

ICTR-05-82-T  
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UNITED NATIONS  
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**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Khalida Rachid Khan, presiding  
Lee Gacuiga Muthoga  
Aydin Sefa Akay

**Registrar:** Mr. Adama Dieng

**Date:** 27 November 2009

**THE PROSECUTOR  
v.  
DOMINIQUE NTAWUKULILYAYO**

**Case No. ICTR-05-82-T**

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**DECISION ON PROSECUTION MOTIONS OPPOSING PROPOSED DEFENCE  
EXPERT WITNESS CHARLES NTAMPAKA**

*Rules 89 and 94bis of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**  
Charles Adeogun-Phillips  
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**Counsel for the Defence:**  
Maroufa Diabira  
Dorothee Le Fraper du Hellen

INTRODUCTION

1. On 10 November 2009, the Defence filed the report of its proposed expert on Rwandan administrative authorities, Mr. Charles Ntampaka ("Report") and his curriculum vitae ("CV") was filed on 11 November 2009.<sup>1</sup>

2. On 19 November 2009, the Prosecution filed a Motion objecting to Mr. Ntampaka's Report on the basis that it was filed out of time.<sup>2</sup> On 23 November 2009, the Prosecution filed a Motion opposing Mr. Ntampaka's qualifications as an expert.<sup>3</sup> The Prosecution filed further submissions on 25 November 2009.<sup>4</sup> On 26 November 2009, the Defence filed its Response.<sup>5</sup>

DISCUSSION

Applicable Law

3. Rule 94bis of the Rules of Procedure and Evidence ("Rules") requires that the full statement of an expert witness must be disclosed to the opposing party as early as possible and be filed with the Trial Chamber not less than 21 days prior to the date on which the expert is expected to testify. Sub-Rule (B) provides that within 14 days of the filing of the report, the opposing party shall file a notice to the Trial Chamber indicating whether:

- (i) It accepts or does not accept the witness' qualification as an expert;
- (ii) It accepts the expert witness statement; or
- (iii) It wishes to cross-examine the expert witness.

Sub-Rule (C) states that if the opposing party accepts the expert's statement, it may be admitted into evidence by the Trial Chamber without calling the witness to testify.

4. In all other respects, the admission of expert testimony is governed by Rule 89 of the Rules which is the general provision governing the admission of evidence before this Tribunal.<sup>6</sup> Rule 94bis is therefore the *lex specialis* with regard to the admission of expert evidence and Rule 89, the *lex generalis*.

5. Rule 89 (B) entrusts the Chamber with a broad discretion to employ "rules of evidence which will best favour a fair determination of a matter before it and are consonant with the spirit of the Statute and the general principles of law." Further, Sub-Rule (C) provides that a

<sup>1</sup> Le Fonctionnement de l'Administration Territoire Rwandaise, 10 November 2009.  
<sup>2</sup> Prosecution's Motion to Oppose the Admission of Charles Ntampaka as an Expert Witness: Rule 94bis of the Rules of Procedure and Evidence, 19 November 2009 ("Prosecution Motion Regarding the Late Filing of the Expert Report").  
<sup>3</sup> Prosecution's Motion to Oppose Charles Ntampaka's Qualification as an Expert: Rule 94bis of the Rules of Procedure and Evidence, 23 November 2009 ("Prosecution Motion").  
<sup>4</sup> Prosecution's Further Submission on the Motion to Oppose Charles Ntampaka's Qualification as an Expert: Rule 94bis of the Rules of Procedure and Evidence, 25 November 2009 ("Prosecution's Further Submissions").  
<sup>5</sup> Réponse de la Défense à la Requête du Procureur aux Fins d'Opposition à la Qualification de Charles Ntampaka en Qualité de Témoin Expert, 26 November 2009 ("Defence Response").  
<sup>6</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution Prospective Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee, 25 October 2007 ("*Karemera* Decision of 25 October 2007"), para. 13; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosecutor's Motion Objecting to the Admission of Professor Geoffrey Corn's Report, 16 May 2008 ("*Bizimungu* Decision of 16 May 2008"), para. 4.

