



International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

ICTR-99-54-T  
01 - 03 - 2011  
(102396 - 102389)  
102396  
Mwamp

OR: ENG

**TRIAL CHAMBER II**

Before: Judge William H. Sekule, Presiding  
Judge Solomy Balungi Bossa  
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 1 April 2011

2011 APR 21 P 1:21  
JUDICIAL RECORDS ARCHIVE

**The PROSECUTOR**

v.

**Augustin NGIRABATWARE**

Case No. ICTR-99-54-T

**DECISION ON DEFENCE MOTION FOR DISCLOSURE OF ADDITIONAL  
EXCULPATORY AND OTHER RELEVANT MATERIAL  
PURSUANT TO DEFENCE ORAL MOTION PRESENTED ON 24 NOVEMBER 2010**

**Office of the Prosecutor**

Mr. Wallace Kapaya  
Ms. Veronic Wright  
Mr. Patrick Gabaake  
Mr. Iskandar Ismail  
Mr. Michael Kalisa  
Ms. Faria Rekkas

**Defence Counsel**

Mr. Peter Herbert  
Ms. Mylène Dimitri  
Mr. Deogratias Sebureze  
Ms. Anne-Gaëlle Denier  
Ms. Chloé Gaden-Gistucci

*Handwritten signature*

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the "Tribunal"),

**SITTING** as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the "Chamber");

**BEING SEIZED** of the "Defence Extremely Urgent Motion for Disclosure of Additional Exculpatory and Other Relevant Material Pursuant to the Defence Oral Motion Presented on 24 November 2010 under Rule 68(A) of the Rules of Procedure and Evidence" filed on 13 December 2010 (the "Defence Motion");

**CONSIDERING:**

- (a) The "Prosecutor's Response to Defence Extremely Urgent Motion for Disclosure of Additional Exculpatory and Other Relevant Material Pursuant to Defence Oral Motion Presented on 24 November 2010 under Rule 68(a) of the Rules of Procedure and Evidence", filed on 20 December 2010 (the "Prosecution Response"); and
- (b) The "Defence Reply to Prosecution's Response to Defence Extremely Urgent Motion for Disclosure of Additional Exculpatory and Other Relevant Material Pursuant to Defence Oral Motion Presented on 24 November 2010 under Rule 68(A) of the Rules of Procedure and Evidence", filed on 28 December 2010 (the "Defence Reply");

**CONSIDERING** also the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

**NOW DECIDES** the Motion pursuant to Rule 68(A).

**INTRODUCTION**

1. On 24 November 2010, the Defence proffered an Oral Motion for the Disclosure of the Audiotape of a Radio Rwanda Broadcast of 4 March 1994, pursuant to Rule 68 of the Rules ("Oral Defence Motion").<sup>1</sup> The Defence prayed the Chamber to direct the Prosecution to disclose the audiotape of a Radio Rwanda broadcast of 4 March 1994. According to the Defence, it had specifically identified the material, the Prosecution had admitted custody, and the material was potentially exculpatory, in that it could impact the credibility of Prosecution evidence or mitigate the guilt of the Accused.<sup>2</sup>

2. In response to the Oral Defence Motion, the Prosecution acknowledged that it possessed the audiotape, but submitted that the Defence had failed to present a *prima facie* showing of the broadcast's probable exculpatory nature. In the Prosecution's view, the requested material was neither exculpatory nor relevant to the Defence case, in part because no basis had been shown that Radio Rwanda had a duty to report on alleged hate speech.<sup>3</sup>

<sup>1</sup> T. 24 November 2010, pp. 2-6.

<sup>2</sup> *Id.*, pp. 2-6, 8-9.

<sup>3</sup> *Id.*, pp. 6-8.

3. On 2 December 2010, the Defence orally requested the disclosure of additional exculpatory and other relevant material based on the legal arguments presented in the Oral Defence Motion. The Chamber directed that the Defence do so by way of written motion.<sup>4</sup>

4. The Defence filed the present Motion on 13 December 2010.

5. The Oral Defence Motion is being addressed by the Chamber separately, and accordingly will be the subject of a different Decision.

