# ANNEX A

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INTEROFFICE MEMORANDUM MEMORANDUM INTERIEUR

TO: Adama Dieng
A: Registrar
International Criminal Tribunal for Rwanda
CC: Everard O'Donnell
Deputy Registrar
International Criminal Tribunal for Rwanda

DATE 26 November 2007

FROM: Larry D. Johnson
DE: Assistant Secretary-General for Legal Affairs

SUBJECT: **Pending Rukundo Motion Seeking Acknowledgment of an**
OBJET: **Immunity from Legal Process Benefiting a Former ICTR Defence Investigator**

ICTR OFFICE OF THE REGISTRAR BUREAU DU GREFFIER RECEIVED ON RECU LE 11 DEC 2007 4183

1. I refer to your memorandum of 6 November 2007, supplemented by your memorandum of 21 November 2007, which raises the issue of whether a Defence investigator has immunity from legal process with respect to his activities as an investigator on the Defence team of an accused before the International Criminal Tribunal for Rwanda. This issue arises because a former Defence investigator on the Rukundo team, Mr. Nshogoza was arrested and detained by the Rwandan authorities while on mission on charges under Rwandan law of tampering with witnesses, and "spreading genocide ideology".

2. You have advised that this issue is currently pending before the Trial Chamber *via* motion of the Defence and that you are seeking to make submissions before the Trial Chamber pursuant to Rule 33(B) of the Rules of Procedure and Evidence of the ICTR. In that respect, you have requested our advice on the matter. In so doing, you note that there is no clear provision conferring immunity on members of the Defence team in any of the relevant instruments.

3. Before turning to consider the substantive question, it is necessary to identify the function of Defence investigators and their relationship with the ICTR. Defence investigators are retained *ad hoc* by the Tribunal at the request of Defence Counsel. The role of Defence Counsel is to give effect to and protect the statutory right of the accused to a defence before the Tribunal. As such, investigators are retained by Defence Counsel as part of the Tribunal's statutory obligation to ensure the defence has adequate facilities for the preparation of a defence, and that the defence can "obtain the attendance and examination of witnesses on his or her behalf on the same conditions as witnesses against him or her" (Article 20 of the Statute of the ICTR). By their function, defence investigators assist the Defence Counsel in the realization of the accused right to present an effective defence.

4. I note that in your memorandum of 21 November 2007, you stress that ICTR has no direct contractual relationship with the defence investigator and that the direct contractual relationship of Defence investigators is with Defence Counsel. As such, you conclude that

"there is no clear contract between ICTR and defence investigators". In our view, while the contractual relationship may not be direct, in the sense that a defence investigator is retained at the request of Defence Counsel to perform tasks identified by the Defence Counsel, we do not consider this to mean that there is no contractual relationship at all with the ICTR. The contract issued to the defence investigator is not issued by Defence Counsel but by the ICTR Registry at the request of Defence Counsel. The Contract issued to defence investigators by the ICTR Registry, which identifies the remuneration and the purpose of the contract, states that "the other conditions of service applicable to Defence Counsel" apply to them. These conditions of service are conditions of service of performing work for the ICTR, albeit at the request of Defence Counsel. Further, it is the ICTR who reimburses the defence investigator for work done, albeit following a request by Defence Counsel to do so. In our view, sufficient factors are present to establish a contractual relationship with the ICTR, facilitated by the needs of Defence Counsel to discharge his mandate of ensuring an effective defence.

5. While accused have a right to an effective defence under the Statute, the Statute is silent with respect to the immunity of Defence Counsel and their teams.

6. Article 29 of the Statute, which deals with privileges and immunities of the Judges, Prosecutor and Registrars and their staff, does not specifically grant immunity to Defence counsel or their defence teams. The only provision of Article 29 that may be interpreted broadly as covering the activities of Defence Counsel is Article 29(4) which provides:

"Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda"

7. As defence investigators generally carry out their activities away from the seat of the Tribunal is may be argued that they cannot fall within the definition of persons "required at the seat or meeting place of the International Tribunal". However, Defence Counsel is persons required at the seat of the Tribunal to present the Defence of an accused. By positing that Article 29(4) is applicable to Defence Counsel, it is possible to argue that it also covers those contracted by the Tribunal to assist Defence Counsel in the discharge of its mandate. Without extending that same grant of immunity to those that assist the Defence Counsel in carrying out his function, the Defence Counsel's ability to carry out his function may be frustrated. As such, immunity necessarily must apply to all members of the Defence team. Further, as already stated, the standard contract issued to defence investigators by the ICTR at the request of Defence Counsel states that the same conditions of service as apply to Defence Counsel shall apply to them.

8. This argument is strengthened by the Agreement between the United Nations and the United Republic of Tanzania concerning the Headquarters for the International Tribunal for Rwanda ("Headquarters Agreement") which specifically grants immunity for the Counsel of an accused in Article XIX. In relevant part it provides:

9. "1. The counsel of a suspect or an accused who has been admitted as such by the Tribunal shall not be subjected by the host country to any measure which may affect the free and independent exercise of his or her functions under the Statute. [...]

