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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

ICTR-2001-64-A
29 September 2004
(123/A-111/A)

123/A

IN THE APPEALS CHAMBER

Before: Judge Inés Mónica Weinberg de Roca, *Presiding*
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: Mr Adama Dieng

Date of filing: 29 September 2004

2004 SEP 29 P 4: 51
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THE PROSECUTION

v.

SYLVESTRE GACUMBITSI

Case No. ICTR-2001-64-T

PROSECUTION'S MOTION FOR VARIATION OF THREE GROUNDS IN ITS NOTICE OF APPEAL PURSUANT TO RULE 108

Office of the Prosecutor

Counsel for Sylvestre Gacumbitsi

Hassan Bubacar Jallow

Me Kouengoua

James Stewart

Me Anne Ngatio Mbattang

NATURE OF THE MOTION

1. **THE PROSECUTION** hereby respectfully moves the Appeals Chamber, pursuant to the provisions of Rule 108, to authorise a variation of Grounds 2, 3, and 6, of its Notice of Appeal in this case, filed on 16 June 2004, and to permit the filing of a Prosecutor's Amended Notice of Appeal, for the following reasons:

- Grounds 2, 3, and 6 of the Prosecution's original Notice of Appeal identified an error of fact, but it has become apparent that each of the errors of fact so identified necessarily implies errors of law in the Trial Chamber's reasoning, and these further related errors of law have now also been identified, and should be the subject of argument and decision in the appeal.
- Labelling the errors of law, which are imbedded in the errors of fact originally identified, as distinct bases of appeal, in relation to each of the grounds affected, will define the issues, to which the Respondent must respond, and with which this Chamber should deal, clearly and fairly, which is in the interests of justice and can cause no material prejudice to the Respondent.
- The errors of fact described in Grounds 2, 3, and 6 were properly identified as errors of fact, based on the jurisprudence emanating from this Chamber, and the errors of law only became apparent to the Appellant as the Appellant's Brief was prepared, which required further analysis and assessment of the Trial Chamber's reasons for Judgement.
- As the final arbiter of the law of the ICTR, this Chamber has the power and responsibility to determine whether the Trial Chamber committed an error of law, where this is alleged, and the errors of law now in question are significant, not only

for this case, but for other cases.¹

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- For all of the above reasons, it is submitted that good cause is shown to justify the timely variation in the grounds of appeal requested.

SUBMISSIONS

2. This Motion does not seek to add entirely new grounds of appeal, but simply to vary and clarify three grounds of appeal, namely, Grounds 2, 3 and 6, in order to furnish better notice to both the Respondent and the Appeals Chamber of the issues involved, by labelling as distinct errors of law certain bases of appeal that are necessarily implicit or imbedded in the errors of fact originally identified in the Prosecutor's Notice of Appeal. In addressing the errors of fact raised in these three grounds of appeal in question, the Appellant has necessarily had to deal with the related errors of law in the Appellant's Brief.

3. Attached is the proposed Prosecutor's Amended Notice of Appeal, with the requested variations to Grounds 2, 3 and 6 indicated in ***bold italics***, which the Appellant, by this Motion, seeks authorisation to file. (See Attachment "A").

3. Grounds 2, 3 and 6 of the original Notice of Appeal plead that the Trial Chamber *erred in fact* by failing to draw the only reasonable inferences from the facts proven that the Respondent was guilty of the named crimes. The variations or clarifications seek to add *errors of law* to the pleadings. At the time the original Notice of Appeal was filed, what was apparent, based on the *Rutaganda* Appeal Judgement, in which it was held that failure by a Trial Chamber to draw the necessary legal inferences from proven facts should be construed as an *error of fact*,² was that the Trial Chamber in the Respondent's case had committed such *errors of fact*. However, during the course of preparing the Prosecution's Appellant's Brief, it also became apparent that the Trial Chamber's erroneous factual conclusions were premised, to a significant degree, on, or closely intertwined with, errors of law, which were important, and had to be identified and addressed. Hence, in relation to the errors of fact identified in each ground, comes the need also to plead *errors of law*.

