



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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*Office of the President
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Before: Judge Navanethem Pillay, President

Original: English

Registrar: Adama Dieng

Decision of: 28 May 2001

THE PROSECUTOR

Versus

AUGUSTIN NGIRABATWARE

ICTR-99-54-I

JUDICIAL RECORDS/ARCHIVES
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ICTR

2001 MAY 29 A 11: 58

RESCISSION OF THE NON-DISCLOSURE ORDER

Prosecutor : Ken Fleming

: Don Webster

I, Judge Navanethem Pillay, President of the International Criminal Tribunal for Rwanda (the "Tribunal"), hereby consider an *ex parte* Motion (the "Motion"), filed by the Prosecutor on 5 February 2001, requesting a rescission of the Non-Disclosure Order (the "Order") issued by the Confirming Judge, Judge Navanethem Pillay, and incorporated in the decision of 1 October 1999 which confirmed the Indictment against Augustin Ngirabatware ("Ngirabatware") and Jean De Dieu Kamuhanda ("Kamuhanda").

The Order stipulated that:

"THE TRIBUNAL,

CONFIRMS ...

TAKES NOTE ...

ORDERS that there shall be no disclosure of the Indictment, the Confirmation Order or the Warrant of Arrest to the public until both accused have been arrested;

FURTHER ORDERS that, in respect of non-disclosure to the accused:

(i) The name and other identifying particulars of Augustin Ngirabatware shall be redacted from the Indictment and the Warrant of Arrest to be served on Jean De Dieu Kamuhanda, if Augustin Ngirabatware is still at large;

(ii) The name and other identifying particulars of Jean De Dieu Kamuhanda shall be redacted from the Indictment and the Warrant of Arrest to be served on Augustin Ngirabatware, if Jean De Dieu Kamuhanda is still at large;

(iii) Where only one of the accused has been arrested, redacted copies of the Indictment, Confirmation Order and Warrant of Arrest, shall be used at the Initial Appearance and other preliminary hearings in respect of that accused, unless the Trial Chamber orders otherwise."

The Prosecutor submitted *inter alia* , that:

- (i) Kamuhanda has already been arrested and is currently detained under the jurisdiction of the Tribunal;
- (ii) Ngirabatware is still at large but his identity in relation to the Indictment has circulated in the public domain, more specifically on the worldwide web and in newspaper articles announcing a reward for his arrest;

On 26 February 2001, the Prosecutor was requested to clarify whether:

- (i) she intended maintaining the Order against Kamuhanda;
- (ii) the Order was varied by Trial Chamber II, in respect of Kamuhanda and the Prosecutor was called upon to specify the ruling, if this was the case;
- (iii) it was her contention that the Order is no longer applicable to Kamuhanda, in light of the decision of Trial Chamber II, which ordered that he be severed from the joint indictment;
- (iv) she intended maintaining the Order with regard to the Warrants of Arrest and Confirmation Order;
- (v) the Motion should be adjudicated by Trial Chamber II, in light of the fact that Kamuhanda is currently appearing before that Chamber.

These issues were subsequently addressed by the Prosecutor in a brief filed on 26 April 2001, in which she submitted *inter alia* that:

- (i) Her request pertains to the rescission of the Order in respect of all accused, "...without distinction as to whether or not they have been arrested or have been judged by a Trial Chamber." In this regard the Prosecutor argued that if the Order is rescinded with respect to the Ngirabatware, who has not been apprehended, it serves no purpose to enforce the Order against Kamuhanda who is currently on trial before Trial Chamber II;
- (ii) Trial Chamber II did not vary the Order, but rather in its 7 November 2000 decision, Trial Chamber II deemed "...it necessary as a preliminary matter to caution the Parties and to recall to their attention the order.....issued on 1 October 1999 by Judge Pillay...";
- (iii) Trial Chamber II, in its decision of 7 November 2000, severed Kamuhanda from the joint indictment. Consequently, there is no purpose in maintaining

the Order until Ngirabatware has been arrested, as their cases are separated and independent of each other;

- (iv) The Order should be rescinded with respect to the Indictment, the Confirmation Order and the Warrant of Arrest;
- (v) Should the President determine that Trial Chamber II is the proper forum for the adjudication of the present motion, the Prosecutor will re-file this motion before Trial Chamber II.

Article 18 (2) of the Tribunal's Statute states that:

"Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial."

Rule 52 of the Rules states that:

"Subject to Rule 53, upon confirmation by a Judge of a Trial Chamber, the indictment shall be made public."

and Rule 53 of the Rules states that:

"(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice order the non-disclosure to the public of any documents or information until further order."

"(B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or in case of joint accused, on all accused."

(C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice."

Kamuhanda is currently on trial and any orders that may be required for the conduct of his trial fall within the jurisdiction of the Trial Chamber. Where a Trial Chamber is seized of a motion of this nature, it may rule on the said motion or alternatively, it may refer the motion to the Confirming Judge for consideration. In this instance, Trial Chamber II is not seized of the Motion, but the Confirming Judge is. In my view, motions applicable to the accused whose trial has commenced are matters that fall within the jurisdiction of the Trial Chamber. Accordingly, I will not exercise jurisdiction over Kamuhanda.

Ngirabatware has not been arrested and has not made an initial appearance before any Trial Chamber. Therefore, motions arising from his Indictment fall within the jurisdiction of the Confirming Judge. In this regard, I concur with the reasoning of Judge T. H. Khan when he held that:

*"Because these persons remain at large and have not made an initial appearance before a chamber, it is my opinion that jurisdiction lies with the Judges who confirmed their indictments."*¹

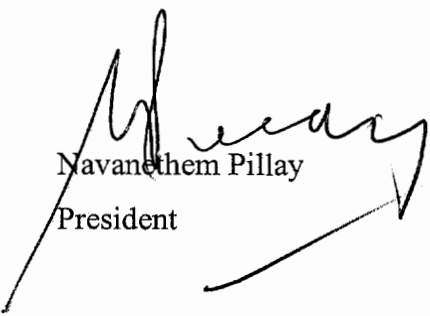
In my view, it is no longer in the interest of justice to maintain the Order, in so far as it pertains to the Indictment, the Confirmation Order and the Warrant of Arrest against Ngirabatware, for the reasons given by the Prosecutor.

¹ The Prosecutor versus Theoneste Bagosora and 28 Others; Case Number: ICTR-98-37-I; Dismissal of Indictment; Decision of 31 March 1998; Page 11.

In light of the above, I therefore:

ORDER the rescission of the Non Disclosure Order of 1 October 1999 to allow public disclosure of the Indictment, the Confirmation Order and the Warrant of Arrest in respect of **Augustin Ngirabatware**.

Arusha, 28 May 2001,


Navanethem Pillay
President

(Seal of the Tribunal)

