

ICTR-98-44-T

21-7-2008

(36772 - 36758)

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Jury
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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: 21 July 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

2008 JUL 21 P 12:02
JUDICIAL RECORDS ARCHIVED

JOSEPH NZIRORERA'S ELEVENTH NOTICE OF
RULE 68 VIOLATION AND MOTION FOR STAY
OF PROCEEDINGS

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

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1. Joseph Nzirorera respectfully provides notice to the Trial Chamber of fresh violations of Rule 68 by the prosecution in his case, and asks the Chamber to put a stop to this trial. Discovery of these latest violations, coupled with the history of massive disclosure violations by the prosecution in this case, leads to the conclusion that Mr. Nzirorera's right to a fair trial can no longer be guaranteed.

The Latest Violations

2. In November 2006, Witness ALL-42, a former RPF official, testified in closed session in the *Bagosora* trial.¹ Among the revelations made during his testimony were:

- The RPF infiltrated the Interahamwe.²
- The National President of the Interahamwe, Robert Kajuga, was working for the RPF, which financed his election as President³
- The Vice President of the Interahamwe, Phineas Ruhumuliza, was working for the RPF.⁴
- Prosecution Witness G was working for the RPF.⁵
- A close relative of Mathieu Ndirumpatse was working for the RPF, and arranged for RPF operative Jean Pierre Turatsinze, to work for MRND as coordinator of the Interahamwe⁶
- The RPF was responsible for the assassination of Felicien Gatabazi in February, 1994 and sought to blame it on the Habyarimana regime.⁷

3. In April 2006, Witness BRA-1, a former RPA soldier, testified in closed session in the *Bagosora* trial.⁸ Among the revelations made during his testimony were:

¹ A copy of the transcript of his testimony is Confidential Annex "C" to this motion. The testimony is referred to in this public motion in generic terms, and not quoted, so as not to reveal information which could lead to identifying the witness.

² Transcript of 8 November 2006 @ 38-39

³ Transcript of 8 November 2006 @ 38-39

⁴ Transcript of 8 November 2006 @ 39

⁵ Transcript of 8 November 2006 @ 39

⁶ Transcript of 8 November 2006 @ 38-39; Transcript of 9 November 2006 @ 1-5

⁷ Transcript of 8 November 2006 @ 40

- Direct information that the RPF assassinated Felicien Gatabazi in February 1994 and sought to blame it on the Habyarimana regime⁹
- Direct information that the RPF assassinated Emmanuel Gapyisi in 1993 and sought to blame it on the Habyarimana regime¹⁰
- Direct information that the RPF assassinated President Habyarimana on orders of President Kagame¹¹

4. The prosecution has been in possession of this information since 2006. It never disclosed the transcripts until July 2008 after Mr. Nzirorera got wind that these testimonies might be useful to his defence and made a specific request for them.

The Requirements of Rule 68

5. Rule 68(A) provides:

“The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.”

6. A party alleging a violation of Rule 68 must: (1) identify specifically the material sought; (2) present a *prima facie* showing of its probably exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the prosecution.¹²

Specificity

7. By letter dated 11 June 2008, Mr. Nzirorera requested disclosure of the closed session testimony of witness BRA-1.¹³ By letter dated 17 June 2008, Mr. Nzirorera

⁸ A copy of the transcript of his testimony is Confidential Annex “D” to this motion.

⁹ Transcript of 6 April 2006 @ 20-22

¹⁰ Transcript of 6 April 2006 @ 22-23

¹¹ Transcript of 5 April 2006 @ 67-74

¹² *Decision on Joseph Nzirorera’s Appeal from Decision on 10th Rule 68 Motion* (14 May 2008) at para. 9

¹³ A copy of this letter is Annex “A” to this motion.

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requested disclosure of the closed session testimony of witness ALL-42.¹⁴ Therefore, the exculpatory material has been specifically identified.

Exculpatory Nature

8. The exculpatory nature of the testimony of Witness ALL-42 is obvious. The indictment charges that Mr. Nzirorera conspired with and exercised control over Robert Kajuga and the other leaders of the Interahamwe.¹⁵ Witness ALL-42 testified that three of those leaders, including Kajuga, were actually controlled by the RPF.