¹ *Rutaganda* (AC), Judgement, Case No. ICTR-96-3-A, 26 May 2003, paragraph 20.

² *Rutaganda* (AC), paragraph 580.

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4. The *errors of law* alleged are not immediately apparent from the Trial Chamber's reasons for Judgment. They can only be discerned or inferred from an inquiry into *why* the Trial Chamber made the factual errors it did. It appears that the factual errors are due, in part, to flawed *legal* reasoning, involved wrong concepts of law, or erroneous application of legal principles to the evidence. For example, the Appellant wishes to submit that the Trial Chamber's conclusion that the Respondent was not culpable for other rapes than the ones that formed the basis for his conviction of Rape as a Crime Against Humanity was due, in part, to an error regarding the scope of the concept in law of *instigation*, in relation to Ground 3. The error of fact pleaded is premised, to a significant degree, it now appears, on an error or errors of law. Similarly, with respect to the factual conclusions reached by the Trial Chamber that form the basis of appeal in Grounds 2 and 6, significant errors of law, relating to the *way in which circumstantial evidence is to be understood and applied* and the nature and scope of *corroboration* or the concept of *ordering*, respectively, appear to play an important role. These are all matters that properly arise from the grounds already pleaded in the original Notice of Appeal, and which should be the subject of argument and decision on the appeal.

5. It had been the Appellant's intention to file this Motion contemporaneously with the Appellant's Brief, but the Appellant was informed that the Brief had to be filed a day earlier than the Appellant had thought necessary, pursuant to Article 46(2) of the Directive for the Registry: Judicial and Legal Services Division, and so ensured that the deadline was met, by filing the Appellant's Brief on 28 September 2004.³ This Motion, with the attached Prosecutor's Amended Notice of Appeal, is therefore being presented as soon as practicable thereafter. It is, in any event, timely, it is submitted, and can cause no material prejudice to the Respondent. In the original Notice of Appeal, the Prosecutor listed as a ground of appeal, "**Such variation of the grounds of appeal as this Chamber may authorize**, upon the Prosecutor's application pursuant to Rule 108," in anticipation of just such a possibility.

6. There is good cause for variation of the grounds of appeal, the variations sought will not cause any material prejudice to the Respondent, and they are not contrary to the interests of justice—indeed, just the opposite, in terms of clarifying the issues that properly arise for

³ The Prosecutor's Notice of Appeal was filed on 16 June 2004.

decision on the appeal.⁴

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RELIEF SOUGHT

7. It is respectfully requested that the Appeals Chamber grant the Motion and order that the Appellant file the attached Prosecutor's Amended Notice of Appeal, containing the variation of Grounds 2, 3, and 6 requested.

DATED: 29 September 2004,
Arusha, Tanzania.



James K. Stewart
Senior Appeals Counsel

⁴ *Rutaganda* (AC), Decision (on Motion to Amend the Appellant's Notice of Appeal), 5 April 2001, p. 6.

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ATTACHMENT "A"

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Inés Mónica Weinberg de Roca, *Presiding*
Judge Mohamed Shahabuddeen
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Date of filing: 29 September 2004

THE PROSECUTION

v.

SYLVESTRE GACUMBITSI

Case No. ICTR-2001-64-T

PROSECUTION'S AMENDED NOTICE OF APPEAL

Office of the Prosecution

Hassan Bubacar Jallow
James Stewart

Counsel for Sylvestre Gacumbitsi

Me Kouengoua
Me Anne Ngatio Mbattang

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PROSECUTION'S AMENDED NOTICE OF APPEAL

THE PROSECUTION hereby files a Notice of Appeal, pursuant to Article 24 of the Tribunal's Statute and Rule 108 of the *Rules of Evidence and Procedure*, against the Judgement of Trial Chamber III, rendered on 17 June 2004, in the case of *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T.

IN THE GROUNDS OF APPEAL set out below, a reference to an error on a question of law means a question of law invalidating the decision, within the scope of Article 24(1)(a) of the Statute, unless otherwise specified, and a reference to an error of fact means an error of fact, which has occasioned a miscarriage of justice, within the scope of Article 24(1)(b) of the Statute, unless otherwise specified.

