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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

**Before Judges:** Taghrid Hikmet, Presiding  
Seon Ki Park  
Joseph Masanche

**Registrar:** Adama Dieng

**Date:** 30 October 2009

**THE PROSECUTOR**

v.

**Gaspard KANYARUKIGA**

*Case No. ICTR-2002-78-T*

JUDICIAL  
RESERVED  
2009 OCT 30 PM 12:00

**DECISION ON DEFENCE MOTION FOR DISCLOSURE AND RETURN OF  
EXCULPATORY DOCUMENTS SEISED FROM THE ACCUSED**

*Rule 68 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Holo Makwaia  
Althea Alexis-Windsor  
Cheikh Tidiane Mara  
Lansana Dumbuya

**Defence Counsel:**

David Jacobs  
Claver Sindayigaya  
Marc Nerenberg

## INTRODUCTION

1. The Accused, Gaspard Kanyarukiga, was arrested in South Africa on 19 July 2004.
2. On 7 August 2009, the Defence filed a motion pursuant to Rule 68(A) of the Rules of Procedure and Evidence ("the Rules"), requesting that the Prosecution disclose and return exculpatory documents seised from the Accused.<sup>1</sup> The Defence contends that, at the time of his arrest, the Accused possessed three Rwandan laissez-passers, which were seised by officers of the Tribunal and are currently in the custody of the Prosecution.<sup>2</sup>
3. On 18 August 2009, the Chamber issued an Interim Order, instructing the Prosecutor to provide further information regarding the arrest of the Accused and the seizure, inventory and custody of the Accused's possessions.<sup>3</sup>
4. On 21 August 2009, the Prosecutor filed a response to the Chamber's Interim Order.<sup>4</sup> In his response, the Prosecutor conceded that the Accused made notations on the second inventory list of the Accused's belongings, dated 10 September 2004, indicating that certain seised items were missing from the list.<sup>5</sup> The Prosecutor also acknowledged that certain items included in the first inventory, made on 19 July 2004, were not accounted for in the 10 September 2004 inventory.<sup>6</sup> In his response, the Prosecutor provided several possible explanations for the inconsistencies between the two inventories.<sup>7</sup> The Prosecutor further indicated that he had contacted authorities in South Africa regarding the items seised from the Accused at the time of his arrest and that a response from South Africa would be forthcoming in about a month.<sup>8</sup>
5. On 25 August 2009, the Defence filed an extremely urgent motion for a stay of the proceedings, arguing that Kanyarukiga's defence had been irreparably damaged by the Prosecution's failure to act for the past five years and to preserve exculpatory evidence, *i.e.*, the three laissez-passers.<sup>9</sup>
6. On 28 August 2009, the Chamber denied the Defence motion for a stay of the proceedings but indicated that it remained seised of the underlying issues.<sup>10</sup> The Chamber also noted in its decision that the missing item was a medicine bag, the contents of which

<sup>1</sup> Motion for the Prosecution to Disclose and Return Exculpatory Documents Seised from the Accused, filed on 7 August 2009 ("Motion").

<sup>2</sup> Motion, paras. 2, 4-6.

<sup>3</sup> Interim Order Concerning the Defence Request for Rule 68 Disclosure (TC), 18 August 2009 ("Interim Order").

<sup>4</sup> Prosecutor's Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure, filed on 21 August 2009 ("Response to the Interim Order").

<sup>5</sup> Response to the Interim Order, para. 12.

<sup>6</sup> Response to the Interim Order, para. 14.

<sup>7</sup> Response to the Interim Order, para. 11.

<sup>8</sup> Response to the Interim Order, para. 5.

<sup>9</sup> Extremely Urgent Defence Motion for a Stay of Proceedings Due to the Impossibility of Having a Fair Trial Following the Disappearance of Exculpatory Evidence in the Hands of the Prosecutor, filed on 25 August 2009 ("Motion for Stay of Proceedings").