Chamber may admit evidence which it deems to be both relevant and probative. The Chamber therefore has a broad discretion when assessing the admissibility of evidence.<sup>7</sup>

6. According to the Tribunal's jurisprudence, whether expert witness testimony is relevant may be determined by considering whether: (i) it enlightens the Chamber on specific issues of a technical nature, requiring specialised knowledge in a special field; and (ii) the specialised knowledge possessed by the expert may assist the Chamber in understanding the evidence before it.<sup>8</sup>

7. The determination of whether a witness is qualified to testify as an expert is subject to the Chamber's discretion.<sup>9</sup> The Chamber must be satisfied that the witness possesses specialised knowledge acquired through education, expertise, or training in his proposed field of expertise,<sup>10</sup> and the Chamber may make a determination based on the materials before it.<sup>11</sup>

*Preliminary Matters*

8. The Chamber notes that the Prosecution has filed two Motions with regard to Mr. Ntampaka's Report and qualifications. As the issues in the two Motions are linked, the Chamber will address both in this Decision. Furthermore, since the Prosecution filed its Further Submissions within the 14 day period for filing its Rule 94bis (B) notice, the Chamber will also take these into consideration for the purposes of this Decision.

9. The Chamber further notes that both Prosecution Motions request that the Chamber dismiss the Defence motion to call Mr. Ntampaka. The Chamber notes that the Defence has not filed a motion to call Mr. Ntampaka or to admit his Report. Indeed, there is no obligation to do so under Rule 94bis.<sup>12</sup> Accordingly, contrary to the Prosecution's request, there is no Defence motion to dismiss.

10. The Chamber will now turn to consider the merits of the Prosecution Motions and Further Submissions.

<sup>7</sup> *Bizimungu et al.*, Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe (Rule 89 (C)), 2 September 2005 ("*Bizimungu* Decision of 2 September 2005"), para 10; *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness (AC), 21 July 2000, para. 20; *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC) 4 October 2004, paras 6-7; *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Admit Documents Authored by Enoch Ruhigira, 26 March, 2008, para. 3.

<sup>8</sup> *Bizimungu* Decision of 16 May 2008, para. 11; *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka, 26 September 2007 ("*Karemera* Decision of 26 September 2007"), para. 8; *Karemera* Decision of 25 October 2007, para. 14; *Nahimana v The Prosecutor*, Case No. ICTR-99-52-T, Judgement (AC), 28 November 2007, para. 198.

<sup>9</sup> *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, para. 31.

<sup>10</sup> *Karemera* Decision of 25 October 2007, para. 16; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Oral Decision on Defence Motions Challenging the Qualification of Expert Witness Dr. Alison Des Forges, 4 September 2002.

<sup>11</sup> The Chamber recalls that a *voir dire* hearing is not mandatory. See for example, *Bizimungu* Decision of 16 May 2008; *Karemera* Decision of 26 September 2007, para. 6; and *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgment (AC), 26 May 2003, para. 164.

<sup>12</sup> Mr. Ntampaka is included in the Defence Witness List and his Report was filed by the Defence. Rule 94bis (A) only requires the party calling the expert to file his or her full report 21 days prior to the date on which the proposed expert is expected to testify.



*Prosecution Motion Regarding the Late Filing of the Report*

11. The Prosecution submits that Mr. Ntampaka should not be allowed to testify in this case due to the late filing of his Report.<sup>13</sup> It requests the Chamber to find that both the Report and the CV of Mr. Ntampaka have been filed out of time in violation of the provisions of Rule 94bis.

12. The Chamber notes that the Defence has intended to call Mr. Ntampaka as an expert on Rwandan administrative authorities since 24 September 2009.<sup>14</sup> Further, the Defence has been aware of the schedule for the presentation of its case and yet filed Mr. Ntampaka's Report just seven days prior to commencement of the second trial session for its case.<sup>15</sup> The Chamber therefore finds that the Defence did fail to comply with Rule 94bis and reminds the Defence that the filing obligations under this Rule are intended to ensure that the opposing party has sufficient notice to effectively prepare for cross-examination and make objections thereto.<sup>16</sup>

13. However, the Chamber does not consider it in the interests of justice to make a determination on how to proceed with regard to Mr. Ntampaka's Report, and proposed oral testimony, solely on the basis that it was filed out of time. Such an approach would not favour a fair determination of the matter before the Chamber and would thus be contrary to Rule 89 (B). The Chamber will therefore proceed to consider Mr. Ntampaka's qualifications and if necessary, the contents of his Report, in light of the aforementioned Rules and jurisprudence.

