

ICTR-98-44-T  
10-12-2008  
(39149-39134)

39149

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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: 9 December 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES  
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*[Handwritten signature]*

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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 respectfully moves 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. It is well established that a Trial Chamber may reconsider its own decisions if a new fact is discovered that was not known to the Chamber at the time, if there is a material change in circumstances, or where there is reason to believe that a previous decision was erroneous and therefore prejudicial to either party.<sup>1</sup>

3. The *Decision* contained a number of errors, both factual and legal. It was highly prejudicial to the reputation and standing of Mr. Nzirorera's lead counsel, as well as to Mr. Nzirorera's right to mount an effective defence.

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

4. The Trial Chamber held that:

“The Trial Chamber notes that Joseph Nzirorera filed his Motion for Extension of Time to Respond to the Motion of 20 October 2008 after the Chamber rendered its Order of 24 October 2008. Considering this Chamber's Order of 24 October 2008, as well as the previous orders of the Chamber regarding Joseph Nzirorera's obligations pursuant to Rule 73 *ter*, the Chamber declares Joseph Nzirorera's Motion for Extension

<sup>1</sup> *Prosecutor v Nindliyiimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials* (3 November 2004) at para. 21; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Harmonize and Amend Witness Protection Orders* (1 June 2005) at para. 3; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosecutor's Consolidated Corrigendum to Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses* (7 July 2005) at para. 7; *Prosecutor v Nindliyiimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision of 14 September 2005 on Admissibility of Witness XXO's Testimony in the Military I Case in Evidence* (10 October 2005) at para. 11; *Prosecutor v Nindliyiimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber's Decision of 13 May 2005* (24 November 2005) at para. 18; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Urgent and Confidential Defence Motion Requesting Reconsideration of the 1 March 2007 Ruling Refusing a Subpoena for the Witness JPFR3* (20 March 2007) at para. 2

of Time is moot and abusive of the process.”<sup>2</sup> (emphasis added)

5. Indeed the filing of a motion for extension of time to respond after the Chamber had already ruled would be an abuse of the process. However, the Trial Chamber got the facts wrong. Mr. Nzirorera’s Motion for Extension of Time was filed **before** he received the Trial Chamber’s order.

6. This was confirmed by the Chamber’s own Coordinator in e-mail correspondence, which is attached as Annex “A”.

7. Therefore, because the Trial Chamber ordered sanctions based upon an incorrect factual premise, it should reconsider its decision. There was nothing wrong or improper about filing a timely motion for extension of time to respond to a prosecution motion. The prosecution has sought extensions of time to respond to defence motions without being sanctioned. In fact, on 15 occasions, the prosecution has failed to file responses to defence motions within the time required by Rule 73(E).<sup>3</sup> No sanctions have ever been imposed.

#### **Error #2—Failure to Appeal**

8. The Trial Chamber held that:

“The failure to take advantage of the opportunity to appeal provided by the certification to appeal granted in the order of 24 October 2008 could imply that it is not contended that there is any error or abuse of power. It certainly implies that the application to reconsider is frivolous. The Chamber is satisfied that Nzirorera has had abundant time and facilities for preparation of his defence and that there are no exceptional circumstances that warrant a reconsideration of its order. The motion is denied and declared to be abusive of the process.”<sup>4</sup>

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<sup>2</sup> *Decision* at para. 11

<sup>3</sup> *Joseph Nzirorera’s Notice of 15<sup>th</sup> Violation of Rule 72(E) and Motion to Strike* (24 September 2008)

<sup>4</sup> *Decision* at para. 14

9. The Trial Chamber's reasoning constitutes a legal error. Mr. Nzirorera never requested certification to appeal the decision to reduce his witness list. The Appeals Chamber jurisprudence is clear that the Trial Chamber has the authority to order a party to reduce his witness list, so long as it retains the flexibility to allow additional witnesses if demonstrated to be in the interest of justice.<sup>5</sup>

10. Mr. Nzirorera expressed this view on 25 September 2008 when commenting on the application for certification to appeal a similar decision by Ngirumpatse. He said:

“As to the second requirement for certification, Mr. Nzirorera is not fully convinced that an immediate resolution of the issue will materially advance the proceedings, since, in the Impugned Decision, the Trial Chamber indicated it was flexible as to the limitations and would consider varying them in the interests of justice.<sup>6</sup> He suggests that the issue would be more appropriate for interlocutory appellate review when and if the Trial Chamber refused to allow the Ngirumpatse team to call any more witnesses.”<sup>7</sup>

11. Therefore, the Trial Chamber erred in concluding that Mr. Nzirorera's failure to appeal its decision demonstrated that his motion for reconsideration was frivolous.

