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1998 SEP 25 P 2: 30

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal H. Khan

Registry: Mr. John Kiyeyeu

**THE PROSECUTOR
VERSUS
ALOYS NTABAKUZE**

Case No. ICTR-97-34-T

**DECISION ON THE DEFENCE MOTION FOR ANNULMENT OF PROCEEDINGS,
RELEASE AND RETURN OF PERSONAL ITEMS AND DOCUMENTS**

For the Office of the Prosecution:

Mr. William Egbe

Counsel for Aloys Ntabakuze:

Ms. Simonette Rakotondramanitra

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| International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda | |
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| NAME / NOM: <u>ALFREDINE MUKINDUZA</u> | |
| SIGNATURE: <u>[Signature]</u> | DATE: <u>25.9.98</u> |

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

SITTING as Trial Chamber II; composed of Judge William H. Sekule, Presiding, Judge Yakov A. Ostrovsky and Judge Tafazzal H. Khan ("the Trial Chamber");

CONSIDERING THAT the Order for the transfer of Aloys Ntabakuze ("the accused") was made by this Tribunal on 16 July 1997;

CONSIDERING ALSO THAT the Kenyan authorities, in conjunction with the Office of the Prosecutor ("the OTP"), arrested the accused in Nairobi, Kenya on 18 July 1997, after which he was transferred by the OTP to the Detention facility in Arusha on the same day;

TAKING INTO CONSIDERATION THAT on 19 July 1997, the accused was questioned by the investigators of the Office of the Prosecutor;

GIVEN THAT the provisional detention of the accused was extended by an order made by the President of the Tribunal, Judge Laity Kama;

CONSIDERING THAT following a decision by Judge Navanethem Pillay the detention of the accused was once again extended for a second time for a maximum duration of 30 (thirty) days from 17 September 1997 to 16 October 1997;

CONSIDERING FURTHER THAT a joint indictment was issued against Ntabakuze and Gratien Kabiligi and confirmed by Judge Aspegren on 15 October 1997 pursuant to rule 47 (D) of the Rules of Procedure and Evidence ("the Rules");

TAKING INTO ACCOUNT rule 62 of the Rules pertaining to initial appearances and considering that the initial appearance of the accused took place on 24 October 1997 when he pleaded not guilty to all counts of the indictment;

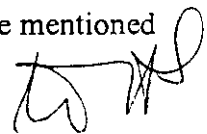
BEING NOW SEIZED OF the motion filed by the defence filed on 23 February 1998 based on rule 72 of the Rules;

MINDFUL THAT in the above mentioned motion, Counsel for the Defence requested the Trial Chamber to annul the proceedings on several grounds, namely, illegal arrest, search and seizure, bad behaviour of the investigators of the OTP and lack of grounds for extension of his provisional detention;

CONSIDERING THAT the Prosecution did not file a response in respect of the above mentioned motion but made oral submissions;

HAVING HEARD the arguments of both parties on 11 May 1998.

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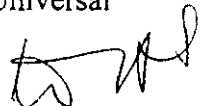
PLEADINGS BY THE DEFENSE

The Defense Counsel submitted that irregularities existed in the arrest and the detention of the accused and he elaborated as hereunder.

A. With Regard to the Illegality of the Arrest and Detention of the Accused

The Defense Counsel argued:

- (a) That the Prosecutor infringed upon the provisions of Articles 17 and 18 of the Statute of the Tribunal ("the Statute") because she failed to establish a *prima facie* case against the accused;
- (b) That rule 40 *bis* of the Rules can only be applied if it complies with Article 17 and 18 of the Statute;
- (c) That the provisions of Article 20 of the Statute and rule 42 of the Rules, which enumerate the rights of suspects and the provisions of rule 40(D) of the Rules, which requires an indictment to be issued by the Prosecutor within twenty days of the transfer, were breached;
- (d) That the breach referred to above in paragraph (c) could be exemplified by the Arrest Warrant dated 16 October 1997, which was not accompanied by the requisite documents. Furthermore, as a result, the accused has been detained since 18 July 1997 without being informed of his rights;
- (e) That upon his transfer to the detention facility in Arusha, the accused, being a suspect at the time of his arrest, was not brought before a Judge or another Judge belonging to the same Trial Chamber to be formally charged as required by rule 40 *bis* (J) of the Rules. Instead, on 18 August 1997, the accused first appeared before the Tribunal in order to have his detention extended;
- (f) That despite the fact that rule 40 *bis* (D) of the Rules provide the grounds for making an order for the transfer and provisional detention of the suspect, this was not respected;
- (g) That the provisions of Article 9 (prohibiting arbitrary arrest and detention) and Article 10 (regarding the right to fair and public hearings) of the Universal Declaration of Human Rights were not observed;