*Prosecution Motion Opposing Mr. Ntampaka's Qualifications*

14. The Prosecution submits that Mr. Ntampaka does not possess the requisite knowledge or expertise to qualify him to testify as an expert on the administrative structures that existed within Rwanda in 1994.<sup>17</sup> The Prosecution further refers to the Trial Chamber's decision in the *Karempera* case which found, without a *voir dire* hearing, that Mr. Ntampaka's expertise and/or specialisation lay in the area of Rwandan family and customary law. The Prosecution therefore challenges Mr. Ntampaka's claim that he served as an expert for the Tribunal on the constitutional disposition applied in Rwanda in 1994, as stated in his CV.<sup>18</sup>

15. The Defence responds that Mr. Ntampaka is a proposed expert witness whose testimony would enlighten the Judges on specific issues of a technical nature requiring special knowledge in a specific field. The Defence submits that Mr. Ntampaka is qualified to provide expertise on Rwandan administrative authorities and that his report is reliable, probative and relevant.<sup>19</sup> The Defence further submits that the Chamber should not preclude

<sup>13</sup> Prosecution Motion Regarding the Late Filing of the Report, para. 7.  
<sup>14</sup> Email communication dated 24 September 2009 from Defence Counsel to the Chamber.  
<sup>15</sup> The second session of the Defence case commenced on 17 November 2009. The Defence was informed that it would be allocated one week for this second session, and if necessary, also the following week to complete its case. See T. 13 October 2009, p. 48. See also Scheduling Order Regarding Preparation for and Commencement of Defence Case, 12 May 2009 which allocated four weeks for the Defence case.  
<sup>16</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004, para. 6.  
<sup>17</sup> Prosecution Motion, paras. 10-12.  
<sup>18</sup> Prosecution's Further Submissions, paras. 4-5 referring to the *Karempera* Decision of 26 September 2007.  
<sup>19</sup> Defence Response, paras. 7-45.



the testimony of Mr. Npampaka on the sole base of previous decisions of this Tribunal because, according to the jurisprudence, the Chambers have discretionary power in this matter.<sup>20</sup>

16. As a preliminary point, with respect to the Prosecution submission regarding the *Karempera* Trial Chamber's Decision on Mr. Ntampaka's qualifications, the Chamber recalls that it is not bound by another Trial Chamber's rejection of an expert based on his or her qualifications.<sup>21</sup> In addition, Mr. Ntampaka's CV does not specify in which case he acted as an expert and the Chamber cannot therefore assume that it was in the *Karempera* case. The Chamber will therefore proceed to make its own determination on Mr. Ntampaka's qualifications based on the information before it.

(i) *Subject Matter of the Report*

17. Mr. Ntampaka's Report deals with the structure, functioning and powers of administrative authorities in Rwanda in 1994 with reference to Rwandan laws, and Judgments of this Tribunal. Its main focus is on the authority of the *sous-préfet* and the *sous-préfet's* relationship with the *bourgmestres*, communal police, security services, *conseillers, responsables de cellule*, and the youth of political parties. It further sets out the *sous-préfet's* legal and *de facto* powers. The Report concludes that power was centralised in the hands of the President of the Republic of Rwanda, and within the *préfecture*, it in fact lay with the *préfet*.

18. The Chamber will now turn to consider Mr. Ntampaka's academic qualifications and professional experience (research publications being relevant to the latter), in order to determine whether he possesses the requisite expertise to provide a specialised or technical opinion on the subject matter of his Report.

(ii) *Mr. Ntampaka's Qualifications*

19. With respect to academic qualifications, Mr. Ntampaka's CV states that he has a PhD in Law, as well as a diploma in International Humanitarian Law and a Juris Doctor in Law. His CV provides no further indication of any areas of specialisation with regard to his academic studies or qualifications.

20. With regard to professional experience, Mr. Ntampaka's CV states that he is a lawyer and a Professor at two universities in Belgium. Since 2008, he has acted as an expert in development cooperation projects. Since 2003, he has been a professor in human rights and development and since 2000, has supervised students of international criminal law and taught courses in family, customary, and constitutional law, as well as chaired a conference on an introduction to African legal systems. Since 1995, Mr. Ntampaka has taught African comparative law, and from 1994 to 1998, was in charge of courses on the rights of the child, as well as family law, and legal systems in Africa. Between 1989 and 1994, Mr. Ntampaka was in charge of courses at the National University of Rwanda ("University") but his CV

<sup>20</sup> Defence Response, paras. 25-27.

