

ICTR-2001-63-I
(454-451)
09/05/2002

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED
NATIONS
NATIONS
UNIES

TRIAL CHAMBER 1

OR: ENG

Before: Judge Navanethem Pillay, Presiding Judge TC1

Registry: Adama Dieng

Date: 8 May 2002

2002
MAY 9
P 12: 01

THE PROSECUTOR

v.

Siméon NSHAMIHIGO

Case No. ICTR-2001-63-DP

**DECISION ON THE DEFENCE MOTION SEEKING RELEASE OF THE ACCUSED PERSON
AND/OR ANY OTHER REMEDY ON THE BASIS OF ABUSE OF PROCESS BY THE
PROSECUTOR**

The Office of the Prosecutor:

Carla Del Ponte
Kenneth C. Fleming

Counsel For The Defence

Mr. David Gachuki

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal"),

SITTING as Judge Navanethem Pillay designated by the President of the Tribunal pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

BEING SEIZED OF a Defence motion of 10 April 2002 filed pursuant to Article 19 of the Statute of the Tribunal and Rules 3, 5, 40, 40 bis, 43 and 73 of the Rules alleging fundamental breach of the rights of the accused;

NOTING the Prosecutor's response filed on 16 April 2002 submitting that the accused did not suffer any prejudice and his rights had not been infringed upon or violated by the Prosecutor;

CONSIDERING Article 19(1) of the Statute of the Tribunal and Rules 3, 40, 40 bis, 43 and 73 of the Rules;

TAKING INTO ACCOUNT the written briefs of the parties and the appendices;

HEREBY DECIDES the motion.

SUBMISSION OF THE PARTIES

The Defence has requested an oral hearing on the basis that the matter is very urgent and important. Further the Defence is seeking a declaration that the accused's rights have been fundamentally breached under the Statute of the Tribunal, the Rules of Procedure and Evidence and Basic Rights. Further, that the Trial Chamber should award an appropriate remedy to the accused in accordance with judicial principles of natural justice and for a decree that the continued detention of the accused is unlawful and that the accused should therefore be released forthwith.

The Defence submits that the arrest of the Accused was not done in accordance with the Statute or the Rules. The Defence states that the accused was never a suspect in Tanzanian custody at the request of the Prosecutor, because he was arrested by the Tribunal and then handed over to the Tanzania Immigration Authority. Moreover, the Prosecutor had not at that point proffered an indictment against him nor were reasons provided for his arrest.

The Defence has further submitted that the accused's rights were fundamentally breached under Rule 43 of the Rules: copies of the audio tapes containing a record of his questioning by the prosecutor were not given to him and the unsealing of the said tapes was done in his absence.

The Defence has also submitted that pursuant to Rule 3 (B) of the Rules, a suspect has exclusive and unqualified legal right to the use of his own language, which in this case, has been communicated to be the French Language yet, the witness statements he has received are in English.

The Prosecutor in response raises a preliminary objection to the effect that grounds (c) and (e) of the Defence motion concerning his arrest under Rules 40 and 40bis had already been disposed of in the oral hearing at the initial appearance of the accused on 29 June 2001 before Judge Erik Møse and also in the written Decision of 8 October 2001 of the Trial Chamber decided by Judge Vaz;

The Prosecutor contends that the accused was arrested on the 19th May 2001 by the Tanzanian authorities pursuant to a request of the Prosecutor made under Rule 40 (A) of the Rules. The Prosecutor submits that the accused was a "suspect" within the meaning of Rule 2 of the Rules. The Prosecutor filed an indictment within 30 days after the transfer of the accused to the detention facility, and was therefore not in breach of the Rules.

Furthermore, the Prosecutor submits, *inter alia*, that on 25 July 2001, the accused was provided copies of the transcripts of his interview with the Prosecutor's Investigators and that nowhere in his affidavit supporting his motion had he challenged the content or accuracy of the transcript. Although he has not been provided with the audiotape of the interview, the audiotapes will be availed to him as soon as practicable. With respect to the unsealing, he has failed to demonstrate that what was transcribed was not representative of the interview that was carried out.