**SUBMISSIONS OF THE PARTIES**

***Defence Motion***

6. The Defence seeks the disclosure under Rule 68(A) of the Rules of the audio records of the Radio Rwanda broadcasts on 9, 10, 11, 16, and 17 April, and 24 May, 1994.<sup>5</sup>

7. The Defence submits that in seeking the disclosure of exculpatory material under Rule 68(A), it must (i) identify the materials sought; (ii) if desired, to satisfy the Trial Chamber on a *prima facie* basis of the Prosecutor's custody or control of the materials requested; and (iii) if disputed, to satisfy the Trial Chamber on a *prima facie* basis of the exculpatory or potentially exculpatory character of the materials requested.<sup>6</sup>

8. As regards the sought audio records being in the custody of the Prosecution, the Defence points out that all the transcripts bear a "K" number for purposes of the present trial. The Defence submits that this indicates that these have been transcribed by the Prosecution and inputted into its Electronic Disclosure System ("EDS"). These documents are therefore within the Prosecution's custody. The Defence further notes that the Prosecution admitted that it had possession of the 4 March 1994 Radio Rwanda broadcast transcript in relation to the Oral Defence Motion.<sup>7</sup>

9. As to the exculpatory or potentially exculpatory character of the materials requested, the Defence explains that the Radio Rwanda broadcasts support the alibi evidence led by the Accused. The Defence contends that the Radio Rwanda broadcast of 9 April 1994 supports the Accused's alibi whereby on this date he was at the *Hôtel des Diplomates* in Kigali to attend the swearing-in ceremony of the Rwandan Interim Government, of which he was a member as the Minister of Planning, and that the Radio Rwanda broadcasts of 10 and 11 April 1994 support the Accused's alibi whereby on these dates he was likewise at the *Hôtel des Diplomates* in Kigali to attend Cabinet meetings. These activities are in contrast to the allegation in the Indictment that the Accused was in Nyamyumba commune in Gisenyi prefecture instigating the *Interahamwe* to exterminate Tutsis.<sup>8</sup>

10. Similarly, the Defence contends that the 16 and 17 April 1994 Radio Rwanda broadcasts confirm that the Accused attended Cabinet meetings in Gitarama, contradicting the allegations in the Indictment that the Accused was committing serious crimes in Gisenyi

<sup>4</sup> T. 2 December 2010, pp. 22-24.

<sup>5</sup> Defence Motion, para. 19.

<sup>6</sup> *Id.*, para. 18.

<sup>7</sup> *Id.*, para. 20.

<sup>8</sup> *Id.*, paras. 21-26.

on these dates. The Accused likewise affirmed in his examination-in-chief that he had listened to these broadcasts on those very dates, and therefore could attest to the accuracy of the audio records thereof.<sup>9</sup>

11. Lastly, the Defence argues that the 24 May 1994 Radio Rwanda broadcast of an interview of the Accused corroborates his testimony that he was on an official trip outside of Rwanda from 23 April to 23 May 1994, visiting Gabon, Togo, Senegal, Swaziland, and Zambia. The Defence thus seeks the disclosure of the audio records of this broadcast.<sup>10</sup>

12. The Defence asserts that the Accused testified that he had listened to the Radio Rwanda broadcast in the evenings of these dates and is therefore in a position to conclude that the transcripts accurately recorded the contents of the broadcasts.<sup>11</sup> The Defence states that the Accused likewise affirmed that the transcript of the 24 May 1994 Radio Rwanda broadcast contained the radio interview he granted that date.<sup>12</sup>

### *Prosecution Response*

13. The Prosecution submits that the requested Radio Rwanda audio records are not potentially exculpatory. The Prosecution argues at the outset that the late disclosure of all three alibis, and the lack of any acknowledgement by the Defence that it had raised two additional alibis, point to the falsity thereof. Furthermore, Prosecution evidence establishes that the various alibis of the Accused are false. As regards the Accused's alibi for 6 to 12 April 1994, the Prosecution asserts that it has shown that the Accused was able to travel to Gisenyi prefecture to commit crimes even while lodged in the French embassy in Kigali. The Prosecution adds that its evidence has disproved that the Accused was out of the country during the remaining two alibi periods.<sup>13</sup>

14. The Prosecution also submits that it has previously disclosed the information sought through EDS, and the Defence Motion is thus unnecessary in order to obtain such documents. The Prosecution nevertheless "undertakes to re-disclose, the EDS material in issue, under general disclosure obligations and spirit of cooperation between the parties, before closure of testimony of the Accused as requested."<sup>14</sup> As the Prosecution has never denied that it had possession of the voluminous audio record transcripts annexed to the Defence Motion, it moves the Chamber to sanction the Defence for abuse of process under Rule 73(F).<sup>15</sup>

### *Defence Reply*

15. The Defence notes that the Prosecution Response was filed beyond the three-day period provided by the Chamber, and the Prosecution did not request for an extension of time to do so. The Defence prays that the Prosecution Response not be considered by the Chamber.<sup>16</sup>

16. The Defence corrects the Prosecution's assertion that the requested material is already available through EDS. While the Defence admits that the Radio Rwanda broadcast

<sup>9</sup> *Id.*, paras. 28-29.

<sup>10</sup> *Id.*, paras. 30-33.

<sup>11</sup> *Id.*, paras. 24, 26, 29, 33.

<sup>12</sup> *Id.*, para. 33.