FURTHER, each ground of appeal is numbered and described by a heading, and indicates the verdict or verdicts affected, the nature of the error or errors, and the relief sought.

AND FURTHER, paragraph references are to paragraphs in the Judgement of the Trial Chamber.

THE PROSECUTION GIVES NOTICE OF THE FOLLOWING GROUNDS OF APPEAL:

Ground 1 – The Trial Chamber erred in imposing a single sentence of 30 years' imprisonment on Sylvestre Gacumbitsi

1. The Trial Chamber erred in law by imposing on Sylvestre Gacumbitsi a single 30-year term (paragraph 356) that is manifestly inadequate, in light of the gravity of the crimes he committed (paragraphs 338 through 345), the degree of his criminal culpability, and the verdicts of GUILTY of Genocide (Count 1), Crimes Against Humanity-Extermination (Count 3), and Crimes Against Humanity-Rape (Count 5) returned against him.

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2. Any additional sentence arising from success in relation to any other ground of appeal will relate to the remedy to be granted, with respect to that ground of appeal, and is distinct from the appeal against the sentence imposed at trial.

3. The Trial Chamber erred in failing to impose a sentence, which is proportional to the gravity of Sylvestre Gacumbitsi's crimes, and which reflects the absence of any mitigating factors for the period of the commission of the crimes. Considering Sylvestre Gacumbitsi's individual circumstances, including his direct and substantial involvement in the crimes, the Trial Chamber abused its discretion by giving weight to extraneous and irrelevant considerations that it considered to be mitigating circumstances (paragraphs 346 through 353).

4. The relief sought is the reversal of the decision of the Trial Chamber and the imposition upon Sylvestre Gacumbitsi of a Sentence of imprisonment for the remainder of his life.

Ground 2 – The Trial Chamber erred in finding Sylvestre Gacumbitsi NOT GUILTY of Murder as a Crime Against Humanity

5. This ground of appeal affects the verdict of NOT GUILTY on the count of Murder as a Crime against Humanity returned in relation to Sylvestre Gacumbitsi, as well as the Sentence of a single 30-year term.

6. The Trial Chamber committed an error of *law and* fact, in particular, in relation to paragraphs 179 through 181, 194 through 197, and 319 and 320, by failing *to appreciate the nature of circumstantial evidence and its ability to corroborate the evidence that the Respondent had ordered the murders of Marie and Beatrice, and by also failing* to draw, from the facts the Trial Chamber had found to be proven, the only reasonable inference that could be drawn, namely, that Sylvestre Gacumbitsi had planned, instigated, ordered, committed (including through his participation in a *joint criminal enterprise*), or at least aided and abetted in the murders, in particular, of Marie and Béatrice, that occurred in the context of a widespread or systematic attack against Tutsi civilians in Rusumo commune in

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April, May and June 1994, pursuant to Article 6(1) or, in the alternative, pursuant to Article 6(3).

7. The Trial Chamber failed to discharge its obligation, by not deducing all the legal implications from the evidence presented.

8. The Appeals Chamber should intervene to correct the error, by reversing the verdict of NOT GUILTY of Murder as a Crime Against Humanity, and convicting Sylvestre Gacumbitsi on Count 4.

9. The further relief sought is the imposition upon Sylvestre Gacumbitsi of a sentence of imprisonment for the remainder of his life, arising from his culpability for Murder as a Crime Against Humanity.

Ground 3 – The Trial Chamber erred by not finding Sylvestre Gacumbitsi criminally responsible for certain other rapes committed in the context of a widespread or systematic attack against civilians in Rusumo commune

10. This ground of appeal affects the limited basis for the verdict of GUILTY of Rape as a Crime Against Humanity returned in relation to Sylvestre Gacumbitsi, which was based only on his criminal responsibility for instigating the rapes of TAQ and seven other Tutsi women and girls, pursuant to Article 6(1) of the Statute, as well as the Sentence of a single 30-year term.