12. The circumstances in which the Motion for Reconsideration was made demonstrate that it was entirely reasonable to do so. At a status conference on 6 November 2008, the day before Mr. Nzirorera's witness list was due, the Trial Chamber unilaterally and without notice changed the order of presentation of the defence cases,

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<sup>5</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List* (21 August 2007) at para. 24; *Prosecutor v Prlic et al*, No. IT-04-74-AR73.4, *Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case* (6 February 2007)

<sup>6</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Mathieu Ngirumpatse's Request for Certification to Appeal the Order of 17 April 2008 on the Presentation of the Defence Case* (14 May 2008)

<sup>7</sup> *Joseph Nzirorera's Joinder in Ngirumpatse Application for Certification to Appeal* (25 September 2008) at para. 5

ordering that Nzirorera call his witnesses before those of Ngirumpatse.<sup>8</sup> This was a material change in circumstances.

13. The Trial Chamber had urged the defence teams to coordinate their defences to avoid duplication of witnesses. In that regard, Mr. Nzirorera's counsel had communicated with the Karemera and Ngirumpatse teams and agreed that certain witnesses would be called by those teams and therefore not be on Mr. Nzirorera's list.

14. For example, in January 2008, Mr. Nzirorera's lead counsel sent an e-mail to the Ngirumpatse team saying:

"Can you please give me the names of any people on my witness list who your team intends to call as witnesses? I don't want both teams to meet the same witness, so if your team will call someone, I don't want my team to waste our time meeting them.

Please do this as soon as possible. I am attaching my list again so you have it. We have too much work to do to duplicate our efforts. My team is already in the field doing interviews."

15. The teams of Ngirumpatse and Nzirorera subsequently agreed that certain witnesses would be called by Ngirumpatse and therefore not be on Nzirorera's witness list. Again, in August 2008, when the Ngirumpatse team was getting ready to file its final witness list, Mr. Nzirorera's lead counsel sent another e-mail confirming that they still intended to call the specified witnesses and asked "If you are no longer planning to call any of these people, can you let me know so I can include them on my list?"

16. Therefore, Mr. Nzirorera relied upon the fact that Ngirumpatse would be presenting his witnesses before Nzirorera when compiling his witness list. When that suddenly changed on 6 November 2008, the day before Mr. Nzirorera's final witness list was due, it was reasonable for Mr. Nzirorera to seek reconsideration so that he could seek

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<sup>8</sup> Transcript of 6 November 2008 @ 4

to expand his witness list to include those witnesses he was counting on Ngirumpatse to call.

17. The Trial Chamber made a legal error in determining that the failure to appeal its order rendered the motion for reconsideration frivolous.

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

18. In its *Decision*, the Trial Chamber held:

“The Chamber notes that Nzirorera’s Motion for Subpoena to Pascal Ntawumenyumunsi was filed subsequent to the Chamber’s Order of 24 October 2008. The Chamber finds that this motion is abusive to the process.”<sup>9</sup>

19. The Motion for Subpoena was filed soon after the last contact between the Nzirorera defence team and Mr. Ntawumenyumunsi in which the witness gave his final decision that he would not agree to testify. It has been held that counsel must make application for subpoena as soon as he becomes aware of the obstacles in the way of the witnesses required to testify within the relevant time frame.<sup>10</sup>

20. There was nothing in the 24 October 2008 order which prohibited Mr. Nzirorera from seeking to subpoena a witness. At the time he made the motion, Mr. Nzirorera intended that Mr. Ntawumenyumunsi would be on his reduced witness list. And indeed he is.

21. The Trial Chamber made a legal error in failing to consider the obligation of counsel to bring a motion to subpoena a witness at the earliest practicable time and that the filing of the motion was not in contravention of any part of the 24 October 2008

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<sup>9</sup> *Decision* at para. 15

<sup>10</sup> *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Decision on the Request of the Defence Pursuant to Rule 73 of the Rules of Procedure and Evidence for Summons on Witnesses* (8 June 2000) at para. 10.

order. Under these circumstances, it should reconsider its finding that an abuse of process occurred.

