that the true facts are known, the Trial Chamber should reconsider its decision that the filing of the motion for extension of time was an abuse of process.

#### **Error #2—Failure to Appeal**

8. The prosecution does not seek to defend the Trial Chamber's conclusion that the fact that Mr. Nzirorera did not appeal the Trial Chamber's 24 October 2008 decision meant that his motion to reconsider the decision was frivolous.<sup>21</sup> Given Mr. Nzirorera's explanation for not appealing, which was consistent with the position he took concerning

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<sup>20</sup> *Joseph Nzirorera's Sixth Rule 73 ter Filing* (8 December 2008)

<sup>21</sup> *Response* at para. 12

Ngirumpatse's request to appeal, the Trial Chamber's conclusion about the failure to appeal has been shown to be erroneous.

9. Since that was the principal basis upon which the Trial Chamber deemed the Motion for Reconsideration frivolous<sup>22</sup>, the sanctions which followed should be reconsidered.

10. The prosecution also agrees that the change in order of the defence cases was a new circumstance and that "there may be good reasons being second instead of third might conceivably mean Nzirorera would now want to argue the witness limitation and re-evaluate his defence presentation."<sup>23</sup>

11. However, the prosecution contends that the only appropriate course for Nzirorera to have pursued was to file his witness list and Rule 92 *bis* motion on 7 November and then seek reconsideration of the order.<sup>24</sup>

12. Mr. Nzirorera could not do so for two reasons. The Trial Chamber had already ruled that it would not entertain more than one Rule 92 *bis* motion and would refuse to compensate his counsel for any further applications. Therefore, Mr. Nzirorera could not file his Rule 92 *bis* motion knowing that changes were likely.

13. Similarly, with respect to his witness list, once he filed a final witness list, Mr. Nzirorera could only add witnesses with leave of the Trial Chamber.<sup>25</sup> Given the frequency with which such applications are denied<sup>26</sup>, and the attitude of this Trial

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<sup>22</sup> See *Decision* at para. 14

<sup>23</sup> *Response* at para. 8

<sup>24</sup> *Response* at para. 9

<sup>25</sup> Rule 73 *ter* (E)

<sup>26</sup> See, for example, *Prosecutor v Ndindiyimana et al*, No. ICTR-00-56-T, *Decision on Augustin Bizimungu Motion to Vary His Witness List* (24 October 2007) at para. 6; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List* (17 November 2006); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion to Vary Its Witness List and Tender a Witness Statement Under Rule 92 bis* (12 December 2006); *Prosecutor v*

Chamber towards the number of witnesses that Mr. Nzirorera wants to call, it would have been prejudicial to Mr. Nzirorera's interests to file a witness list knowing that additional witnesses were likely to be needed. It was more prudent to seek reconsideration of the number of witnesses to be called before locking in any list of witnesses.

14. However, even if reasonable persons could differ over whether to file the material on 7 November and seek reconsideration later, or seek reconsideration before filing the final lists and omnibus Rule 92 *bis* motion, there is nothing in Mr. Nzirorera's choice of the latter route which makes his motion to reconsider frivolous. Given the role of defence counsel to protect his client's interests, Mr. Nzirorera contends that his counsel's manner of proceeding was warranted under the circumstances.

15. The prosecution also contends that the order of presentation of defence cases, while changed on 6 November, should have had no impact on the witness list since all defence witness lists should have been filed before the commencement of the defence case.<sup>27</sup>

16. As Mr. Nzirorera has explained and demonstrated, the defence teams coordinated their witness lists to avoid duplication at the request of the Trial Chamber. Therefore, even if all lists had been filed before the commencement of the defence case, Nzirorera's list would not have included Ngirumpatse's witnesses. When circumstances changed and Nzirorera could no longer be certain that Ngirumpatse would be calling those witnesses, it was reasonable to request that he be able to add Ngirumpatse witnesses to his own list so as to ensure that their evidence was heard.