11. The Trial Chamber made an error of *law and* fact, particularly in relation to paragraphs 215 through 228, and 322 through 333, by *adopting too narrow an approach to the concept in law of instigation (by requiring proof of a strict cause- effect relationship between the alleged instigation and the commission of crimes), and also* failing to conclude that Sylvestre Gacumbitsi bore responsibility for planning, instigating, ordering, committing (including participating in a *joint criminal enterprise*), or otherwise aiding and abetting in the rapes, apart from the rapes mentioned in paragraph 10 above, committed during the widespread or systematic attack against the mostly civilian Tutsi population of

Rusumo commune in April, May and June 1994, pursuant to Article 6(1), or, in the alternative, pursuant to Article 6(3).

12. The Appeals Chamber should correct the error by drawing the only reasonable inference available on the facts found to be proven by the Trial Chamber, namely that Sylvestre Gacumbitsi bore full individual criminal responsibility for all of the rapes proven to have been committed in the context of the widespread or systematic attack against civilians in Rusumo commune during April, May and June 1994.

13. The further relief sought is the imposition upon Sylvestre Gacumbitsi of a sentence of imprisonment for the remainder of his life, arising from his full culpability for Rape as a Crime Against Humanity.

Ground 4 – Necessity of proving absence of consent constituent element of rape

14. The Prosecution raises, as a ground of appeal relating to an error of law, the necessity of proving absence of consent, on the part of the victim of rape, and awareness of that absence of consent on the part of the perpetrator of rape as a crime against humanity, or as an element of genocide.

15. Given the current state of the law, the Trial Chamber correctly addressed the issue of consent (see paragraph 325), but, the absence of consent should not constitute a material element in the crime of rape, and awareness of the absence of consent should not constitute part of the intent for the crime of rape, in the coercive circumstances that inevitably arise as part of rape as a crime against humanity or an element of genocide.

16. The relief sought is a clarification of the law, relating to the elements of rape as a crime against humanity (Article 3(g) of the Statute), or as a constituent element of the crime of genocide (Article 2(2)(b) of the Statute), and the revision of the decision only to the extent necessary to reflect this clarification of the law.

Ground 5 – The Trial Chamber erred, first, by finding that the Prosecutor had not adequately pleaded joint criminal enterprise as a basis for the individual criminal responsibility of Sylvestre Gacumbitsi, and, secondly, by failing to consider joint criminal enterprise as a mode of commission of the crimes

17. This ground of appeal affects the verdict of NOT GUILTY of Murder as a Crime Against Humanity and also the basis, which excluded joint criminal enterprise as a mode of commission, for the verdicts of GUILTY of Genocide, Extermination as a Crime Against Humanity and Rape as a Crime Against Humanity, as well as the Sentence of a single 30-year term.

18. Given the facts alleged in the Indictment, including the allegation that Sylvestre Gacumbitsi acted in concert with others (see paragraph 25 of the Indictment), the evidence as it unfolded at the trial, and the arguments made in the Prosecution's Closing Brief, the Trial Chamber erred on a question of law, notably in relation to paragraph 289, in holding that the Prosecution had failed to plead the issue of *joint criminal enterprise* adequately.

19. The Prosecution put Sylvestre Gacumbitsi on sufficient notice concerning his participation in a *joint criminal enterprise*, and the nature, form and purpose of the *joint criminal enterprise* alleged.

20. The relief sought is the reversal of the Trial Chamber's finding in relation to *joint criminal enterprise*, and the imposition upon Sylvestre Gacumbitsi of a sentence of imprisonment for the remainder of his life, arising from his full culpability.

Ground 6 – The Trial Chamber erred by failing to draw the only reasonable inference from the proven facts, namely that Sylvestre Gacumbitsi had authority to order respecting the *conseillers* and other participants in the widespread or systematic attack in Rusumo Commune

21. This ground of appeal affects the verdict of NOT GUILTY of Murder as a Crime Against Humanity, and, in relation to the verdicts of GUILTY of Genocide, Extermination as a Crime Against Humanity, and Rape as a Crime Against Humanity, the finding that

Sylvestre Gacumbitsi's ability to order was confined to the communal police. This ground also affects the Sentence of a single 30-year term.