<sup>21</sup> *Prosecutor v Simba*, Case No. ICTR-2001-76-I, Decision on Defence Motion to Disqualify Expert Witness Alison Des Forges and to Exclude Her Report, 14 July 2004, para. 6; *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on the Prosecution's Objections to Expert Witnesses Lugan and Strizek, 23 October 2008, para. 9, *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Appeal Judgment, 7 July 2006, para. 31.



does not state which courses these were. Between 1981 and 1994, Mr. Ntampaka taught courses at the University in family law and trained magistrates. From 1978 to 1981, he worked as an assistant at the University in the areas of *droit judiciaire*<sup>22</sup> and family law.

21. Although not included in his CV, at the beginning of Mr. Ntampaka's Report, it is stated that between 1989 and 1994, he taught administrative organisation<sup>23</sup> at the "Institut Supérieur des Finances Publiques" in Kigali ("Institute"). Neither his CV, nor his Report, provides further detail on this course.

22. Further, Mr. Ntampaka's CV states that he has written reports and participated in several expert meetings on land rights in Africa. He has also participated in many seminars relating to the training of the judiciary, technical cooperation, human rights and Belgian cooperation in the Great Lakes Region.<sup>24</sup> The CV further states that Mr. Ntampaka has acted as an expert for the Tribunal on the constitutional disposition applied in Rwanda in April 1994 but no further detail is provided in this respect.

23. Mr. Ntampaka is also editor-in-chief of a newspaper which deals with the social, political and economic issues in the Great Lakes Region.

(iii) *Should the Chamber hold a Voir Dire Hearing?*

24. The Chamber recalls that while a *voir dire* hearing is not mandatory, where there is any query regarding the qualifications of a proposed expert, or where the scope and definition of their expertise is subject to genuine dispute; such matters may be more appropriately addressed by extending the inquiry by oral examination of the proposed expert witness.<sup>25</sup> The Chamber considers that non-oral *voir dire* procedure would only be appropriate where the Chamber had no queries. Indeed, such an approach is in the interests of justice and favours a fair determination of the matter as provided by Rule 89 (B), as well as consonant with the spirit of ensuring the Accused's fair trial rights as guaranteed in the Tribunal's Statute.<sup>26</sup>

25. In this case, the Chamber considers that Mr. Ntampaka's CV and Report raise queries which require determination through a *voir dire* hearing. In particular, Mr. Ntampaka's CV is not sufficiently precise with regard to his specialised experience or knowledge of Rwandan administrative authorities in 1994. Although he has a PhD in Law, the Chamber considers it necessary to enquire as to whether this included any specialisation in the areas addressed in his Report.

26. Similarly, while Mr. Ntampaka appears to have considerable professional experience in academic institutions teaching and running courses, his experience of having taught a course on administrative organisation between 1989 and 1994 at the Institute in Kigali is not mentioned in his CV. Nor are there any details regarding the course. The Chamber therefore considers it necessary to hear from Mr. Ntampaka on his studies, qualifications and

<sup>22</sup> Civil proceedings.

<sup>23</sup> It states "cours d'organisation administrative".

<sup>24</sup> None of these projects are directly relevant to the administrative structures in Rwanda in 1994. They include for example a study on the *gacaca* system and two books on women and genocide. He has also worked as a UNDP expert. Further, with regard to his participation in seminars, it is not indicated whether this has been as a participant or a presenter/trainer/expert.

<sup>25</sup> *Karemwa* Decision of 25 October 2007, para. 10.

<sup>26</sup> Articles 19 and 20 of the Tribunal's Statute.



professional experience which qualified him to teach this course, as well as the content of the course and the status of the Institute.

27. Finally, the Chamber notes the Prosecution submission that Mr. Ntampaka cannot claim that he has served as an expert before the Tribunal in the area of constitutional disposition applied in Rwanda in 1994 as he was rejected as an expert by the *Karemera* Trial Chamber. The Chamber however considers that since Mr. Ntampaka's CV does not specify which case he was instructed in, or provide any detail in this regard, it is necessary to obtain further information on this experience.

28. Accordingly, the Chamber considers it appropriate to conduct a *voir dire* hearing which focuses on the aforementioned areas. The Chamber further considers that in order to facilitate the Prosecution's preparation for cross-examination of Mr. Ntampaka on any additional qualifications or experience, the Defence should make efforts to obtain any supporting documents and disclose these to the Prosecution in advance of the *voir dire* hearing.

