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(5062-5057)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 20 November 2009

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-T

JUDICIAL RECORDS/ARCHIVES
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**DECISION ON THE DEFENCE MOTION FOR CERTIFICATION TO APPEAL
THE TRIAL CHAMBER'S DECISION OF 30 OCTOBER 2009**

Rule 73(B) of the Rules of Procedure and Evidence

Office of the Prosecutor:

Holo Makwaia
Althea Alexis Windsor
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Defence Counsel:

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INTRODUCTION

1. The trial in this case commenced on 31 August 2009. After calling eleven witnesses over fourteen trial days, the Prosecution closed its case on 17 September 2009.
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 seized from the Accused during his arrest in South Africa in June 2004.¹ The Defence contended that, at the time of his arrest, the Accused possessed three Rwandan laissez-passers, which were seized by officers of the Tribunal and are currently in the custody of the Prosecution.²
3. On 18 August 2009, the Chamber issued an Interim Order, instructing the Prosecution to provide further information regarding the arrest of the Accused and the seizure, inventory and custody of the Accused's possessions.³
4. On 21 August 2009, the Prosecution filed a response to the Chamber's Interim Order.⁴ In its response, the Prosecution conceded that the Accused made notations on the second inventory list of the Accused's belongings, dated 10 September 2004, indicating that certain items seized at the time of his arrest were missing from the list.⁵ The Prosecution 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.⁶ In its response, the Prosecution provided several possible explanations for the inconsistencies between the two inventories.⁷ The Prosecution further indicated that it had contacted authorities in South Africa regarding the items seized from the Accused at the time of his arrest and that a response from South Africa would be forthcoming in about a month.⁸
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.⁹
6. On 28 August 2009, the Chamber denied the Defence motion for a stay of the proceedings but indicated that it remained seized of the underlying issues.¹⁰ The Chamber also noted in its decision that the missing item was a medicine bag, the contents of which

¹ Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009 ("Motion for Disclosure").

² Motion for Disclosure, paras. 2, 4-6.

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

⁴ 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").

⁵ Response to the Interim Order, para. 12.

⁶ Response to the Interim Order, para. 14.

⁷ Response to the Interim Order, para 11.

⁸ Response to the Interim Order, para. 5.

⁹ 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").

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

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had not been itemised and that the existence of the laissez-passers among the items seized from the Accused had not been established.¹¹ 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.¹²

7. 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.¹³ The Prosecution further stated that the South African authorities involved in the arrest and search of the Accused had no knowledge of the laissez-passers requested by the Defence.¹⁴ The Prosecution provided copies of documents received from the authorities in South Africa and from the UNDF to support its submissions.¹⁵

8. 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 as part of the alibi defence.¹⁶

9. On 30 October 2009, the Trial Chamber denied the Defence motion for disclosure and return of the laissez-passers (the "Impugned Decision").¹⁷ The Chamber found that there was no basis for ordering disclosure of the requested items as it had not been established that the laissez-passers were in the custody or control of the Prosecution.¹⁸ In its Decision, the Chamber also recalled that it had 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.¹⁹ The Chamber further found that even assuming that the laissez-passers existed and were subsequently lost, any resulting prejudice would not have been irreparable. Finally, the Chamber held that, at best, the laissez-passers would have helped establish that the Accused *could have gone* to a specific location, but they would not have been proof of the Accused's location at any given time and that additional elements, such as testimonies, would still have been required to establish an alibi.

10. On 5 November 2009, the Defence filed a motion for certification to appeal the decision of the Trial Chamber of 30 October 2009.²⁰

¹¹ Decision on Stay of Proceedings, para. 17.

¹² Decision on Stay of Proceedings, para. 18.

¹³ 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").

¹⁴ Further Response, para. 6.

¹⁵ Further Response, Annexes I and II.

¹⁶ Provisional Formal Notice of Alibi, filed on 30 September 2009.

¹⁷ Decision on Defence Motion for Disclosure and Return of Exculpatory Documents Seised from the Accused (TC), 30 October 2009.

¹⁸ Impugned Decision, para. 19.

¹⁹ Impugned Decision, para. 20, citing Decision on Stay of Proceedings, para. 19.

²⁰ Motion for Certification to Appeal the Trial Chamber's Decision on Defence Motion for Disclosure and Return of Exculpatory Documents Seised from the Accused, filed on 5 November 2009 ("Motion").