22. The Trial Chamber committed an error of *law and* fact, particularly in relation to paragraphs 88, 92 and 93, 96 through 107, 152, 163, 167 through 174, 215, 232 through 243, 282 through 284, 311 and 353, respectively, by *requiring proof of a superior-subordinate relationship to establish culpability for ordering and also* failing to draw, from the facts the Trial Chamber had found to be proven, the only reasonable inference that could be drawn, namely, that Sylvestre Gacumbitsi was, pursuant to Article 6(1) of the Statute, in a position to give orders to his direct or indirect subordinates during the relevant period, including not only the communal police officers, but also the *conseillers* and other participants, such as members of the *Interahamwe*, in the widespread or systematic attack in Rusumo commune.

23. The relief sought is the revision of the Trial Chamber's finding, regarding the scope of Sylvestre Gacumbitsi's authority to order, pursuant to Article 6(1) of the Statute, in relation to the crimes for which he was found GUILTY, and the entry of a conviction for Murder on Count 4.

24. The further relief sought is the imposition upon Sylvestre Gacumbitsi of a sentence of imprisonment for the remainder of his life, arising from his full culpability.

Such variation of the grounds of appeal as this Chamber may authorize, upon the Prosecutor's application pursuant to Rule 108.

DATED: 29 September 2004,
Arusha, Tanzania



Hassan Bubacar Jallow
Prosecutor

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		Case No / no. de l'affaire:	ICTR-01-64-A <i>30/09/04</i>
To: A:	Rosette Muzigo Morrison, Legal Officer, Appeals Unit, The Hague.	<input checked="" type="checkbox"/> Judge / Juge Mohamed SHAHABUDEEN <input checked="" type="checkbox"/> Judge / Juge Florence MUMBA <input checked="" type="checkbox"/> Judge / Juge Mehmet GÜNEY <input checked="" type="checkbox"/> Judge / Juge Wolfgang SCHOMBURG <input checked="" type="checkbox"/> Judge / Juge Inés Mónica Weinberg de ROCA	
ACCUSED / DEFENSE <input checked="" type="checkbox"/> Accused / Accusé Nahimana, Barayagwiza & Ngeze <i>see / voir " CMS4</i> <input checked="" type="checkbox"/> Lead Counsel / Conseil Principal: Me Biju Duval, B. Caldarera & J. Floyd <input type="checkbox"/> In Arusha / à Arusha: (see / voir CMS3) <input type="checkbox"/> Fax: <input type="checkbox"/> Co-Counsel / Conseil Adjoint: <input type="checkbox"/> Arusha (see / voir CMS3) <input type="checkbox"/> Fax:			
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Date:	16 July, 2004	Case Name / affaire:	SYLVESTER GACUMBITSI v. The Prosecutor	
		Case No / no. de l'affaire:	ICTR-01-64-A	
To: A:	Rosette Muzigo Morrison, Legal Officer, <input checked="" type="checkbox"/> Judge / Juge Theodor MERON, Presiding Appeals Unit, The Hague.			
	ACCUSED / DEFENSE <input checked="" type="checkbox"/> Accused / Accusé Sylvester GACUMBITSI <small>see / voir CMS4</small> <input checked="" type="checkbox"/> Lead Counsel / Conseil Principal: KOUENGOUA <input type="checkbox"/> In Arusha / à Arusha: <small>(see / voir CMS3)</small> <input type="checkbox"/> Fax: <input type="checkbox"/> Co-Counsel / Conseil Adjoint: <input type="checkbox"/> Arusha <small>(see / voir CMS3)</small> <input type="checkbox"/> Fax:			
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From: De:	<input type="checkbox"/> JP. Fomété <input type="checkbox"/> F. A. Talon (Appeals Officer) <input type="checkbox"/> Matar Dlop (DP Chief, CMS) <input checked="" type="checkbox"/> CJ Ortega <input type="checkbox"/> K. Afande			
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Date:	16 July, 2004		Case Name / affaire:	SYLVESTER GACUMBITSI v. The Prosecutor	
			Case No / no. de l'affaire:	ICTR-01-64-A	
To: A:	Rosette Muzigo Morrison, Legal Officer, <input checked="" type="checkbox"/> Judge / Juge Theodor MERON, Presiding Appeals Unit, The Hague.				
	ACCUSED / DEFENSE <input checked="" type="checkbox"/> Accused / Accusé Sylvester GACUMBITSI <small>see / voir CMS4</small> <input checked="" type="checkbox"/> Lead Counsel / Conseil Principal: KOUENGOUA <input type="checkbox"/> In Arusha / à Arusha: <small>(see / voir CMS3)</small> <input type="checkbox"/> Fax: <input type="checkbox"/> Co-Counsel / Conseil Adjoint: <input type="checkbox"/> Arusha <small>(see / voir CMS3)</small> <input type="checkbox"/> Fax:				
	OTP / BUREAU DU PROCUREUR <input checked="" type="checkbox"/> Hassan Bubacar JALLOW, Prosecutor <input type="checkbox"/> B. Majola, Deputy Chief <input checked="" type="checkbox"/> James STEWART - SAC: <input type="checkbox"/> name <input type="checkbox"/> The Hague / La Haye <input type="checkbox"/> Arusha <small>(see / voir CMS3)</small> <input type="checkbox"/> Kigali				
From: De:	<input type="checkbox"/> JP. Fomété <input type="checkbox"/> F. A. Talon (Appeals Officer) <input type="checkbox"/> Matar Diop (DP Chief, CMS) <input checked="" type="checkbox"/> CJ Ortega <input type="checkbox"/> K. Afande				
CC:	<input checked="" type="checkbox"/> Registrar <input type="checkbox"/> OLA/NY <input checked="" type="checkbox"/> D. Reg. <input type="checkbox"/> P&PA <input checked="" type="checkbox"/> Spokesman <input checked="" type="checkbox"/> SAR <input type="checkbox"/> WVSS-P <input type="checkbox"/> WVSS-D <input checked="" type="checkbox"/> DCMS <input checked="" type="checkbox"/> CSS <input type="checkbox"/> SADR <input type="checkbox"/> Other				
Subject Objet:	Kindly find attached the following documents / Veuillez trouver en annexe les documents suivants:				