<sup>13</sup> Prosecution Response, paras. 7-14.

<sup>14</sup> *Id.*, para. 18.

<sup>15</sup> *Id.*, paras. 15-18.

<sup>16</sup> Defence Reply, paras. 4-5.

transcripts are available through EDS, the materials sought to be disclosed through the Defence Motion are the audio records themselves and not merely the transcripts. The Defence recalls that the Chamber refused to admit the transcripts into evidence, as the Accused, the witness through which the documents were sought to be introduced, had not seen the transcripts at the material time. Accordingly, the Defence seeks to obtain the audio records of the Radio Rwanda broadcasts.<sup>17</sup>

17. The Defence stresses that disclosure through EDS does not discharge the Prosecution's disclosure obligation under Rule 68(A). The Defence cites, among others, the *Karemera et al.* Appeals Decision holding that "just because [the Prosecution] has placed a particular piece of material on the EDS, it has not necessarily made that piece of material 'reasonably accessible' to any given accused."<sup>18</sup>

18. Finally, the Defence stresses that the inclusion of the transcripts as annexes to the Defence Motion does not constitute an abuse of process. Instead, the Defence was fulfilling its obligation under Rule 68(A) to clearly identify the materials sought. On the contrary, it is the filing of the Prosecution Response which amounts to a waste of time and fees in light of the Prosecution's undertaking to disclose anew the EDS material in issue before the completion of the Accused's testimony.<sup>19</sup>

### DELIBERATIONS

19. As a preliminary matter, the Chamber notes that, once again,<sup>20</sup> the Prosecution filed its Response after the deadline provided by the Chamber,<sup>21</sup> neither providing any compelling reason therefor nor seeking additional time to do so. In the Chamber's view, the Prosecution Response is time-barred; in the interest of justice, however, the Chamber will consider it and the Defence Reply while resolving the Defence Motion. The Chamber should not have to repeat itself that the Parties are expected to comply with all prescribed deadlines.

20. Rule 68 (A) states that: "The 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

<sup>17</sup> *Id.*, para. 6.

<sup>18</sup> *Id.*, para. 7, citing *The Prosecutor v. Édouard 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 ("*Karemera et al.* Appeals Decision of 30 June 2006"), para. 15. The Chamber notes that the second passage quoted by the Defence is not found in the *Karemera et al.* Appeals Decision of 30 June 2006.

<sup>19</sup> Defence Reply, paras. 8, 12.

<sup>20</sup> The Prosecution had filed its Response to the "Defence Motion for Exclusion of Evidence Falling Outside the Temporal Jurisdiction of the Tribunal" of 26 October 2010 beyond the reglementary period without seeking additional time to do so.

<sup>21</sup> The Defence filed its Motion on 13 December 2010. The following day, the Chamber provided the Prosecution with three days to respond. Because 17 December 2010 was a working day, any Response was due that day under Rule 7ter (B). The Prosecution filed its Response on 20 December 2010. See Prosecution Response, p. 1 (stating incorrectly that the Response was filed on 20 October 2010, but bearing a time-stamp showing that the Response was filed late in the afternoon on 20 December 2010).

evidence.” The Prosecution’s obligation to comply with this Rule “is as important as the obligation to prosecute” and is essential to a fair trial.<sup>22</sup>

21. The Prosecution appears to believe that a simple undertaking to re-disclose the Radio Rwanda broadcast audio recordings through EDS is sufficient to discharge its disclosure obligations under Rule 68(A).<sup>23</sup> In response, the Defence aptly cites the Appeals Chamber’s Decision in *Karemera et al.* holding that inclusion of materials in the EDS is not sufficient to discharge the Prosecution’s disclosure obligations under Rule 68(A).<sup>24</sup> Moreover, the Defence indicates that only the transcripts of the Radio Rwanda broadcasts are available through EDS,<sup>25</sup> while it seeks the audio records thereof, and therefore EDS would appear to play no role in the case at bar.

22. The Chamber also recalls that the Prosecution made an undertaking to disclose the requested audio records.<sup>26</sup> It appears, however, that as of the issuance of this Decision, no such disclosure has actually been made.

23. In order to show a Prosecution breach of its disclosure obligations under Rule 68 (A), the Defence must: (1) specifically identify the 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 control of the Prosecution.<sup>27</sup>

24. The Defence has specifically identified the material sought.

25. The Prosecution does not deny possession of the requested audio records, and in fact admits possession of the transcripts thereof.<sup>28</sup> The Chamber is therefore satisfied that the Defence has established possession by the Prosecution of the audio records of the Radio Rwanda broadcasts of 9, 10, 11, 16, and 17 April 1994, and of 24 May 1994.