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*Muvunyi*, No. ICTR-2000-55A-T, *Decision on Accused's Motion to Expand and Vary the Witness List* (28 March 2006); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Emergency Motion to Vary Witness List* (12 June 2008)

<sup>27</sup> *Response* at para. 10

17. Therefore, the Trial Chamber erred in its conclusion that there was no new circumstance on 6 November 2008 when it unilaterally changed the order of presentation of defence cases, and when Ngirumpatse's health issues made the prospect of his presenting any witnesses at all uncertain.

18. The prosecution also "leaves open" the argument that the motion for reconsideration was filed on the date the filings were due may support a finding that the motion was frivolous.<sup>28</sup> This cannot be right. The new circumstance which required filing the motion only occurred on 6 November when the Trial Chamber changed the order of defence cases. The motion for reconsideration was filed the very next day.

19. The prosecution's response demonstrates that Mr. Nzirorera's counsel was reasonable in deciding to file a motion for reconsideration when the order of defence cases was changed. While the prosecution claims it may have done it differently, there is no basis for a finding that Mr. Nzirorera's motion was frivolous.

### **Error #3—The Ntawumenyumunsi Subpoena Motion**

20. The prosecution indicates it is "cautiously sympathetic" on this issue and that "it is not immediately clear how the motion is clearly abusive."<sup>29</sup> Mr. Nzirorera and his lead counsel appreciate the prosecution's position on this issue. If it is not clear to even the prosecution that filing a motion for subpoena contravened the Trial Chamber's 20 October 2008 order, how can Mr. Nzirorera's counsel be sanctioned for it?

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<sup>28</sup> *Response* at para. 11

<sup>29</sup> *Response* at para. 13

**Error #4—Breach of 24 October 2008 Order Concerning Rule 92 bis**

21. The prosecution notably offers no defence for the legal error of the Trial Chamber in finding that Mr. Nzirorera was in breach of the 24 October 2008 order when he had made a timely motion to reconsider it.

22. The prosecution seeks to rescue the Trial Chamber's error in this regard by contending that, although the 6 November 2008 decision to change the order of defence cases was a new circumstance "if there were to be 92bis amendments subsequent to the 6 November ruling, then they ought to be offered by a fresh motion to vary."<sup>30</sup>

23. However, this flies in the face of the Trial Chamber's order of 24 October 2008 which provided that:

"The Chamber further notes that Joseph Nzirorera repeated that he intends to submit more than 40 written statements in lieu of oral testimony under Rule 92 bis. Filings under Rule 92 bis require orders and Nzirorera has already applied for Rule 92 bis orders on a statement by statement basis. The Chamber considers that this would unreasonably and unnecessarily increase the work of the Chamber and any party that may wish to respond. Consequently, it directs that applications for adducing statements under Rule 92 bis be made in one application. The Chamber will direct the Registrar that fees for additional filings are denied unless cause is shown. It would also be consistent with the Rule 73 ter orders of the Chamber that such applications be made forthwith."<sup>31</sup>

24. The order also "DIRECTS that the Registrar deny payment of fees associated with any additional filing for a specific written statement under Rule 92 bis unless cause is shown."<sup>32</sup>

25. Indeed, in his motion for reconsideration, Mr. Nzirorera offered to file his Rule 92 bis statements immediately. He stated that:

"Given the situation described above, it is not possible to provide

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<sup>30</sup> Response at para. 15

<sup>31</sup> Order to Joseph Nzirorera to Reduce His Witness List (24 October 2008) at para. 11

<sup>32</sup> Order to Joseph Nzirorera to Reduce His Witness List (24 October 2008) at page 5, III

a final Rule 92 *bis* motion at this time for all potential witnesses. Should the Trial Chamber reconsider its order and remove the provisions precluding further filings, Mr. Nzirorera can file what he has at the present time.”<sup>33</sup>

26. Once again, while the prosecution may have done it differently, it offers no basis for demonstrating that it was “frivolous” or “abusive of the process” to decide to move for reconsideration of the order that all Rule 92 *bis* statements be filed simultaneously given the change in order of defence cases, and the uncertainty of being compensated for subsequent applications which may have been necessitated by this change.