(iv) *Relevance of Mr. Ntampaka's Report*

29. With regard to the subject matter of the Report, the Chamber notes the Prosecution submission that the only Prosecution witness who testified on the reporting and command structure within the communal and local governmental administration in Butare *prefecture* during 1994 was Witness AXV.<sup>27</sup> The Prosecution submits that opinion evidence of an expert such as Mr. Ntampaka will not assist the Chamber to understand, evaluate and make a decision on Witness AXV's evidence. The Prosecution further argues that the subject matter of Mr. Ntampaka's opinion relates to the criminal responsibility of the Accused, a determination which falls solely within the remit of the Chamber. It further contends that Mr. Ntampaka's proposed evidence seeks to contradict the evidence of Witness AXV, an established subordinate of the Accused and thus exonerate the latter from criminal responsibility as a superior.<sup>28</sup> The Defence responds that Mr. Ntampaka would enlighten the Chamber on the great distortion between *de jure* powers and *de facto* powers of the *sous préfet* in Rwanda in 1994.<sup>29</sup>

30. The Chamber considers that while the determination of the Accused's individual and superior responsibility rests solely with the Chamber, independent expert evidence may assist in understanding the nature of the office of the *sous-prefet* which is directly relevant to the charges in the Indictment, in particular (i) alleged orders given by the Accused, (ii) the effect of the Accused's alleged presence at various sites and meetings, and (iii) the Accused's alleged criminal responsibility as a superior.<sup>30</sup> Mr. Ntampaka's opinion may therefore assist in understanding Witness AXV's evidence, as well as the evidence of other Prosecution witnesses who testified on the aforementioned allegations.

31. The Chamber therefore considers that Mr. Ntampaka's Report may enlighten the Chamber on issues of a specialised technical nature and assist it in understanding the evidence before it. Accordingly, Mr. Ntampaka's opinion may be relevant for the purposes of Rule 89 (C). The Chamber however reserves its final determination on the extent of the

<sup>27</sup> Prosecution Motion, para. 8.

<sup>28</sup> Prosecution's Further Submissions, paras. 7-8.

<sup>29</sup> Defence Response, para. 35.

<sup>30</sup> Indictment of 19 May 2009.



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relevance of Mr. Ntampaka's proposed evidence, and whether his opinion should be limited to specific issues, until after it has decided whether he qualifies as an expert witness.

**FOR THESE REASONS THE CHAMBER**

**I. DENIES** the Prosecution Motions;

**II. ORDERS** that a *voir dire* hearing with respect to Mr. Charles Ntampaka's qualifications will be held soon after the testimony of the Accused,<sup>31</sup> and be limited to the following areas:

- (i) Whether Mr. Ntampaka's PhD in Law specialised in the areas relevant to the subject matter of the Report;
- (ii) The academic studies, qualifications, or professional experience which qualified him to teach the administrative organisation course at the Institute as well as the content of the course and the status of the Institute; and
- (iii) Further details on Mr. Ntampaka's experience of having acted as an expert before this Tribunal on the area of constitutional disposition applied in Rwanda in 1994.

**III. ORDERS** that the Defence file further supporting documents, if any, in relation to Mr. Ntampaka's additional qualifications or experience, by close of business on 4 December 2009.

27 November 2009

Khalida Rachid Khan  
Presiding Judge

For and with the consent of  
Lee Gacuiga Muthoga  
Judge

Aydin Sefa Akay  
Judge



<sup>31</sup> The Defence indicated by email that Mr. Ntampaka will be available to appear before the Chamber towards the end of the week commencing 7 December 2009, following the Accused's testimony which will commence on 8 December 2009.





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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"/> Appeals Chamber / Arusha F. A. Talon
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<b>From:</b>	<input checked="" type="checkbox"/> Chamber III <b>Sophie Maurice</b>	<input type="checkbox"/> Defence	<input type="checkbox"/> Prosecutor's Office	<input type="checkbox"/> Other:
<b>Case Name:</b>	The Prosecutor vs. <b>Dominique Ntawukullyayo</b>		<b>Case Number: ICTR-05-82-T</b>	
<b>Dates:</b>	Transmitted: 27 November 2009		Document's date: 27 November 2009	
<b>No. of Pages:</b>	<b>9 including this page</b>	<b>Original Language:</b>	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
<b>Title of Document:</b>	<b>DECISION ON PROSECUTION MOTIONS OPPOSING PROPOSED DEFENCE EXPERT WITNESS CHARLES NTAMPAKA Rules 89 and 94bis of the Rules of Procedure and Evidence</b>			
<b>Classification Level:</b>		<b>TRIM Document Type:</b>		
<input type="checkbox"/> Ex-Parte		<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties		
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**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):

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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:

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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):

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