<sup>10</sup> Decision on the Extremely Urgent Defence Motion for a Stay of the Proceedings (TC), 28 August 2009 ("Decision on Stay of Proceedings").

had not been itemised, and that the existence of the laissez-passers among the items seised from the Accused had not been established.<sup>11</sup> The Chamber nevertheless ordered the Prosecution to continue its search for the items missing from the second inventory list and to report back to the Chamber with any additional information, including any response to the inquiries made to South African authorities.<sup>12</sup>

7. Upon commencement of the Accused's trial on 31 August 2009, the Trial Chamber again reminded the Prosecution to continue its search for the items missing from the second inventory list.<sup>13</sup>

8. On 11 September 2009, the Trial Chamber ordered the Registry to transmit to the Prosecution a copy of the list of items seised from the Accused, Gaspard Kanyarukiga, at the time of his admission to the United Nations Detention Facility (UNDF) in Arusha.<sup>14</sup>

9. On 24 September 2009, the Prosecution filed a "Further Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure," indicating that it had continued its search for the documents requested by the Defence but that it had not located any laissez-passers or other travel documents pertaining to the Accused.<sup>15</sup> The Prosecution further stated that the South African authorities involved in the arrest and search of Accused had no knowledge of the laissez-passers requested by the Defence.<sup>16</sup> The Prosecution provided copies of documents received from authorities in South Africa and from the UNDF to support its submissions.<sup>17</sup>

10. The Defence has not filed any submissions in response to the Prosecution's "Further Response".

11. On 30 September 2009, the Defence filed a "Provisional Formal Notice of Alibi," indicating, *inter alia*, that it intends to rely on the requested laissez-passers.<sup>18</sup>

12. Having received full submissions on the issue of the allegedly missing *laissez-passers*, the Chamber now decides the matter.

### DELIBERATIONS

13. Rule 41(B) provides that after drawing up an inventory of all materials seised from the Accused, the Prosecutor shall return to the Accused without delay the materials that are of no evidentiary value.

14. Rule 68(A) provides that, "[t]he Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence." The Prosecution's obligation to disclose exculpatory material is

<sup>11</sup> Decision on Stay of Proceedings, para. 17.

<sup>12</sup> Decision on Stay of Proceedings, para. 18.

<sup>13</sup> T. 31 August 2009, p. 6.

<sup>14</sup> Order for Disclosure of UNDF Inventory List (TC), 11 September 2009.

<sup>15</sup> Prosecutor's Further Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure, filed on 24 September 2009 ("Further Response").

<sup>16</sup> Further Response, para. 6.

<sup>17</sup> Further Response, Annexes I and II.

<sup>18</sup> Provisional Formal Notice of Alibi, filed on 30 September 2009.

essential to a fair trial.<sup>19</sup> It forms part of the Prosecution's duty to assist in the administration of justice and is equally important as the obligation to prosecute.<sup>20</sup>

15. To show that the Prosecution has breached its disclosure obligations under Rule 68(A), an accused must: (1) identify the specific material sought; (2) present a *prima facie* showing of its probable exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the Prosecution.<sup>21</sup> Information is considered exculpatory under Rule 68(A) if there is any possibility, in light of the submissions of the parties, that the information could be relevant to the defence of the accused.<sup>22</sup>

16. The Defence requests disclosure/restitution of three Rwandan laissez-passers,<sup>23</sup> allegedly issued to the Accused between 14 and 16 April 1994.<sup>24</sup> The Chamber finds that the Defence has sufficiently identified the material sought, as required by the Tribunal's jurisprudence. The Chamber also accepts that the laissez-passers, as described by the Defence, could support Kanyarukiga's alibi defence. Thus, the Chamber finds that the Defence has made a *prima facie* showing of the materials' probable exculpatory value.

17. As regards the third criterion, the Chamber notes that the Prosecution has denied having custody or control over the requested items.<sup>25</sup> The Defence submits that the laissez-passers were seised from the Accused on 19 July 2004 and are currently in the custody of the Prosecution.<sup>26</sup> To support this contention, the Defence relies on notations made by the Accused on the 10 September 2004 inventory list,<sup>27</sup> discrepancies between the inventory prepared by the Prosecution on 19 July 2004 and that prepared on 10 September 2004 and a letter from Kanyarukiga's duty counsel to the Office of the Prosecutor, dated 17 September 2004.<sup>28</sup>

<sup>19</sup> *The Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, "Decision on Defence Motions alleging Violations of the Prosecution's Disclosure Obligations Pursuant to Rule 68", 22 September 2008 ("Ndindiliyimana Decision"), para. 12, citing *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal regarding the role of the Prosecutor's Electronic Disclosure Suite in discharging Disclosure Obligations (AC), 30 June 2006, para. 9.

