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UNITED NATIONS  NATIONS UNIES
International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

OR: ENG

Before: Judge Pavel Dolenc

Registrar: Dr. Agwu U. Okali

Decision of: 2 June 2000

THE PROSECUTOR
v.
GRATIEN KABILIGI and
ALOYS NTABAKUZE

Case No. ICTR-97-34-I

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**DECISION ON KABILIGI'S MOTIONS TO NULLIFY
AND DECLARE EVIDENCE INADMISSIBLE**

The Office of the Prosecutor:

Carla Del Ponte
David Spencer
Frédéric Ossogo
Holo Makwaia

Defence Counsel for Gratien Kabiligi:

Jean Yaovi Degli

Defence Counsel for Aloys Ntabakuze:

Clemente Monterosso

1. **The International Criminal Tribunal for Rwanda (Tribunal)**, sitting today as Judge Pavel Dolenc, designated by Trial Chamber III from among its members pursuant to Rule 73(A) of the Tribunal's Rules of Procedure and Evidence (Rules);
2. **Being Seized** of Defence Counsel for Gratién Kabiligi's Motion Filed by the Defence to Nullify and to Declare Evidence Inadmissible (the Motion), filed 23 February 1998, and his Additional Motion to Nullify and to Declare Evidence Inadmissible, filed 22 May 2000;
3. **Considering** the Prosecutor's Response to the Defence Motion to Nullify and to Declare Evidence Inadmissible, filed 23 May 2000;
4. **Recalling** the Decision of the former Trial Chamber II in *Prosecutor v. Kabiligi*, ICTR-97-34-I (Decision on the Defence Motion to Lodge Complaint and Open Investigations into Alleged Acts of Torture Under Rules 40(C) and 73(A) of the Rules of Procedure and Evidence) (5 October 1998);
5. **Now considers** the matter solely on the briefs of the parties pursuant to Rule 73(A);

SUBMISSIONS OF THE PARTIES

Submissions of the Defence:

6. The Defence files the Motion under Rules 40(C) and 73(A);
7. The Defence argues that the way in which representatives of the Office of the Prosecutor arrested, charged, and questioned Kabiligi (the Accused), who was then a suspect, breached several international covenants, and various Rules;
8. The Defence submits that at the time of Kabiligi's arrest the representatives of the Office of the Prosecutor did not inform him of the reasons for his arrest, the charges against him, and his rights;
9. The Defence alleges that the representatives of the Office of the Prosecutor, during the arrest, transfer and questioning, subjected Kabiligi to acts of torture and cruel inhuman or degrading treatment, namely handcuffing and threats that he would be handed over to the Rwandan authorities if he refused to answer the questions of the investigators;
10. The Defence contends that representatives of the Office of the Prosecutor did not record properly the breaks in the questioning of Kabiligi, in violation of Rule 43(ii). Representatives of the Office of the Prosecutor did not supply the Accused with a copy of the tape of the questioning "as soon as practicable" pursuant to Rule 43(iv);
11. In the additional Motion the Defence submits that Rule 5 as amended in June 1998 considerably reduced the right of an accused person to request to nullify the procedure. The Motion was filed before the amendment. Hence, the initial provision of Rule 5 should be applied in accordance with principle of non retroactive applicability pursuant to Rule 6;
12. The Defence prays that the Tribunal summon the representatives of the Office of the Prosecutor that questioned the Accused and establish that they violated various Rules. The

Defence further prays that the Tribunal declare the questioning null and void, and declare the records of the questioning inadmissible as evidence;

13. In the alternative, the Defence prays that the Tribunal defer consideration of the Motion pending the submission of a report by an independent investigating commission. The Defence proposed creating such an independent investigating commission in a separate motion, entitled "Motion to Lodge Complaint and Open Investigations into Acts of Torture" and filed on 20 February 1998 (Motion to a Lodge Complaint);

Submissions of the Prosecutor:

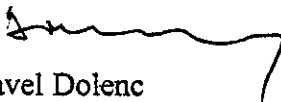
14. The Prosecutor in her reply submits that the same issues have been already raised. Trial Chamber II in its decision of 5 October 1998 ruled that the Accused was lawfully handcuffed and that no evidence has been adduced to show the threats against him. The Office of the Prosecutor also denied the Defence's request to open investigations into acts of torture to the accused and to nullify the questioning because of an alleged violation of Rule 43;
15. The Prosecutor further submits that the Defence failed to allege any prejudice to the Accused as a result of any non-compliance with the Rules, or as a result of application of the amended Rule 5;
16. The Prosecutor requests the Chamber to deny the Motion.

REASONING

17. The Tribunal notes that it has already decided the issues raised in the Motion. The former Trial Chamber II dismissed the Defence Motion to Lodge a Complaint that raised the same objections, namely: violation of the right of the Accused to be informed of reasons for his arrest, of his rights, especially on assistance of counsel, handcuffing, threats with return to Rwanda if he failed to answer the questions of investigators and that Prosecutor failed to supply the Defence with copies of the tapes from the questioning. *See Prosecutor v. Kabiligi, ICTR-97-34-I (Decision on the Defence Motion to Lodge Complaint and Open Investigations into Alleged Acts of Torture Under Rules 40(C) and 73(A) of the Rules of Procedure and Evidence) (5 October 1998)*. In fact, in dismissing the Motion to Lodge a Complaint, the former Trial Chamber II considered the same request by the Defence "to nullify the proceedings and declare illegal and inadmissible evidence obtained from him [the Accused]". *Id.* at 1;
18. Here, the Defence seeks the same relief for a second time. The Tribunal cannot allow such unnecessary re-litigation because it is a waste of judicial resources;
19. Further, regarding the request to declare the interrogation null and void, the Statute and Rules do not authorise the Tribunal to exercise general control over the Prosecutor's investigations as such. Only when an alleged unlawful investigation results in material prejudice to an accused, may the Tribunal grant relief, pursuant Rule 5. However, the Defence fails to show that the alleged violations of the rights of the Accused provided for by Rules 40(C) and 42, and questioning allegedly contrary to Rule 43, caused any material prejudice to the Accused;

20. In regard of the retroactive application of Rule 5, the Tribunal notes that the initial Rule 5 provided that an unlawful act of a party could be declared null only if the act was inconsistent with the fundamental principles of fairness and has occasioned miscarriage of justice. The Motion does not allege any such prejudice to the Accused, thus the Tribunal finds that the amendment of Rule 5 is applicable in the present case in accordance with Rule 6(C);
21. Regarding admissibility of evidence (statements of the Accused), the Tribunal, in general, decides if evidence is admissible, relevant, and reliable. The Tribunal decides the admissibility of particular evidence at trial, only after a party gives notice or seeks to introduce the particular item. The Tribunal notes that Rule 95 bars evidence if a party obtained it by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage the integrity of the proceedings;
22. Any record of any questioning is only possible evidence at a future trial. The Tribunal notes that at this stage of the proceedings it is unknown whether the Prosecutor will seek to introduce any evidence of the questioning at trial. Thus, the Tribunal defers from ruling on the issue of admissibility of the challenged possible evidence. The Motion is premature in this respect;
23. The Tribunal notes that the Motion was dated and filed on 23 February 1998, that is only three days after the Motion to Lodge a Complaint was filed. Because both of the motions raised the same objections and requested the same remedies, the Tribunal finds the Motion to be unnecessary, unreasonable and an abuse of process of the Tribunal.
24. For the above reasons, the Tribunal:
 - (a) **DISMISSES** Kabiligi's Motions to Nullify and to Declare Evidence Inadmissible; and
 - (b) **DIRECTS** the Registrar, pursuant to Rule 73(E), not to pay costs including fees associated with the filing of the Motion.

Arusha, 2 June 2000.


Pavel Dolenc
Judge

Seal of the Tribunal