B. Concerning the Issue of Search and Seizure

The Defense Counsel submitted:

- (a) That the OTP investigators lacked a warrant of arrest when they searched the domicile of the accused, they took away his personal documents and those belonging to his family, wife and children. Moreover, no inventory was made in respect of the materials seized;
- (b) That since the OTP investigators had no search warrant, the search and seizure were irregular and illegal. Furthermore, the seizure of his personal documents was prejudicial to the interests of the accused since the seized documents would be necessary for the preparation of his defense;
- (c) That despite several requests made by the defense for the restitution of these documents, the OTP has failed to respond.

C. The Conduct of the OTP Investigators During the Arrest of the Accused in Nairobi

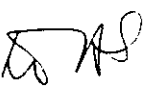
The Defense Counsel complained about the way the OTP investigators treated the accused and made the following submissions:

- (a) That the accused was handcuffed although he did not display any sign of an intent to escape and further, that he was photographed in the presence of his wife who was not party to the alleged crimes;
- (b) That the accused was not informed about the reasons for his arrest nor of his destination, thereby causing him and his family anguish.

D. Complaints by the Accused Against the Second Extension of His Provisional Detention

The Defense Counsel contended that the second extension of the provisional detention of Ntabakuze constituted flagrant violations of the rights of the accused and furthermore, he submitted:

- (a) That the grounds relied upon by the OTP to justify the extension of the detention of the accused that, *inter alia*, "many suspects were detained in Arusha" did not amount to 'special circumstances' as envisaged by rule 40 *bis* (G) of the Rules and that there was nothing to link the accused and the others detained in Arusha;



- (b) That the notion of 'special circumstances' requires the establishment of new facts in relation to the situation as previously presented. However, in the instant case, the facts referred to by OTP were not new since they existed at the time of the arrest of the accused as well as during the application for the first extension of the provisional detention.

Reply by the Prosecutor

A. With Regard to the Illegality of the Arrest and Detention of the Accused

The Prosecutor contended:

- (a) That the arrest of the accused was legal because he was informed of the offences with which he was charged as well as his rights and that he even signed the *Avis Des Droits de Suspect* on 18 July 1997;
- (b) That under rule 40 *bis* of the Rules there is no need for a warrant of arrest;
- (c) That there is no contradiction between the mandatory provisions of Articles 17 and 18 of the Statute and the operative provisions of rule 40 *bis* of the Rules because rule 40 *bis* operates at a level different from the provisions of those Articles. In addition, the Articles refer to 'an accused' yet at the time the applicant was arrested, he was only "a suspect;"
- (d) That if the applicant were arrested under rule 40 of the Rules, he would be considered to be a detainee as defined by the Rules and rule 40 of the Rules would automatically be attracted. However, the requirement of twenty days within which he may be released or indicted, referred to in rule 40 of the Rules would be suspended;
- (e) That for arrests and detentions, the provisions of rule 40 *bis* of the Rules are the substantive provisions whereas the provisions of rule 40 of the rules are temporary provisions to be applied for urgent purposes as referred to in the Rules;
- (f) That although the applicant was in detention for 90 (ninety) days, his detention was neither illegal nor arbitrary since it was done pursuant to an order of the Tribunal.

B. Concerning the Issue of Search and Seizure



The OTP contended:

- (a) That the search of the domicile of the accused and the seizure of some documents were conducted legally and moreover, the provisions of rules 39(i) and 42 of the

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Rules make no specific mention of the manner in which searches and seizures should proceed;

- (b) That the search and seizure were done in conformity with the provisions of rule 39 (i) and rule 42 of the Rules. The said Rules permit the Prosecutor to carry out on site investigations and to seize property that belongs to a suspect for the purposes of proceeding with the investigations of the case.

C. With Regard to the Conduct of the OTP Investigators During the Arrest of the Accused in Nairobi

The OTP averred that no rights of the accused were violated and stated that handcuffing is a reasonable preventive measure envisaged by the Statute and the Rules and is a practice well known world wide and is used when arresting authorities think there would be possibility of escape.

D. Complaints by the Accused with Respect to His Second Detention

The OTP submitted:

- (a) That challenging the grounds for the second detention of the accused was just an attempt by the applicant to appeal against the decision of the confirming Judge;
- (b) That with regard to the issue of "special circumstances" required by rule 40 *bis*(G) for extending the detention of the accused, the hearings were *inter partes*. Furthermore, that the parties had an opportunity to present their arguments as a result of which the Judge decided that there were "special circumstances."