27. The Trial Chamber erred in concluding that Mr. Nzirorera’s counsel was in breach of the 24 October 2008 order and in imposing sanctions for the timely motion for reconsideration of the Rule 92 *bis* order.

#### **Error #5—Intention to Exploit Remuneration System**

28. The prosecution does not dispute the fact that defence Rule 92 *bis* applications have always been made on a statement by statement basis and that Mr. Nzirorera’s counsel had no advance notice prior to the imposition of sanctions that he should file all Rule 92 *bis* applications in a single motion.

29. It contends that there is no requirement of a warning before imposing sanctions under Rule 73(F) and that therefore the Trial Chamber could properly sanction defence counsel for conduct which it had not previously disapproved.<sup>34</sup>

30. While the prosecution is correct that a warning is not a pre-requisite to imposition of sanctions under Rule 73 (F), there is no justification for a finding that filing

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<sup>33</sup> *Joseph Nzirorera's Motion for Reconsideration: Order to Joseph Nzirorera to Reduce his Witness List* (7 November 2008) at para. 7

<sup>34</sup> *Response* at para. 16

separate Rule 92 *bis* motions are abusive of the process when that has been the established practice and Mr. Nzirorera's counsel had no reason to believe that the Trial Chamber did not want it done that way. When the Trial Chamber made such an order on 24 October 2008, Mr. Nzirorera immediately ceased filing separate Rule 92 *bis* motions.

31. Therefore, the Trial Chamber erred in finding that multiple Rule 92 *bis* motions warranted sanctions.

#### **Error #6—Communication of Misconduct to State Bar**

32. The prosecution responded that:

“The Prosecution does recognise the seriousness of a personal report by the Tribunal to a domestic bar, and short of jailing a counsel for contempt; it seems difficult to imagine a more severe response. The Prosecutor recognises that if one or more of the findings of the Chamber will be reconsidered, then the Chamber might in its discretion wish to consider afresh the appropriate penalty.”<sup>35</sup>

33. Mr. Nzirorera and his lead counsel appreciate the prosecution's position in this regard and the recognition, even by their opponent, that the Trial Chamber's sanctions may have been excessive.

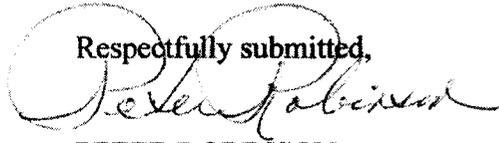
#### **Conclusion**

34. Mr. Nzirorera's lead counsel once again apologizes to the Trial Chamber for the acts which caused such a severe reaction in its 2 December 2008 decision. He and Mr. Nzirorera respectfully request that the Trial Chamber reconsider its decision in light of the issues raised in the Motion for Reconsideration, and in light of the position of the prosecution in this matter.

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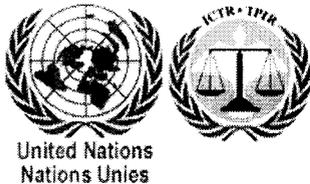
<sup>35</sup> *Response* at para. 18

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Peter Robinson". The signature is written in black ink and is positioned above the printed name.

PETER ROBINSON

Lead Counsel for Joseph Nzirorera



# 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. Hometownu	<input type="checkbox"/> Trial Chamber III A. N'Gum
	<input type="checkbox"/> Chief, CMS J.-P. Fométié	<input type="checkbox"/> Appeals Chamber / Arusha Chamber II F. A. Talon		<input type="checkbox"/> Appeals Chamber / The Hague K. K. A. Afande 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>18 December 2008</b>		Document's date: <b>19 December 2008</b>	
<b>No. of Pages:</b>	<b>12</b>	<b>Original Language:</b>	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
<b>Title of Document:</b>	<b>REPLY BRIEF: JOSEPH NZIRORERA'S MOTION FOR RECONSIDERATION OF 2 DECEMBER 2008 DECISION</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 checked="" 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 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

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**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

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**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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## 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: