

ICTR-98-44-T  
29-12-2009  
(48999-48983)

48999  
A

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: 28 December 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES  
RECEIVED

2009 DEC 29 A 11:24

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JOSEPH NZIRORERA'S 28<sup>th</sup> NOTICE OF RULE 66 VIOLATION,  
19<sup>th</sup> NOTICE OF RULE 68 VIOLATION, AND  
MOTION FOR REMEDIAL MEASURES:  
ELECTRONIC DISCLOSURE SUITE

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The Office of the Prosecutor:

Mr. Don Webster  
Mr. Saidou N'Dow  
Mr. Takeh Sendze

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 notifies that Trial Chamber that the prosecution is in violation of Rules 66(B) and 68 by refusing to permit inspection and make disclosure of items material to the preparation of the defence and exculpatory material. He requests that the Trial Chamber order the prosecution to immediately comply with its obligations under these Rules, to postpone the resumption of the trial until it does so, and to preclude the prosecution from using at trial any documents which have not been disclosed.

2. The violations which are the subject of the instant motion—the latest in a long string of disclosure violations by the prosecution in this case—stem from the prosecution’s new position, expressed in a letter of 15 December 2009, that it would heretofore meet its disclosure obligations by making material available on its Electronic Disclosure Suite (EDS) and discontinue furnishing copies to the accused and defence teams.<sup>1</sup>

3. Lead Counsel for Mr. Nzirorera attempted to access the EDS to determine the feasibility of obtaining disclosure in this manner. He first found that he did not have access to the separate folder established for this case.<sup>2</sup> When that was remedied, he discovered that there was no way to locate items which were recently added to the EDS. Therefore, in order to find new disclosure material, the defence has to search the entire collection. In addition, the accused, who is the principal person on the defence team to review new disclosure and understand its relevance to the case, has no access to the EDS.

4. The Appeals Chamber has already held in this case that the prosecution cannot meet its disclosure obligations by simply placing material on its Electronic Disclosure

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<sup>1</sup> The letter is attached as Annex “A”

<sup>2</sup> See e-mails between Lead Counsel and the OTP, attached as Annex “B”

Suite.<sup>3</sup> The prosecution is therefore once again in violation of direct Appeals Chamber precedent.

5. In its decision, the Appeals Chamber did leave the door open to the prosecution to use the EDS to satisfy its disclosure obligations. It said that:

It might be helpful if the Prosecution either separates a special file for Rule 68 material or draws the attention of the Defence to such material in writing and permanently updates the special file or the written notice.<sup>4</sup>

6. The Appeals Chamber noted that at the ICTY “in the *Halilovic* Decision, the Prosecution’s Electronic Disclosure Suite contained a separate folder for material directed at Halilovic, the Prosecution informed the accused when new material was placed into the folder, and it also indexed, to some extent, the electronic collection.”<sup>5</sup>

7. In the *Karadzic* case at the ICTY, the Trial Chamber upheld the prosecution’s disclosure via the EDS where the prosecution segregated the material for that case into separate folders, provided the defence with a list of material being added to the EDS on an ongoing basis so that he could identify and locate that material, and made the EDS available to the Accused at the detention unit.<sup>6</sup>

8. The prosecution’s efforts in this case fall short of meeting those requirements. While a special folder for Mr. Nzirorera’s case has been created, the prosecution does not and has not informed Mr. Nzirorera when new material is placed into the folder, or made it possible to search for new material, and has not indexed its electronic collection at all. This makes it impossible to locate new material which the prosecution intends to use to

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<sup>3</sup> *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 10

<sup>4</sup> *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 15

<sup>5</sup> *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at fn. 46

<sup>6</sup> *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on Adequate Facilities* (10 March 2009) at para. 20

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continue to ambush defence witnesses, or which is exculpatory. The prosecution has also not provided access to the EDS by the accused himself.