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11. On 9 November 2009, the Prosecution filed a response, arguing that the Defence had mischaracterised the Impugned Decision and that "by failing to raise a ground of appeal that addresses the findings set out by the Trial Chamber in the Impugned Decision, the Defence has failed to meet the requirements for certification to appeal set out at Rule 73(B)."²¹

12. On 12 November 2009, the Defence filed a reply, maintaining its arguments in the Motion and arguing that with respect to the first criterion of Rule 73(B) the Prosecution had failed to rebut many of the facts and issues it had raised and had made no arguments in contravention of the Defence's submissions regarding the second criterion of this Rule.²²

13. On 19 November 2009, the Defence filed an addendum to its Reply²³ requesting that the Chamber consider the jurisprudence contained in the judgement of *Zigiranyirazo v. The Prosecutor* delivered by the Appeals Chamber on 16 November 2009.²⁴

DELIBERATIONS

14. According to Rule 73(B), the Trial Chamber may grant certification to appeal a decision of the Chamber "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." The Chamber recalls that certification to appeal is a matter of Trial Chamber discretion and is only warranted under exceptional circumstances.²⁵ In deciding whether to grant certification to appeal, the Trial Chamber need not consider the merits of the Impugned Decision but rather whether the moving party has satisfied the criteria set forth in Rule 73(B). The Trial Chamber may, however, revisit the substance of the Impugned Decision within the context of determining whether the Rule 73(B) criteria are met.²⁶

15. The Defence submits that the Trial Chamber erred in accepting that the Prosecution had exhausted all avenues of inquiry regarding the recovery and return of the requested materials and therefore the Chamber's finding that the Prosecution should not be ordered to disclose the missing documents was either incorrect or premature. The Defence further submits that obliging the Accused to present an alibi before having

²¹ Prosecutor's Response to Defence Motion for Certification to Appeal the Trial Chamber's Decision on Defence Motion for Disclosure and Return of Exculpatory Documents Seised from the Accused, filed on 9 November 2009, paras. 6-7.

²² Reply to the "Prosecutor's Response to Defence Motion for Certification to Appeal the Trial Chamber's 'Decision on Defence Motion for Disclosure and Return of Exculpatory Documents Seised from the Accused'", filed on 12 November 2009, paras. 4, 10.

²³ Addendum to the Defence Reply to the "Prosecutor's Response to Defence Motion for Certification to Appeal the Trial Chamber's 'Decision on Defence Motion for Disclosure and Return of Exculpatory Documents Seised from the Accused'", filed 19 November 2009, paras. 1-3.

²⁴ *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A.

²⁵ *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on the Defence Motion for Certification to Appeal the Trial Chamber's Decision on the Extremely Urgent Defence Motion for a Stay of the Proceedings (TC), 16 September 2009 ("16 September 2009 Decision"), para. 11 (with further references).

²⁶ 16 September 2009 Decision, para. 12 (with further references).

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definitively determined the unavailability of "persuasive physical documentary evidence" would be unfair. The Defence also submits that that the Chamber "erred in its statements of the law concerning alibi evidence" effectively reversing the burden of proof. Therefore, the Defence argues, an immediate resolution would materially advance the proceedings because a favourable decision of the Appeals Chamber could allow the Defence to reduce its expected testimonial evidence.²⁷

16. The Chamber recalls that, on 30 October 2009, it accepted "that the laissez-passeurs, as described by the Defence, could support Kanyarukiga's alibi defence."²⁸ It also found "that the Defence has made a *prima facie* showing of the materials' probable exculpatory value."²⁹ In that regard, the Chamber considers that the ability of the Defence to effectively present the Accused's alibi and, related to that, the question of whether the Prosecution complied with its obligations under Rules 41 and 68, are issues that may significantly affect the fair and expeditious conduct of the proceedings. Therefore the Chamber finds that the first criterion under Rule 73(B) is satisfied.

17. With regard to the second criterion of Rule 73(B), the Chamber is satisfied that an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings. In particular, the Chamber finds that, if this matter were to be raised in a later appeal, a contrary decision could undermine the entirety of the proceedings. In these circumstances, the Chamber considers it appropriate to grant certification to appeal the Impugned Decision.

²⁷ Motion, paras. 3, 8, 13.

²⁸ Impugned Decision, para. 16.

²⁹ Impugned Decision, para. 16; See also Decision on Stay of Proceedings, 28 August 2009, para. 17.

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FOR THESE REASONS, the Chamber

GRANTS the Defence motion; and

CERTIFIES the following issues for appeal:

1. whether the Trial Chamber's finding, in paragraph 19 of the Impugned Decision, that there was no basis to order disclosure of the laissez-passers was correct; and
2. whether the Trial Chamber's statement in paragraph 20 of the Impugned Decision on the Defence of alibi, including on the laissez-passers, was correct.

Arusha, 20 November 2009

[read and approved]



Taghrid Hikmet

Taghrid Hikmet
Presiding Judge
[absent at time of signature]

Seon Ki Park

Seon Ki Park
Judge

Joseph Masanche

Joseph Masanche
Judge

[Seal of the Tribunal]