<sup>20</sup> Ndindiliyimana Decision, para. 12, citing *The Prosecutor v. Kordić and Cerkez*, Case No. IT-95-14/2-A, "Decision on Motions to Extend for Filing Appellant's Briefs" (AC), 11 May 2001, para. 14.

<sup>21</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings (TC), 11 September 2008, para. 6; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence (AC), 8 December 2006, para. 34.

<sup>22</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, para. 12.

<sup>23</sup> A *feuille de route* for travel to Ndera, issued by Commander Torero at the military barracks in Gitarama on 14 April 1994; a *feuille de route* for passage from Ndera to Gitarama, issued by the Bourgmestre of Rubungu Commune on 15 April 1994; and a *feuille de route* for travel from Ndera to Gitarama, issued by Colonel Muberuka, Commander of Mayuya Camp, on 16 April 1994.

<sup>24</sup> Motion, paras. 4-6.

<sup>25</sup> Prosecutor's Response to the Motion for the Prosecution to Disclose and Return Exculpatory Documents Seised from the Accused, filed on 11 August 2009, paras. 10-11.

<sup>26</sup> Motion, para. 7.

<sup>27</sup> Inventory of Items Seised from KANYARUKIGA, *Gaspard*, dated 10 September 2004.

<sup>28</sup> Motion, paras. 7-8, 11; Motion for Stay of Proceedings, para. 10.

18. The Chamber recalls that, on 18 August 2009, it ordered the Prosecution to explain the discrepancies between the 19 July and 10 September 2004 inventory lists and that it has repeatedly reminded the Prosecution to search for the items omitted from the second list.<sup>29</sup> In response to these instructions, the Prosecution has filed two submissions in addition to its initial response to the Defence motion for disclosure of exculpatory materials.<sup>30</sup> It has also obtained information from the UNDF and from police and immigration officials in South Africa.<sup>31</sup> Despite these efforts, the Prosecution has not uncovered any laissez-passers or other travel documents pertaining to the Accused.<sup>32</sup>

19. As it has not been established that the laissez-passers are in the custody or control of the Prosecution, there is no basis for the Chamber to order disclosure of the requested items.<sup>33</sup>

20. Moreover, the Chamber previously held that the requested documents would only be part of a defence of alibi and that the Accused's alibi may still be effectively presented through other means, including witness testimony placing the Accused at the locations where he allegedly was during the events in question.<sup>34</sup> Even assuming that the laissez-passers existed and were subsequently lost, the Chamber finds that any resulting prejudice would not have been irreparable. At best, the laissez-passers would have helped establish that the Accused *could have gone* to a specific location. They would not have been proof of the Accused's location at any given time. Additional elements, such as testimonies, would still have been required to establish an alibi. In this regard, the Chamber recalls that on 19 October 2009, the Chamber ordered the Defence to disclose to the Prosecution by 6 November 2009, the names, current locations and addresses in 1994 of all witnesses upon whom it intends to rely to establish the alibi.

<sup>29</sup> Interim Order; Decision on Stay of Proceedings; T. 31 August 2009, p. 6; T. 17 September 2009, p. 46.

<sup>30</sup> Response to the Interim Order; Further Response.

<sup>31</sup> Further Response, Annexes; Documents Disclosed by the Prosecution on 25 September 2009.

<sup>32</sup> Further Response, para. 9.

<sup>33</sup> See, e.g., *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicomumpaka's Urgent Motion for Disclosure of Exculpatory Material (TC), 4 February 2009, para. 6.

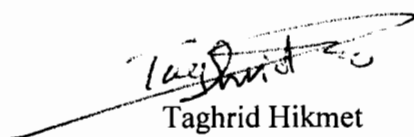
<sup>34</sup> Decision on Stay of Proceedings, para. 19.


**FOR THE FOREGOING REASONS**, the Chamber

**DENIES** the Defence motion.

Arusha, 30 October 2009

[read and approved]

  
Taghrid Hikmet  
Presiding Judge

  
Seon K. Park  
Judge  
[absent at the time of  
signature]

  
Joseph Masanche  
Judge

[Seal of the Tribunal]