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

22. In its decision, the Trial Chamber found that Counsel for Joseph Nzirorera was in breach of the order of 24 October 2008 that he make an omnibus filing of all Rule 92 *bis* applications for admission of written statements or testimony.<sup>11</sup>

23. This is a legal error. Mr. Nzirorera made a timely motion for reconsideration of the order. A party who seeks reconsideration of an order prior to the time for compliance is not in breach of that order.

24. The Trial Chamber never indicated that it preferred to receive all Rule 92 *bis* applications in a single pleading until its order of 24 October 2008. Once that order was received, no further Rule 92 *bis* applications were made. Therefore, the Trial Chamber erred in finding that there was a breach of the order with respect to Rule 92 *bis* applications.

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

25. In its *Decision*, the Trial Chamber found that:

“Making filings in this manner improperly exploits the method of remuneration adopted by the Tribunal. Moreover, it presents unreasonable burdens on the Chambers and other Parties. The Chamber is satisfied that this is not coincidental but is typical and strategic. The Chamber is also satisfied that it evinces an intention to unreasonably delay and impede the process.”

26. The Trial Chamber erred in finding that the filing of separate Rule 92 *bis* applications was done with the intention to exploit the remuneration system and to delay and impede the process. In fact, it is the standard procedure in all cases at the ICTR. Mr.

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<sup>11</sup> *Decision* at para. 20

Nzirorera does not know of a single case where the defence was required to combine all of its Rule 92 *bis* applications into one motion. The jurisprudence of the Tribunal is completely devoid of any such order by a Trial Chamber and is replete with instances of multiple Rule 92 *bis* applications by defence teams.

27. Mr. Nzirorera genuinely believed that the Trial Chamber would be in a position to make a better assessment of the Rule 92 *bis* factors if presented with individual motions for each witness whose statements or testimony was sought to be admitted. When the Trial Chamber expressed its desire for the first time on 24 October 2008 to have an omnibus motion, Mr. Nzirorera immediately ceased filing individual motions.

28. In the absence of prior notice or practice requiring a single omnibus Rule 92 *bis* motion, the Trial Chamber erred in concluding that the intent in filing individual motions was to exploit the remuneration system or to delay and impede the proceedings and in imposing sanctions on counsel.

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

29. The Trial Chamber ordered that:

“In relation to Peter Robinson, the Chamber considers that his misconduct should be communicated to the professional body regulating the conduct of counsel in his State of admission.”<sup>12</sup>

30. Since, as set forth above, the Trial Chamber erred in concluding that (1) an application for extension of time to respond was filed after a decision on the Motion; (2) failure to appeal a decision meant that moving to reconsider it was frivolous; (3) filing a motion to subpoena a witness intended to be on the final witness list at the earliest practicable time was an abuse of process; (4) counsel was in breach of an order that he

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<sup>12</sup> *Decision* at para. 24

had timely moved to reconsider; and (5) an intention to abuse the system was evidenced by filing individual Rule 92 *bis* applications, it follows that sanctions were erroneously imposed on lead counsel for Mr. Nzirorera, as well as a warning erroneously imposed upon co-counsel for Mr. Nzirorera.

31. The Trial Chamber also erred in failing to heed the admonition of the Appeals Chamber that sanctions should be imposed cautiously, bearing in mind the interests of justice and the right to a fair trial and the absence of appellate review.<sup>13</sup> The tone and manner in which the sanctions were imposed on a wholesale basis indicate that the Trial Chamber did not have this admonition in mind when rendering its decision of 2 December 2008.

32. The remedy of reporting lead counsel to his bar association is also disproportionate to the conduct complained of, and to the actions taken against the prosecution when it was sanctioned. On that occasion, the Trial Chamber simply directed that its decision be served upon the Prosecutor. No report to the prosecution counsel's bar association was made.<sup>14</sup>

33. A proportionate remedy would be to serve the present decision on the Head of the Defence Counsel Management Section. Reporting a matter to counsel's bar association, as opposed to the disciplinary body within the ICTR, is a more drastic

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<sup>13</sup> *Karemera & Nzirorera v Prosecutor*, No. ICTR-98-44-AR73.4, *Decision on Interlocutory Appeals Regarding Participation of Ad Litem Judges* (11 June 2004); *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motion to Vacate Sanctions* (23 February 2005) at para. 6; *Prosecutor v. Kanyarukiga*, No. ICTR-2002-78-AR11bis, *Decision on the Request to Admit Additional Evidence of 1 August 2008* (1 September 2008) at para. 11; *Karera v Prosecutor*, No. ICTR-01-74-A, *Decision on the Appellant's Request to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence* (29 October 2008) at para. 14

<sup>14</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution* (20 October 2006) at para. 17

sanction that will require greater time and effort to defend away from the seat of the Tribunal.