9. Witness ALL-42 also testified that Prosecution Witness G was controlled by the RPF. This is clearly a matter which would affect the credibility of Witness G's testimony.

10. The testimony of Witness ALL-42 and Witness BRA-1 concerning the RPF's responsibility for the assassinations of MDR leader Emmanuel Gapyisi, Minister Felicien Gatabazi, and President Juvenal Habyarimana also is of an exculpatory nature.

11. In the *Bagosora* case, the Trial Chamber held that:

“Descriptions of infiltration into areas of government control by RPF soldiers disguised as civilians could provide context or background information which may assist the Chamber in understanding some of the conduct about which the Chamber has heard testimony during the Prosecution case. Information concerning the assassination of President Habyarimana may also assist the Chamber in understanding the background to events in April 1994.”¹⁶

13. The prosecution has already agreed in this case to disclose the evidence of RPF crimes committed within the territory controlled by the Rwandan government.¹⁷ It

¹⁴ A copy of this letter is Annex “B” to this motion.

¹⁵ Indictment at paras. 6(iv), 18(ii), 23

¹⁶ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68(A)* (8 March 2006) at para. 6

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has specifically offered evidence suggesting that the MRND was obstructing implementation of the Arusha Accords and was responsible for these assassinations.¹⁸ Therefore, evidence that it was the RPF which was responsible for these assassinations contradicts prosecution evidence and is of an exculpatory nature.

Possession of the Prosecution

14. The prosecution was a party to the *Bagosora* trial and therefore has been in possession of the transcripts of the closed session transcripts of Witnesses ALL-42 and BRA-1 since 2006.

15. Indeed, the prosecution successfully resisted an order in the *Bagosora* and *Bizimungu* cases that would have restricted dissemination of defence witness materials to the trial team in each case. It argued that to do so would cause it to violate its obligation to disclose exculpatory material to the accused in other cases.¹⁹ The Appeals Chamber agreed with the prosecution and reversed the Trial Chambers.²⁰ It specifically noted that the prosecution was required to have procedures in place to re-examine closed session testimony in one case to determine if it must be disclosed in other cases.²¹

¹⁷ *Prosecutor's Application for an Order for Conditional Disclosure of Witness Statements and Other Documents* (5 April 2006)

¹⁸ Exhibit P220, pages 7-8

¹⁹ *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeals of Decision on Witness Protection Orders* (6 October 2005) at para. 41

²⁰ *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeals of Decision on Witness Protection Orders* (6 October 2005) at para. 46; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR73, *Decision on Prosecution Appeal of Witness Protection Measures* (16 November 2005)

²¹ *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeals of Decision on Witness Protection Orders* (6 October 2005) at para. 44

16. More recently, in the *Niyitegeka* case, the Appeals Chamber found that the prosecution violated Rule 68 by failing to disclose testimony from another trial pursuant to Rule 68.²²

17. Therefore, the prosecution has long been on notice that Rule 68 requires it to disclose exculpatory testimony from one trial to the accused in another trial. The notice was even heightened in this case when Witness ALL-42 specifically mentioned Mathieu Ndirumpatse by name when describing the infiltration of the Interahamwe by the RPF.²³

18. Therefore the prosecution has been shown to have been in possession of the material. Its failure to disclose it is inexcusable.

Prejudice

19. The failure to disclose the testimony of Witness ALL-42 is prejudicial to Mr. Nzirorera. It prevented him from using the information in his cross-examination of witnesses who testified to statements and activities of Jean Pierre Turatsinze, such as Frank Claeys, Witness HH, and Witness AWD. It also prevented him from using the information in his examination of witnesses who testified to the activities of Robert Kajuga such as Witness HH, and Witness AJY.

20. In addition, the failure to disclose the information from both Witnesses ALL-42 and Witness BRA-1 until the defence case was underway will disrupt the preparation of the defence, forcing it to divert resources to investigate the new material, which it should have had in 2006, well before the prosecution case closed.

21. Therefore, there has not only been a blatant violation of Rule 68 by the prosecution, but the violation has prejudiced the accused.

