

UNITED NATIONS



NATIONS UNIES

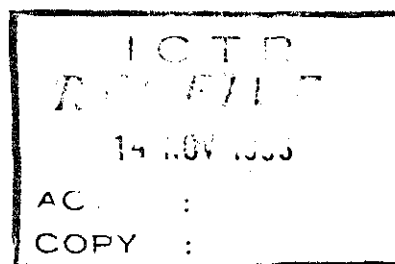
International Criminal Tribunal for Rwanda
TRIAL CHAMBER 1

OR : FR

Before: Judge Laïty Kama, Presiding Judge
Judge Lennart Aspegren
Judge Yakov A. Ostrovsky

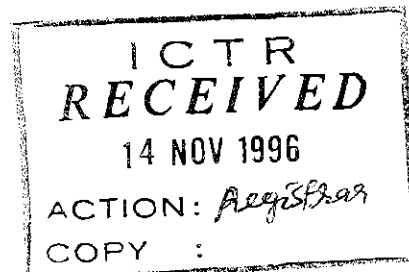
Registry: Ms. Prisca Nyambe
Ms. Cécile Aptel

Decision of: 6 November 1996



**THE PROSECUTOR
VERSUS
CLÉMENT KAYISHEMA**

Case No. ICTR-95-1-T



**DECISION ON THE PRELIMINARY MOTION
FILED BY THE DEFENSE**

The Office of the Prosecutor:

Mr. Jonah Rahetlah
Ms. Elizabeth Ann Farr
Ms. Brenda Sue Thorton
Mr. Cheickh Mara

The Counsel for the Accused:

Mr. André Ferran

THE TRIBUNAL

Sitting as Trial Chamber 1, composed of Judge Laïty Kama as Presiding Judge, Judge Lennart Aspegren and Judge Yakov A. Ostrovsky;

CONSIDERING the indictment issued by the Prosecutor against Clément Kayishema pursuant to Rule 47 of the Rules of Procedure and Evidence ("The Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that he has committed genocide, conspiracy to commit genocide, crimes against humanity and violations of article 3 common to the 1949 Geneva Conventions and Additional Protocol II thereto;

CONSIDERING the decision confirming this indictment, signed by Judge Navanethem Pillay on 28 November 1995;

CONSIDERING the preliminary motion filed by the Defense on 26 July 1996;

CONSIDERING the response to the aforementioned motion filed by the Prosecutor on 2 September 1996;

HAVING THEN HEARD the parties at the hearing held on 5 November 1996,

CONSIDERING the Statute and the Rules of the Tribunal, namely Rules 66 and 73;

AFTER HAVING DELIBERATED:

WHEREAS the Defense has filed before the Tribunal a preliminary motion in which it requests the annulment of the procedure, and consequently, the provisional release of Clément Kayishema, and the annulment of the procedure leading to an arrest warrant;

A. On the matter of the Defense's motions for the annulment of proceedings

WHEREAS, in support of its request, the Defense pleads that, since the case documents have not been made available to it by the Prosecutor, as provided for in Rule 66(A) of the Rules, within the sixty day time-limit set by Rule 73(B) in which preliminary motions may be filed by the Defense, its rights to file said motions were violated because it was foreclosed;



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WHEREAS the Tribunal considers that disclosure under Rule 66 of the Rules is intended to ensure that the rights of the Defense are respected, out of concern for equal justice, since the said Rule provides for the Defense to obtain in a timely manner all the evidence that the Prosecutor intends to use at trial, so that the Defense may contest and possibly rebut it, and that the expression used in Rule 66(A) of the Rules: "As soon as practicable after the initial appearance (...)" must be interpreted in the light of the principles of equal justice, as stated above;

WHEREAS, in this regard, the Tribunal recalls that, although nothing inhibits references to regional Human Rights agreements, such as the African Charter on Human and Peoples' Rights or the European Covenant for the Protection of Human Rights and Fundamental Freedoms, the fact remains nonetheless that both the Statute of the Tribunal and its Rules refer to universal instruments of Human Rights, ratified by a larger number of States, such as the Universal Declaration of Human Rights and particularly the International Covenant on Political and Civil Rights, and Article 14 of this Covenant which directly inspired the drafting of Article 20 of the Statute and of the provisions of the Rules concerning the rights of the accused;