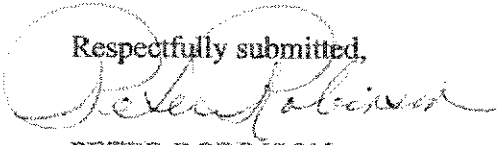
#### **New Circumstances**

34. The Trial Chamber should also consider that Mr. Nzirorera has now complied with the Trial Chamber's decision. On 8 December 2008, he reduced his witness list and filed a single omnibus Rule 92 *bis* motion. Therefore, the Chamber's decision has had the effect of obtaining compliance. No further purpose would be served by reporting the matter to counsel's bar association and detracting from the presentation of the defence case.

#### **Conclusion**

35. Lead counsel for Mr. Nzirorera finds it regrettable that the Trial Chamber is so displeased with his conduct on behalf of his client that it imposed multiple sanctions against him in its 2 December 2008 decision. He hopes that, upon reconsideration, the Trial Chamber will understand that the actions he has undertaken were not in violation of any of its orders and not frivolous or abusive. They were simply a legitimate effort to protect the rights of his client to a fair trial, including presentation of a full and complete defence to the serious allegations in the indictment.

36. It is respectfully requested that the Trial Chamber reconsider its decision of 2 December 2008.

Respectfully submitted,  
  
PETER ROBINSON  
Lead Counsel for Joseph Nzirorera

**ANNEX "A"**

> "Peter Robinson"  
> To: "Constant > Hometownu  
> 03/12/2008 10:19 Subject: Request for  
> Information  
>  
> Dear Constant,  
>  
> In its Decision on Joseph Nzirorera's Motions for Reconsideration...(2  
> December 2008), the Trial Chamber said the following in paragraph 11:  
>  
> "The Chamber notes that Joseph Nzirorera filed his Motion for Extension of  
> Time to Respond to the Motion of 20 October 2008 after the Chamber  
> rendered  
> its order of 24 October 2008. 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, the Chamber  
> declares that Joseph Nzirorera's Motion for Extension of Time is moot and  
> abusive of the process."  
>  
> I am requesting CMS to review the e-mail correspondence from and to me and  
> inform me and the Chamber whether the statement that my Motion for  
> Extension of Time was filed after the Trial Chamber's order of 24 October  
> 2008 is correct. My own recollection is that at the time I filed the  
> Motion for Extension of Time on 24 October 2008, I had not yet received  
> the  
> Trial Chamber's order of that day, and indeed had no idea that such an  
> order would be issued before the 5 day time period for responding to  
> motions had expired.  
>  
> Given that the Trial Chamber ordered that my fees be withheld for this  
> filing, and that it wishes this alleged transgression to be reported to my  
> bar association, it is very important that the exact facts be known.  
> Therefore, I would appreciate it if you could review your e-mail  
> correspondence for 24 October 2008 and advise me and the Chamber of the  
> time at which my motion was sent to CMS and time at which the Chamber's  
> order was sent to me.  
>  
> Thank you very much for your help on this.  
>  
> Yours truly,  
>  
> Peter Robinson  
> Lead Counsel for Joseph Nzirorera

From: "Constant Hometown" <[hometown@un.org](mailto:hometown@un.org)>  
 To: <[peter@peterrobinson.com](mailto:peter@peterrobinson.com)>  
 Sent: Wednesday, December 03, 2008 1:14 AM  
 Subject: Re: Request for Information - Chambers order to deny cost and report Peter Robinson to his Bar Association