26. As to the second ground, the *Kalimanzira* Appeals Judgement confirmed that the Prosecution’s obligation to disclose exculpatory material is to be interpreted broadly. The

<sup>22</sup> *Emmanuel Nindabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Judgement (AC), 16 January 2007, para. 72; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement (AC), 17 December 2004, para. 242. See also *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement (AC), 20 October 2010 (“*Kalimanzira* Appeals Judgement”), para. 18; *Karemera et al.* Appeals Decision of 30 June 2006, para. 9; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 264.

<sup>23</sup> Prosecution Response, para. 16.

<sup>24</sup> Defence Reply, para. 7, citing *The 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 (“*Karemera et al.* Appeals Decision”), paras. 10, 15.

<sup>25</sup> Defence Reply, para. 6.

<sup>26</sup> T. 24 February 2011, p. 56 (“... As regards to disclosure, they filed a motion that we should disclose these things... And then I made an undertaking that... we will give you the documents you are requesting for before the end of the cross-examination, as requested, and we will do that.”).

<sup>27</sup> *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73, Decision on Kanyarukiga’s Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents (AC), 19 February 2010, para. 16; *The Prosecutor v. Édouard 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 (“*Karemera et al.* Appeals Decision of 14 May 2008”), para. 9; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44-A-A, Judgement (AC), 23 May 2005, para. 262.

<sup>28</sup> Prosecution Response, paras. 15-18.

Appeals Chamber also emphasized that a Trial Chamber must assess only whether the requested material is “potentially”, instead of actually, exculpatory.<sup>29</sup>

27. The Defence explains that the Radio Rwanda broadcasts of 9, 10, 11, 16, and 17 April 1994 corroborate the Accused’s testimony concerning his attendance at the swearing-in ceremony of the Interim Government at the *Hôtel des Diplomates* in Kigali on 9 April 1994, at Cabinet meetings held at the *Hôtel des Diplomates* in Kigali on 10 and 11 April 1994, and at Cabinet meetings in Gitarama on 16 and 17 April 1994. Accordingly, the Defence concludes that these transcripts are potentially exculpatory with respect to allegations in the Indictment concerning the Accused’s presence and acts on 7 April 1994 and in or around mid-April 1994 in Nyamyumba commune, Gisenyi prefecture.<sup>30</sup>

28. The Chamber notes that paragraph 55 of the Indictment states that the Accused was in Nyamyumba commune “around” 7 April 1994, and other Indictment paragraphs allege that the Accused committed criminal acts in the said commune in or around mid-April 1994.<sup>31</sup> The Chamber considers that the audio records of these broadcasts may pertain to the Accused’s whereabouts during these time periods. The Chamber therefore considers that the Defence has established *prima facie* that the audio records of these Radio Rwanda broadcasts could be potentially exculpatory.

29. Lastly, the Defence submits that the Radio Rwanda broadcast of 24 May 1994 supports the Accused’s alibi that he embarked on official trips to Gabon, Togo, Senegal, Swaziland, and Zambia from 23 April to 23 May 1994. As this broadcast is said to have been an interview with the Accused about these trips on these dates, the Chamber considers that the Defence has *prima facie* established that the audio record of this Radio Rwanda broadcast may pertain to the Accused’s alibi for the period of 23 April to 23 May 1994, and therefore could be potentially exculpatory with respect to allegations in the Indictment concerning the Accused’s alleged crimes in the middle and latter parts of April and May 1994.<sup>32</sup>

30. The Chamber therefore considers that the Defence has established a Prosecution breach of its disclosure obligations under Rule 68 (A). Accordingly, the Chamber orders the Prosecution to immediately disclose the audio records of the Radio Rwanda broadcasts of 9, 10, 11, 16, and 17 April 1994, and 24 May 1994.

<sup>29</sup> *Kalimanzira* Appeals Judgement, paras. 18-20. See also *Karemera et al.* Appeals Decision of 14 May 2008, paras. 12-14.

<sup>30</sup> Defence Motion, paras. 21, 23, 25, 27.

<sup>31</sup> See, for instance, Amended Indictment, 13 April 2009, paras. 25, 27, 42-43, 50-52.

<sup>32</sup> See, for instance, *id.*, paras. 19-20, 25-30, 42-46, 51-53.

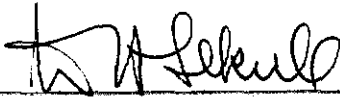


**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the Defence Motion; and

**ORDERS** the Prosecution to immediately disclose the audio records of the Radio Rwanda broadcasts of 9, 10, 11, 16, and 17 April 1994, and 24 May 1994.

Arusha, 1 April 2011



William H. Sekule  
Presiding Judge



Solomy Balungi Bossa



Mparany Rajohnson  
Judge



[Seal of the Tribunal]