²² *Niyitegeka v Prosecutor*, No. ICTR-96-14-T, *Decision on Third Request for Review* (23 January 2008) at para. 27

²³ Transcript of 8 November 2006 @ 38-39; Transcript of 9 November 2006 @ 1,4-5

History of Violations

22. As the Trial Chamber well knows, this violation of Rule 68 is the latest in a series of disclosure violations by the prosecution in this case.

23. This Trial Chamber, and the Appeals Chamber, have found that the prosecution failed to comply with its disclosure obligations on the following occasions:

- Failure to disclose expert witness report of Alison Des Forges when ordered (Rule 46(A) invoked)²⁴
- Violation of Rule 66(A)(ii) and 68 at commencement of second trial session (expressing disapproval of the conduct of the Prosecution and strongly recommending that the prosecution improve its management of disclosure in this case.)²⁵
- Violation of Rule 66(A)(ii) in connection with Witness T (warning imposed pursuant to Rule 46(A))²⁶
- Violation of Rule 68 as to statements of Jean Damascene Habyarimana and Pierre Celestin Mbonankira.²⁷
- Violation of Rule 66(A)(ii) in connection with Witness XBM²⁸
- Violation of Rule 68 in connection with RPF material (Sanction imposed pursuant to Rule 46(A))²⁹
- Violation of Rule 68 in connection with statement from Joseph Karorero³⁰
- Violation of Rule 66(A)(ii) in connection with Witness AMM³¹
- Violation of Rule 66(A)(ii) in connection with Fidele Uwizeye³²

²⁴ Transcript of 3 October 2005 @ 18

²⁵ Transcript of 16 February 2006 @ 4,8

²⁶ Transcript of 24 May 2006 at 36

²⁷ *Decision on Joseph Nzirorera's Notices of Rule 68 Violations and Motions for Remedial and Punitive Measures* (25 October 2007)

²⁸ Transcript of 4 July 2006 @ 32; Transcript of 5 July 2006 @ 2

²⁹ *Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution* (19 October 2006) at para. 17

³⁰ *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (29 November 2007) at para. 12

³¹ *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Witness AMM* (15 June 2007)

³² *Decision on Defence Motions to Exclude the Testimony of Witness QBG* (11 July 2007)

- Violation of Rule 67(D) in connection with testimony of Witness BDX³³
- Violation of Rule 68 in connection with testimony of Witness AXA³⁴
- Violation of Rule 66(A)(ii) in connection with testimony of Witness AXA and BDW³⁵
- Violation of Rule 68 in connection with document #1 from U.S. National Security Archive³⁶
- Violation of Rule 68 in connection with document #2 from U.S. National Security Archive³⁷

24. On more than 30 other occasions, material has been located which had not been disclosed by the prosecution, but no express finding of violation of the Rules has been made.³⁸

25. On 18 July 2008, the defence became aware of yet another violation of the prosecution's disclosure obligations under Rule 66(B). *Joseph Nzirorera's Eighteenth Motion for Rule 66 Violation* remains pending before the Trial Chamber.

26. With specific reference to disclosure of RPF crimes, the Trial Chamber has already sanctioned the prosecution once for failure to disclose the identity of witnesses with exculpatory information in violation of its express order.³⁹ The prosecution

³³ Transcript of 10 October 2007 @ 7
³⁴ Oral Decision on Joseph Nzirorera's Ninth Notice of Violation of Rule 68 and Motion for Remedial and Punitive Measures (Transcript of 21 November 2007 @ 10-11)
³⁵ Decision on Joseph Nzirorera's Seventeenth Notice of Rule 66(A)(ii) and Motion for Remedial and Punitive Measures (20 February 2008) at para. 10
³⁶ Decision on Reconsideration of Joseph Nzirorera's Tenth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures (14 April 2008)
³⁷ Decision on Joseph Nzirorera's Appeal from Decision on 10th Rule 68 Motion (14 May 2008) at para. 13
³⁸ See Joseph Nzirorera's Motion for Mistrial at the Close of the Prosecution Case (7 January 2008)
³⁹ Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution (19 October 2006) at para. 17

thereafter obstructed the defence efforts to obtain information on the whereabouts of those persons.⁴⁰ The defence has still not been able to locate three of those witnesses.