> Dear Mr. Robinson,  
 >  
 > I acknowledge receipt of your correspondence below and hereby respond as  
 > follows.  
 >  
 > 1. You filed your motion for extension of time on Thursday, 23 October  
 > 2008  
 > at 1:31 pm. However, an e-mail from you on Sunday, 26 October 2008  
 > indicated that the document was not delivered to us because the ICTR  
 > server  
 > was down. In that e-mail, you forwarded the original e-mail to us,  
 > advising  
 > that the filing be done the following day, Monday, 27 October 2008.  
 > Consequently, the filing was processed and transmitted to the Judges on  
 > Monday, 27 October 2008.  
 >  
 > I attach herewith your correspondence for ease of reference:  
 >  
 >  
 > "Peter Robinson"  
 > <[peter@peterrobinson.com](mailto:peter@peterrobinson.com)> To: "Zerthun Belay"  
 > <[belay@un.org](mailto:belay@un.org)>, "Constant Hometown"  
 > <[hometown@un.org](mailto:hometown@un.org)>  
 > cc: "Don Webster"  
 > <[webster@un.org](mailto:webster@un.org)>  
 > 26/10/2008 20:36 Subject: Fw: Nzirorera pleading  
 >  
 >  
 >  
 > Zerthun,  
 >  
 > This was sent on Thursday, but never filed. I got a message that it was  
 > not delivered. Can you file it on Monday?  
 >  
 > Peter  
 >  
 > ----- Original Message -----  
 > From: Peter Robinson  
 > To: Zerthun Belay ; Constant Hometown

> Cc: Don Webster  
> Sent: Thursday, October 23, 2008 1:38 PM  
> Subject: Nzirorera pleading  
>  
> Dear Zerthun,  
>  
> Happy UN day. It is a holiday at ICTY.  
>  
> Attached please find JOSEPH NZIRORERA'S MOTION FOR EXTENSION OF  
TIME to be  
> filed and distributed as a public document.  
>  
> Thank you for all your help.  
>  
> Yours truly,  
>  
> Peter Robinson  
> Lead Counsel for Joseph Nzirorera(See attached file: cover sheet.doc)(See  
> attached file: Motion for Extension of Time 102408.doc)  
>  
> Find below a correspondence indicating that the filing was transmitted to  
> the Chamber and parties on Monday, 27 October 2008.,  
>  
> Zerthun Belay  
> To:  
>  
> [peter@peterrobinson.com](mailto:peter@peterrobinson.com),  
> Subject: KAREMERA ET AL -  
> JOSEPH NZIRORERA'S MOTION FOR  
> EXTENSION OF TIME  
>  
> (See attached file: nziro00270000.pdf)  
>  
> 2. The Chamber's order was filed, processed and transmitted to you on  
> Friday, 24 October 2008. However, the document was not delivered to any  
> party due to the problem with the ICTR server. Consequently, it was  
> re-transmitted (forwarded) to all on Monday, 27 October 2008, as per the  
> attached self-explanatory correspondence.  
>  
>  
> Zerthun Belay  
> To:  
> [peter@peterrobinson.com](mailto:peter@peterrobinson.com),  
>  
> Subject: Fw: KAREMERA ET  
> AL - 1. ORDER TO JOSEPH NZIRORERA

> TO REDUCE HIS WITNESS LIST;  
> 2. DECISION RELATIVE A LA  
> PROTECTION DES TEMOINS D'EDOUARD  
> KAREMERA; and 3. DECISION  
> RELATIVE A LA REQUETE EN  
> CERTIFICATION D'APPEL DE LA  
> DECISION DU 17 SEPTEMBRE  
> RELATIVE A LA PRESENTATION DE LA  
> PREVUE DE MATHIEU  
> NGRUMPATSE  
>

> Dear All,

>  
> Because of the network problem, the attached document was not delivered to  
> you on time.

> Sorry for the inconvenience.

> Regards.

> Zerthun.

> ----- Forwarded by Zerthun Belay/ICTR/UNO on 27/10/2008 10:42 -----

> Zerthun Belay

> To:

> )  
>  
> I hope this answers all your questions.

> Best regards.

> Constant.

>  
>  
>  
>  
>

39134

Dear Constant,

Thank you for the thorough research.

Indeed, you have confirmed that I sent my Motion before I received the Trial Chamber's order and not after, as the Trial Chamber has stated when sanctioning me.

I will be seeking reconsideration of the Trial Chamber's decision of 2 December 2008 as a result of this error, and other issues. I would appreciate it if you could inform the Vice President so that she does not transmit anything to my bar association until I have had the opportunity to be heard.

Thank you for all your help.

Yours truly,

Peter Robinson  
Lead Counsel for Joseph Nzirorera