9. Therefore, it is respectfully requested that the Trial Chamber find that the prosecution is once again in violation of Rules 66 and 68. As a remedial measure, it should order the prosecution to disclose all such material in its possession forthwith, and postpone the resumption of the trial until the defence has had the opportunity to review the withheld material. It should also preclude the prosecution from using the withheld material at trial.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

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## **ANNEX "A"**

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## **ANNEX "B"**

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12/20/2009 06:31 Subject: Access to EDS

Dear Don,

I tried to access the EDS at <http://eds.unictr.org> and received a screen that said there was no link to that address. Is there a new way to access EDS from outside of the network?

Thanks for your help.

Peter

48992

Monday, December 21, 2009 12:25 AM

Subject: Re: Access to EDS

Dear Peter,

I am informed by IESS that you must use the following hyper-link in order to access the

EDS: From outside --> <http://eds2.unictt.org/>

Please try that and then let me know if there are any problems.

Thanks and regards

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12/21/2009

Don,

Thank you for that link, which indeed worked.

However, only the common folder appears--no special folders for the Karemera case.

Can you assist with that problem or forward this to IESS so that they can help me directly?

Also, will you continue to provide CD Roms of ongoing disclosures to the accused or will some arrangement be made so that they have access to EDS at the UNDU?

Your friend,

Peter

48990

Monday, December 21, 2009 10:58 PM

Subject: Re: Access to EDS

Peter,

IESS has addressed the problem and appears to have resolved it. You should now have access to the targeted Karemera et al. folders, which includes a folder for R66B inspection.

The EDS is not accessible to the Accused at UNDF. Where R66B inspection is concerned, this should not be an issue. If you were to come into my office for on site physical inspection, the Accused would not accompany you. Providing inspection through the EDS is certainly more convenient than requiring you to come to my office in Arusha.

You may consult the EDS and decide if any relevant materials should be printed out for review by your client.

Please check the website again and let me know if you still have difficulty. I will be in the office tomorrow [Wed], but after that will be away from Arusha through Sunday 10 January. Please let's try to resolve as much as possible by tomorrow.

Thanks and regards

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22 December 2009

Dear Don,

I accessed the EDS again today and observed the Rule 66b folder, as well as the Rule 68 folders for this case. The problem is that there appears to be no way to see what documents have been added to the folder and when. That means that the only way for me to find material that has not previously been disclosed to me is to conduct random word searches through the entire collection.

For example, I am interested in seeing what documents have been added to EDS since March 2009 when you obtained materials from the Rwandan government relating to Mukingo commune and Ruhengeri prefecture. There seems to be no way to do this on EDS--all I can do is search for "Mukingo" and "Ruhengeri". There are over 600 documents with those words in the Rule 66(B) folder--most of which presumably have already been disclosed to me.

If it is necessary for my team to conduct random searches to locate the documents you have not previously disclosed so that we can avoid being ambushed during the next trial session, I will ask for a continuance in order to do that. However, it would be better if you could segregate, either in the EDS, or by making a separate disclosure, the material that has not previously been disclosed to us.

It is also problematic that my client has no access to the material. He is the principal person who needs to review the disclosure to determine what is relevant and what is not. He is also able to read Kinyarwanda, which I am

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not. While I have Kinyarwanda speakers on my team, they are fully engaged in other tasks for the presentation of our defence case and I don't have anyone who I can spare to download all EDS documents and produce them for my client's review.

So, in summary, I would be willing to agree to receive Rule 66(B) material via EDS if (1) the new material can be segregated and I can be notified when new material is posted on EDS; and (2) my client can be given access to the EDS or given the new disclosures on CD Rom.

Thanks for your consideration of these issues.

Your friend,

Peter

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**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**

Arusha International Conference Centre  
P.O. Box 6016, Arusha, Tanzania

UNITED NATIONS  
NATIONS UNIES

Tel: 255 27 2504207-11/2504367-72 or 1 212 963 2850 — Fax: 255 27 2504000/2504373 or 1 212 963 2848

**INTEROFFICE MEMORANDUM — MEMORANDUM INTERIEUR**

To: All Defence Teams Date: 11 May 2009  
 A: *Karemera et al.*  
 (Mr. Peter Robinson, and Mmes. Chantal Hounkaptin and Dior Diagne) Ref:

Cc: Constant Hometowu, Legal Officer, CMS  
 Karine Ardault, Trial Chamber III Coordinator