27. Therefore, the violation of Rule 68 in this instance is not an isolated incident, but part of a widespread and systematic violation of its disclosure obligations by the prosecution.

A Call for Courage

28. The question the Trial Chamber has to ask itself in light of this latest Rule 68 violation is whether it is assured that the prosecution has communicated to Mr. Nzirorera all exculpatory material in its possession. If it can not be so assured, it must stop the trial.

29. At the International Criminal Court, the Trial Chamber in the *Lubanga* case did just that, on the eve of that institution's very first trial. It ordered a stay of proceedings when it could not be assured that the prosecution had or would disclose all of the exculpatory material in its possession to the accused.⁴¹

30. The circumstances in Mr. Nzirorera are even more compelling. The history of disclosure violations in this case are the most pervasive in the history of international criminal justice. No trial dating back to Nuremburg has been plagued by as many established violations of the rules of disclosure and court orders as this one. It is a safe bet that additional violations of the disclosure rules will be uncovered as the trial progresses.

31. The Trial Chamber is understandably concerned with managing the trial. But what is the value in managing an unfair trial? Even if the Trial Chamber continues to

⁴⁰ *Decision on Joseph Nzirorera's Motion for Modification of Decision on Disclosure of RPF Witnesses* (8 April 2008)

⁴¹ *Prosecutor v Lubanga*, No. ICC-01-04/01-06, *Decision on the consequences of non-disclosure of exculpatory materials...* (13 June 2008)

overlook disclosure violations, any conviction of Mr. Nzirorera will be infirm on appeal and possibly require that the case be tried all over again.

32. Mr. Nzirorera urges the Trial Chamber to take a deep breath and do something courageous. Let its legacy be one of standing up for the right to a fair trial, instead of covering up for prosecutorial misconduct. When history judges us for our contribution to international justice, let it record that the Trial Chamber in Mr. Nzirorera's case refused to allow itself to be guided by expediency, and instead struck a blow for fairness.

33. In light of the latest documented violation of Rule 68, Mr. Nzirorera respectfully requests the following relief from the Trial Chamber:

First, expressly find that the prosecution violated Rule 68 by failing to disclose the closed session testimony of Witnesses ALL-42 and BRA-1;

Second, order that the trial proceedings be stayed until all Rule 68 material has been disclosed to Mr. Nzirorera;

Third, find that the prosecution can no longer be relied upon to discharge its Rule 68 obligations in this case;

Fourth, appoint a special master (i.e. a Judge from another Trial Chamber) to supervise a comprehensive review of the material in the possession of the prosecution for exculpatory material;⁴²

Fifth, resume the trial after the special master has certified that all exculpatory material in the possession of the prosecution has been disclosed.

Sixth, impose such other remedial and punitive measures as the Trial Chamber deems necessary.

⁴² The Trial Chamber has the power to make such an order pursuant to its power to manage the trial under Rule 54 and as a sanction under Rule 46(A).

34. If the prosecution is unwilling to provide a special master with access to its holdings, the Trial Chamber should enter a permanent stay of proceedings.

Conclusion

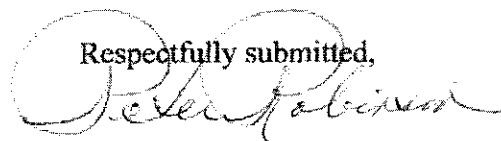
35. Mr. Nzirorera has established yet another serious violation of Rule 68. The prosecution failed to disclose evidence that the leaders of the MRND youth wing (including one of its own witnesses), alleged to be responsible for the most serious crimes during the genocide, were in fact controlled, not by the accused, but by the RPF. It is hard to imagine a more fundamental suppression of exculpatory evidence.

36. Having clearly established the violation of Rule 68, the matter of a remedy is once again before the Trial Chamber. Will it be business as usual—a hint of disapproval with a suggestion that the prosecution improve its management of disclosure—or will the Trial Chamber have the courage to put a stop to the hemorrhaging this time?