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COURT MANAGEMENT ADMINISTRATION DES CHAMBRES

AICC, P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzanie
Tel: 255 27 2504207-11 2504367-72 or 1 212 963 2850 Fax: 255 27 2504000/4373 or 1 212 963 2848/49

PROOF OF SERVICE TO DETAINEES PREUVE DE NOTIFICATION D'ACTES AUX DETENUS

Upon signature of the detainee, please return this sheet to the originator as proof of service.
Formulaire à être renvoyé à l'expéditeur dûment signé par le détenu.

Date: 16 July, 2004		Case Name / affaire: S. GACUMBITSI .v. The Prosecutor		
		Case No / no. de l'affaire: ICTR-01-64-A		
To: A:	Name of detainee / nom du détenu GACUMBITSI	TO BE FILLED IN BY THE DETAINEE A COMPLETER PAR LE DETENU Signature _____ Date, Time / Heure _____ I confirm reception of the documents listed below. <i>Je confirme réception des documents mentionnés ci-dessous.</i>		
Via:	Security Officer, ICTR, HQ. Security Officer, UNDF, ARUSHA	Print name / nom MAGAZI	Signature 	Date, Time / Heure 23/07/04
From: De:	<input type="checkbox"/> JP. Fomété (Chief, CMS) <input type="checkbox"/> Matar Diop (D Chief, CMS) <input type="checkbox"/> F. A. Talon (Appeals Officer) <input checked="" type="checkbox"/> C.J Ortega <input type="checkbox"/> K. Afande <input type="checkbox"/> Other			
Subject Objet:	Kindly find attached the following documents / <i>Veillez trouver en annexe les documents suivants.</i>			

Documents name / titre du document

Date Filed / Date enregistré

Pages

PROSECUTION'S NOTICE OF APPEAL

16.07.2004

(07/A-01/A)

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