The Prosecutor also states that the accused was served through the Registry on 21 June 2001 with all the supporting materials in both languages except for one single witness statement of witness LDA, which was in English only. The Prosecutor also submits that she would avail to the Defence this statement when translated into French. According to the Prosecutor, "the appropriate remedy if a breach is found would be to grant the accused sufficient time to receive and review the said statement in French."¹

DELIBERATIONS OF THE CHAMBER

Taking into account that a substantial number of issues raised in this motion have already been adjudicated by the Tribunal and that no compelling reasons have been advanced by the Defence in support of his request for an oral hearing, this request is denied.

The Defence requests the Chamber to review its decisions of 8 October 2001 & 29 June 2001 dismissing Defence motions on alleged violations of Rules 40 & 40*bis* surrounding the arrest of the accused by the Republic of Tanzania. The Chamber notes that no new or additional facts or arguments have been advanced to warrant a review of the two decisions of the Chamber. Moreover, this Chamber subscribes to the established jurisprudence of the Tribunal that the issue of the arrest of an accused falls within the domain of the requested State and it is that State and not the Tribunal, which organizes, controls and carries out the arrest in accordance with its domestic law.² Therefore, the Trial Chamber declines the request for review of its two earlier decisions.

Concerning the Violation of the Accused's rights under Rule 43, Rule 43, it is stated that

[...]

- (iii) *At the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything he has said, and to add anything he may wish, and the time of conclusion shall be recorded;*
- (iv) *The content of the recording shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to the suspect, together with a copy of the recording or, if multiple recording apparatus was used, one of the original recorded tapes; and*

¹ Prosecutor's Response, p. 5, para. 24

² *The Prosecutor v. Edouard Karemera*, Case No. ICTR-98-44-1 (Decision on The Release of the Accused) and *The Prosecutor v. Mathieu Ndirumpatse*, Case No. ICTR-97-44-1 both dated 10 December 1999; *The Prosecutor v. Juvenal Kajelijeli* Case No. ICTR-98-44-, Decision of 8 May 2000

Rule 43 is silent on the procedure governing the unsealing of the tapes for the purpose of having it transcribed. There is no categorical stipulation that the audiotapes must be unsealed in the presence of the accused although this is implicit for fair trial and the interests of justice. The accused complains that the audiotapes were unsealed in his absence and the Prosecutor concurs. However, the accused does not raise any objection to the contents and accuracy of the transcripts of the tape. The Accused is at liberty to challenge the reliability of the statement during the course of the trial. The accused has not averred that he has suffered any prejudice as a result of the unsealing of the tapes nor has any prejudice been demonstrated. In the circumstances the Chamber finds that there has been no violation of Rule 43.

With regard to the right to the use of the language of his choice, the Chamber recognizes that the accused is entitled to receive documents in a language of his choosing. The Chamber has verified with the Court Management Section and has found that all supporting materials inclusive of witness statements were in the French language except for witness statement LDA-1, which was in English. Further the Chamber has established that the accused has been served with the transcripts of his interview in French³. The Chamber notes the Prosecutor's undertaking that the accused will receive the French translation of witness statement LDA-1 in due course and will still have ample time within which to prepare his defence.

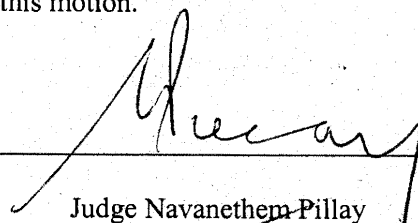
The Chamber, therefore, concludes that there has been no violation of the accused's rights in respect of the tapes of his interview and the disclosure of supporting materials pursuant to Rule 66(A)(i) and therefore finds no basis upon which to release the accused.

The Chamber is of the view that the motion is frivolous in that it substantially covers issues already adjudicated by the Tribunal and misrepresents facts relating to the number of English statements that were disclosed to the accused.

FOR ALL THE ABOVE REASONS, THE TRIBUNAL, HEREBY,

1. **DENIES** the Defence motion.
2. **ORDERS** the Prosecutor to disclose the audiotape of the interview to the accused.
3. **DENIES** the Defence costs of this motion.

Arusha, 8 May 2002,



Judge Navanethem Pillay

(Seal of the Tribunal)



³ Proof of Service: Supporting material used during the confirmation hearing and the transcripts of the accused's interview by the Investigators of the Office of the Prosecutor, 25 July 2001.