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(49248-49244)

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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: 4 January 2010

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR

v.

JOSEPH NZIRORERA

REPLY BRIEF:
JOSEPH NZIRORERA'S 28th NOTICE OF RULE 66 VIOLATION,
19th NOTICE OF RULE 68 VIOLATION, AND
MOTION FOR REMEDIAL MEASURES:
ELECTRONIC DISCLOSURE SUITE

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. On 30 December 2009, there was filed *Joseph Nzirorera's Corrected 28th Notice of Rule 66 Violation, 19th Notice of Rule 68 Violation, and Motion for Remedial Measures: Electronic Disclosure Suite*.

2. On 31 December 2009, there was filed the *Prosecution's Response to Joseph Nzirorera's 28th Rule 66 Notice*. Mr. Nzirorera now replies.

3. The prosecution has acknowledged that it no longer is willing to provide access to Rule 66(B) material by distributing copies on CD Rom. Instead, it insists that the defence obtain the material from the prosecution's Electronic Disclosure Suite. (EDS).

4. The prosecution has not clearly stated its position as to whether it will continue to provide access to Rule 68 material by distributing copies on CD Rom. It has created two "Rule 68" folders for the Karemera case on the EDS. It has made no Rule 68 disclosures since the Nzirorera defence case started, and indeed been found to have violated Rule 68 in October 2009 in connection with Witness GAY.¹ Therefore, Mr. Nzirorera has included Rule 68 material in his motion on the assumption that the prosecution takes the same position for Rule 68 material that it takes for Rule 66(B) material—that it will only make it available on the EDS.

5. 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 Suite.² 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:

¹ Transcript of 28 October 2009 @ 34-35

² *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 10

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.³

6. The issue before the Chamber at this time is whether the prosecution has complied with the suggestion of the Appeals Chamber such as to allow the prosecution to satisfy its disclosure requirements via the EDS. The burden of establishing satisfaction of these requirements rests with the prosecution.

7. The prosecution has created a separate folder for Rule 66(B) material and for Rule 68 material in this case. Therefore, it has satisfied the first requirement of the suggestion made by the Appeals Chamber.

8. However, the prosecution has failed to satisfy the additional requirements that it draw the attention of the defence to the new material it is placing on the EDS. As it stands now, there is no way to identify new material on the EDS which has not previously been disclosed to the defence.

9. Therefore, the defence is unable to retrieve the Rule 66(B) or Rule 68 material which has not previously been disclosed to it. This makes the EDS form of disclosure useless, as the undisclosed documents are buried within tens of thousands of pages of previously disclosed material.

10. There is no way for the defence team to practically segregate this material so that it can review it or make it available to Mr. Nzirorera for his review.

11. A review of the EDS system by Mr. Nzirorera's lead counsel on 1 January 2010, after the response of the prosecution was received, reveals the following facts:

³ *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 15

12. Although there is a tab for "Table of Contents" for the Rule 68 and Rule 66(B) folders, no table of contents has been created for those folders. Therefore, it is impossible to search these folders any other way than conducting a word search.

13. A search for the word "MRND" in the Rule 66(B) folder indicates that 1313 documents contain this word. A search for the word "Ruhengeri" indicates that 500 documents in the Rule 66(B) folder contain this word. A spot check of the description of these documents indicates that the vast majority of them have already been disclosed to the defence on CD Roms.

14. The advanced search options allow for a filter to be used to search for documents which have been placed on the EDS within the last year, or other periods. However, there is no way to generate a list of all such documents. The most that can be done with this filter is to enter random word searches. This method cannot assure that all documents which have not otherwise been disclosed to the defence can be located.

15. Therefore, as currently structured, the EDS system does not allow the defence to identify Rule 66(B) or Rule 68 documents which it does not already have. This makes searching for those documents a burdensome game of finding a needle in a haystack which does not guarantee that all such documents could be located, and does not provide for access to those documents by the accused himself.

16. The Trial Chamber therefore should find that the prosecution has not met its burden of showing that it has discharged its Rule 66(B) and Rule 68 disclosure obligations in conformance with the jurisprudence of the Appeals Chamber and that it is therefore in violation of Rules 66(B) and 68.

17. The Trial Chamber should order that all Rule 66(B) and 68 material be disclosed to the defence forthwith, that no such material be used in cross examination of any witness until full disclosure is made, and that the resumption of the trial should be postponed until the full disclosure can be obtained and reviewed by the defence.

18. Mr. Nzirorera cannot fathom why the prosecution has decided to once again make the disclosure process a contentious one in his case. The prosecution's abrupt refusal to continue to provide disclosure on CD Rom is inexplicable and unnecessary and serves to re-enforce Mr. Nzirorera's belief that the prosecution wishes to have a trial by ambush and violate his right to a fair trial. The Chamber is respectfully requested to protect the rights of Mr. Nzirorera by acting firmly and expeditiously in this matter.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