From: Don Webster  
 De: Senior Trial Attorney / *Karemera et al.*

Subject: **Targeted Rule 68 Disclosure via Electronic Disclosure Suite ["EDS"]**  
 Objet:

JUDICIAL  
 FILED  
 2009 MAY 11 P 12:08  
*[Handwritten signature]*

Dear Defence Teams:

1. In response to your repeated complaints about incomplete Rule 68 searches and disclosures, the Prosecution has revised its EDS service and has undertaken to create a collection of relevant materials in electronic, searchable form which has been specifically targeted for the *Karemera et al.* case.
2. As you should recall, the Appeal Chamber has held that the Prosecution may use the EDS as a means to convey the materials that must be disclosed to the Defence under Rule 68(A).<sup>1</sup> Each of the Defence teams has already requested a password to access the EDS and has signed the appropriate undertakings that govern access to those electronic folders.<sup>2</sup> This writing simply serves to inform you that a segregated collection of materials that may directly pertain to your Defence case has now been placed at your disposal.
3. We will continue to convey copies of certain materials, either in hard copy print-outs or by CD-ROM, where they are deemed to be of such importance that they should be brought to your attention in separate filings. For broader swathes of materials that may be relevant, and which are arguably subject to disclosure under Rule 66(B) or Rule 68(B), you may consult the EDS.
4. Should you encounter any difficulty in accessing the targeted EDS, kindly contact my office and I will make arrangements with the IESS unit to assist you.
5. Regards

<sup>1</sup> Prosecutor v. *Karemera et al.* (ICTR-98-44-AR73.7) Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (6 June 2006) at para. 12.  
<sup>2</sup> See copies of EDS Access Application Forms, appended hereto in annexure.

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International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda



Office of the Prosecutor

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EDS ACCESS  
APPLICATION FORM

Applicant Name		Applicant Title and Case Name & No.	
Dior D. MBAYE		Lead Counsel ICTR9814-T	
Applicant Email Address		mediordiagnes@yahoo.fr <del>mediordiagnes@yahoo.fr</del>	
Application Date	Contract Expiry Date	Telephone No.	ICTR Room No.
15.01.05		0748 581 530	S 261
Applicant's Bar Association			
Name: Barreau de DARAR Address: Bloc des Madeleines Tel No.: Bar Association Administrator: PAPA MOUSBA Felix SORU Fax No.:			
Applicants Signature and Date		ARUBA 19.04.06	

For DCMS use	
Name of Certifying Officer (DCDMS)	Signature and Date
	- 19/04/2006

For OTP use	
Name of Certifying Officer (STA)	Signature and Date
Webster	20 Apr 2006
Name of Certifying Officer (COP)	Signature and Date
Stephen Rapp COP	20/04/06

For IESS use	
Logon Credential Received	
Logon Account Detail mbayed	Signature and Date
	21/04/06



International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda



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Office of the Prosecutor

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EDS ACCESS  
APPLICATION FORM

Applicant Name		Applicant Title and Case Name & No.	
Peter Robinson		Lead Counsel, Nzirorera case 9844	
Applicant Email Address			
peter@peterrobinson.com			
Application Date	Contract Expiry Date	Telephone No.	ICTR Room No.
16 Mar 2005		5419	S-239
Applicant's Bar Association California			
Name: State Bar of California			
Address: 355 Franklin Street San Francisco, CA 92104			
Tel No.: Fax No.:			
Bar Association Administrator:			
Applicants Signature and Date		Peter Robinson 16 Mar 2005	

For DCMS use	
Name of Certifying Officer (DCDMS)	Signature and Date
AMINATTA L.R. N'GUM	A N'gum 16/03/05

For OTP use	
Name of Certifying Officer (STA)	Signature and Date
Don WEBSTER	[Signature] 17-Mar-05
Name of Certifying Officer (COP)	Signature and Date
BORGANI MAJOLA	[Signature] 19-03-05

For IESS use	
Logon Credential Received	
Logon Account Detail	Signature and Date
ROBINSON P	Peter Robinson 22/3/05