37. Mr. Nzirorera's life depends on it.

38. So does the integrity of the Tribunal.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

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ANNEX "A"

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PETER ROBINSON

International Criminal Law

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11 June 2008

Mr. Don Webster
Senior Trial Attorney
International Criminal Tribunal for Rwanda
Arusha, Tanzania

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

Dear Don,

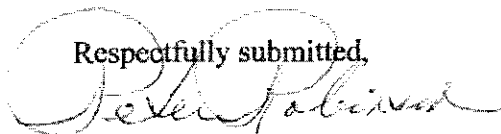
This is a request pursuant to Rule 66(B) to inspect items material to the preparation of Joseph Nzirorera's defence.

I am considering calling Michel Bagaragaza as a defence witness. In order to help me decide whether to put him on my witness list, I am requesting to inspect his plea agreement with the Office of the Prosecutor, as well as all information obtained from him which has not previously been disclosed to us.

I am also considering calling as a witness an individual who testified in the *Bagosora* trial on 5 and 6 April 2006 under the pseudonym BRA-1 in closed session. I would appreciate it if you could allow me to inspect the closed session transcripts of his testimony pursuant to Rule 75(F)(ii). I promise to abide by all protective measures ordered with respect to this witness by Trial Chamber I. This will assist me in determining whether to call BRA-1 as a witness at our trial.

Thank you for your consideration of these requests.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

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ANNEX "B"

36758

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17 June 2008

Mr. Don Webster
Senior Trial Attorney
International Criminal Tribunal for Rwanda
Arusha, Tanzania

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

Dear Don,

Thank you for your letter of 13 June 2008 in which you have agreed to provide inspection of the closed session testimony of Witness BRA-1 in the *Bagosora* trial.

In conducting our preparation for the defence case, I have come across another potential witness who apparently also testified in the *Bagosora* trial in closed session. He testified on 8 and 9 November 2006 under the pseudonym ALL-42.

I would appreciate it if you could allow me to inspect the closed session transcripts of his testimony pursuant to Rule 75(F)(ii). I promise to abide by all protective measures ordered with respect to this witness by Trial Chamber I. This will assist me in determining whether to call ALL-42 as a witness at our trial.

Thank you for your consideration of this request.

Respectfully submitted,



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)

To:	<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"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS M. Diop	<input type="checkbox"/> Appeals Chamber / The Hague R. Muzigo-Morrison K. K. A. Afandé
From:	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence Peter Robinson (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. Joseph Nzirorera		Case Number: ICTR-98-44-T	
Dates:	Transmitted: 20 July 2008		Document's date: 21 July 2008	
No. of Pages:	15	Original Language: <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda		
Title of Document:	JOSEPH NZIRORERA'S ELEVENTH NOTICE OF RULE 68 VIOLATION AND MOTION FOR STAY OF PROCEEDINGS			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Confidential		<input type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
		<input type="checkbox"/> Judgement	<input checked="" type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities
		<input type="checkbox"/> Submission from non-parties		
		<input type="checkbox"/> Submission from parties		
		<input type="checkbox"/> Accused particulars		

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

CMS SHALL take necessary action regarding translation.			
<input checked="" type="checkbox"/> Filing Party hereby submits only the original, and will not submit any translated version.			
<input type="checkbox"/> Reference material is provided in annex to facilitate translation.			
Target Language(s):			
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CMS SHALL NOT take any action regarding translation.			
<input type="checkbox"/> Filing Party hereby submits BOTH the original and the translated version for filing, as follows:			
Original	in	<input type="checkbox"/> English	<input type="checkbox"/> French
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French
CMS SHALL NOT take any action regarding translation.			
<input type="checkbox"/> Filing Party will be submitting the translated version(s) in due course in the following language(s):			
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<input type="checkbox"/> The OTP is overseeing translation. The document is submitted for translation to:		<input type="checkbox"/> DEFENCE is overseeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS):	
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<input type="checkbox"/> The Language Services Section of the ICTR / The Hague.		Name of service:	
<input type="checkbox"/> An accredited service for translation; see details below:		Address:	
Name of contact person:		E-mail / Tel. / Fax:	
Name of service:			
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III - TRANSLATION PRIORITISATION (For Official use ONLY)

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