WHEREAS the Tribunal considers that Rule 73 of the Rules, which provides the Defense with the possibility to file preliminary motions, can only be applied if the Prosecutor has first complied with the provisions of Rule 66 of the Rules;

WHEREAS, in her comments on the motion by the Defense, the Prosecutor maintains, and without contest from said Defense, that on 15 July 1996, she disclosed to the Defense the supporting documentation to the indictment, in accordance with Rule 66 of the Rules, and that henceforth the Defense had the opportunity to file preliminary motions in application of Rule 73 of the Rules, since it was still within the sixty day time-limit provided by the said Rule which expired on 30 July 1996;

WHEREAS the Tribunal is of the opinion that, even if the versions of the indictment and the attached supporting documentation submitted by the Prosecutor, including witness statements, were partially redacted, this could not have prevented the Defense, contrary to what it pleaded in court, from filing preliminary motions based on defects in the form of the indictment, or on the exclusion of evidence obtained from the accused or having belonged to him; this action was possible, since, during the hearing, the Defense counsel himself mentioned that the evidence from the indictment, which it received on 15 July 1996 or thereafter, was not only incomplete but also often illegible, and that in some cases, entire sections of the witness statements had been removed;

WHEREAS, finally, the Tribunal deems that the Prosecutor, with regard to her disclosure of materials to the Defense on 15 July 1996, has complied with the provisions under Rule 66 of the Rules;

WHEREAS, in addition, it is the opinion of the Tribunal that even if the Prosecutor had not

WHEREAS, in addition, it is the opinion of the Tribunal that even if the Prosecutor had not complied with the said provisions, the annulment of the disclosed materials or that of the proceedings, as moved by the Defense, could not have been ordered, as this sanction is not provided for by the Rules;

WHEREAS, in this regard, attention must be drawn once again to the differences that may exist between the Rules and various national legislations, which provide for the possibility of sanctioning procedural errors with textual or substantive annulments, when, in the latter case, there is a prejudice to the very substance of a right or of a legislative or regulatory text;

WHEREAS in her written response of 2 September 1996 to the motion filed by the Defense, the Prosecutor indicated that: "To date, the Office of the Prosecutor has not disclosed to the Defense the complete versions of the supporting documentation or the previous statements made by witnesses for the prosecution collected by the Office of the Prosecutor", the Tribunal reminds the Prosecutor that, subject to an order of non-disclosure from the Tribunal, she is obliged to disclose to the Defense all materials provided under Rule 66 (A) of the Rules which are presently in her possession;

FOR THE AFOREMENTIONED REASONS, the Tribunal deems that it cannot order an annulment, as moved by the Defense, as such sanction is not provided for by the Rules. It nonetheless reminds the Prosecutor of her obligation to disclose the materials currently in her possession, and to make them available to the Defense through the Registrar, in accordance with Rule 66 of the Rules, and requests the Prosecutor to comply with this obligation within fifteen days;

B. On the matter of the request for the provisional release of Clément Kayishema filed by the Defense

WHEREAS the Tribunal deems that, on the one hand, since the arrest warrant cannot be nullified, there can be no annulment of the procedure, and that, on the other hand and in any event, a provisional release may only be ordered in exceptional circumstances, as stated in Rule 65 of the Rules, such circumstances having not been demonstrated by the applicant;



FOR THESE REASONS,

THE TRIBUNAL

DECIDES not to grant the preliminary motion filed by the Defense neither for the annulment of the procedure, which as stated herein is not provided by the Rules, nor regarding the provisional release of Clément Kayishema,

REMINDS the Prosecutor of the obligation regarding the disclosure of materials as provided under Rule 66 of the Rules, subject to the provisions called for in the Tribunal's decision on the motion filed by the Prosecutor for an order for protection measures for victims and witnesses, and requests that she comply within fifteen days, from today's date.

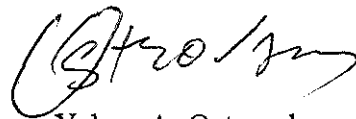
Arusha, 6 November 1996



Laity Kama
Presiding Judge



Lennart Aspegren
Judge



Yakov A. Ostrovsky
Judge

(Seal of the Tribunal)