(c) Immunity from criminal, civil and administrative jurisdiction in respect of words spoke or written and acts performed by him or her in his or her official capacity as counsel. Such immunity shall continue to be accorded to him or her after termination of his or her functions as a counsel of a suspect or accused".

10. Paragraph 4 Article XIX confers the right and duty to waiver the immunity granted with the Secretary-General.

11. Defence investigators are not Counsel "admitted as such by the Tribunal" but are persons retained by the ICTR on the request of Defence Counsel to assist in the preparation of the case by carrying out investigations on their behalf. However, as the purpose of granting immunity to Defence Counsel would be frustrated if those retained by the ICTR to assist Defence Counsel in carrying out his/her function do not benefit from the same right of immunity, it is arguable that this specific grant of immunity was intended to extend to all members of the Defence team.

12. An alternative argument is that Article XVII of the Headquarters Agreement, which grants immunity to persons performing missions for the Tribunal, extends to defence investigators. Article XVII provides:

"1. Persons performing missions for the Tribunal shall enjoy the privileges, immunities and facilities under articles VI and VII of the General Convention, which are necessary for the independent exercise of their duties for the Tribunal".

Pursuant to Paragraph 2 of Article XVII of the Headquarters Agreement the right and duty to waive the immunity granted to persons performing missions for the Tribunal is with the President of the Tribunal.

13. Defence investigators are persons performing missions for the Tribunal, and would fall within this provision. Further, under this provision, defence investigators would be accorded more extensive immunity than that granted to Defence Counsel under the Headquarters Agreement and arguably the Statute, which would appear to be consistent with protecting the function they carry out as evidence gatherers in the field.

14. The provisions of the General Convention referred to in Article XVII of the Headquarters Agreement are provisions which apply to experts on mission. The relevant provision of the General Convention reads as follows:

"SECTION 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the

period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

a) Immunity from personal arrest or detention and from seizure of their personal baggage;
b) In respect of words spoken or written and acts done by them in the course of their performance of their mission, immunity from legal process of every kind. The immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed in missions for the United Nations;
c) Inviolability for all papers and documents;
d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;
e) The same facilities in respect of currency of exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;
f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

15. In the Advisory Opinion of the ICJ on the Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations, The International Court of Justice considered the meaning of experts on missions for the purposes of Section 22 of the General Convention. After finding that the Convention failed to provide a definition it held as follows:

"47. The purpose of Section 22 is nevertheless evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them 'such privileges and immunities as are necessary for the independent exercise of their functions'. The experts thus appointed or elected may or may not be remunerated, may or may not have a contract, may be given a task requiring work over a lengthy period of time or a short time. The essence of the matter lies not in their administrative position but in the nature of their mission".

16. This definition is broad enough to cover defence investigators and the advantage of classifying them under this provision is the delegation of waiver of immunity to the President of the ICTR. This is advantageous as it is the ICTR itself that has the better understanding of the function of defence investigators and the environment in which they operate. As such, the President would be best placed to make a determination as to whether immunity should be waived in light of all the circumstances. I note that a further advantage of classifying defence investigators under this provision is that there is no need to establish a direct contractual relationship between the defence investigator and the ICTR, although as indicated above, we consider that there are sufficient indicator to establish a contractual relationship.

17. The Memorandum of Understanding Between the United Nations and the Republic of Rwanda to Regulate Matters of Mutual Concern Relating to the Office in Rwanda of the International Tribunal for Rwanda ("Memorandum"), in relevant part provides:

"2. The Government of Rwanda shall extend:

[...]

To other persons assigned to the Office whose names shall be communicated to the Government of Rwanda for that purpose, the privileges and immunities to which they are entitled under Articles V1 and VII of the Convention:

"3. The United Nations and the Government of Rwanda also agree that privileges and immunities necessary for the smooth running of the Office also include the following rights and facilities:
" [...]
v) The right to make direct contacts with the national and local authorities in the various branches of the Government of Rwanda, including the armed forces;
vi) The right to question victims and witnesses, to gather evidence and all useful information and to conduct investigations in the field;
vii) The right to make direct contacts with individuals, intergovernmental and non-governmental organizations, private institutions and the media;
[...]"

18. In your memorandum, while identifying this provision, you have made no submissions with respect to whether you have communicated the name of Mr. Nshogoza to the Government of Rwanda signifying your intention that he benefit from the privileges and immunities of an expert on mission conferred under this provision. It is also not clear that Mr. Nshogoza falls within the definition of a "person assigned to the Office". In fact, he is a person assigned by the Office at the request of Defence Counsel to the defence of the accused.

19. The duty and right to waive the immunity granted to persons under this provision is not delegated to another authority, and remains with the Secretary-General.

20. On the basis of the following, I would suggest that the best course for you to adopt is to advise the Trial Chamber that Mr. Nshogoza does benefit from immunity as a person on mission pursuant to Article XVII of the Headquarters Agreement. Pursuant to that provision, waiver of immunity falls to the President of the Tribunal under Paragraph 2 of Article XVII. The Registrar should also be advised to notify the Rwandan authorities of the immunity of Mr. Nshogoza and that no waiver of that immunity has been granted. The matter should then be dealt with by the President of the Tribunal.