DELIBERATIONS

The Trial Chamber had considered the submissions of the parties and takes the following positions on the issues raised:

We take note of Articles 19(1) and 20(4)(c) of the Statute, which require that a trial be conducted without undue delay in a fair and expeditious manner.

With regard to the illegality of the arrest and detention of the accused, it is the view of the Trial Chamber that based upon the particular facts of this case, there was no illegality in the arrest and detention since a specific judicial order for arrest existed. We are also of the view that the accused was well aware of his rights since he signed the *Avis de Droits de Suspect* on 18 July 1997.

Furthermore, the accused knew the charges against him given that he pleaded not guilty to the various charges read out to him at his initial appearance on 24 October 1997.

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We have considered the arguments by the parties on the difference between rule 40 and 40 *bis* of the Rules. We note that there is no conflict between these provisions as each Rule operates at a different level. We take cognizance that of the fact that rule 40 does not encompass every foreseeable situation as it provides for urgent cases whereby the Prosecutor may request any state to provisionally arrest a suspect whereas rule 40 *bis* of the Rules widens the scope of provisional detention.

To this end, pursuant to rule 40 *bis* (C) of the Rules, a suspect may be put in provisional detention for a period not exceeding 30 (thirty) days from the day after the transfer of the suspect to the Detention Unit of the Tribunal. With regard to the detention of the accused, it is the opinion of the Trial Chamber that there was no illegal detention of the accused and that no conflict exists between the provisions of rules 40 and rule 40 *bis* of the Rules.

Furthermore, under rule 40 *bis* (F) of the Rules, upon holding an *inter partes* hearing, a Judge who made an order or another Judge of the same Trial Chamber may extend the detention for a further period of 30 days. In addition to these provisions, rule 40 *bis* (G) of the Rules provides that this extension may also be extended for a further 30 days in similar circumstances as under rule 40 *bis* (F) of the Rules. Finally, in rule 40 *bis*(H) of the Rules, it is provided that the total period of provisional detention shall in no case exceed 90 days.

It is, therefore, the Trial Chamber's view that the detention and extension of the detention of the accused were all within the framework of the Statute and the Rules. Hence, the Prosecutor had acted in accordance with rule 40 *bis* of the Rules.

Concerning the issue of search and seizure, the Trial Chamber is aware of the provisions of rule 40 (A)(ii) of the Rules empowering the Prosecutor to request any state to seize physical evidence. The Trial Chamber takes cognizance of the fact that most countries maintain a police code of ethics for the members of their police forces for search and seizure.

Additionally, we have considered rule 39(i) of the Rules, which enables the OTP to collect evidence and conduct on-site investigations and it is the opinion of the Trial Chamber that the seizures of some items belonging to the accused were authorized. We recognize that the OTP may need certain items in order to continue the investigation of the case but we are also aware that the Defense may require some of those materials for the preparation of its case. The Trial Chamber, therefore, instructs the OTP to return any items that it does not require and to provide a list of those items it retains for its case. 

With respect to the conduct of the OTP during the arrest of the accused in Nairobi, we take cognizance of rule 40(A)(iii) of the Rules. That Rule permits any State requested by the Prosecutor to arrest a suspect, to take all necessary measures to prevent the escape of the a suspect or an accused.

It is our view that handcuffing is a common practice in many countries and whether or not this measure should be employed is dependant upon the arresting authorities and not the OTP. The arresting States, therefore, could decide to handcuff an accused as a reasonable way of restraining

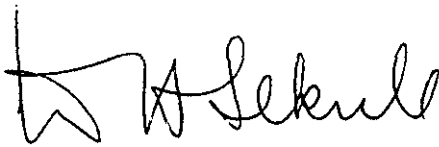
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him. Hence, in the instant case, it was in order for the arresting authorities of Kenya to handcuff the accused given that the accused was a trained commando capable of performing any military tactic to escape.

FOR ALL THE ABOVE REASONS THE TRIAL CHAMBER

1. **DECIDES** that the arrest, detention and continued detention of the accused were authorized by judicial orders.
2. **ORDERS** the OTP to return to the Defense any items that would not be required for the continued investigation of the case, positively within three weeks from the date of this order.
3. **INSTRUCTS** the OTP to inform the Defense of all the items which cannot be returned at this time, positively within three weeks from the date of this order.
4. **DECIDES** that the restraining measures applied by a State to arrest the accused are within the jurisdiction of that State and, in any event, they were reasonable in the circumstances of this case.
5. **DISMISSES** the Defense Motion.

Arusha, 25 September 1998



William H. Sekule
Presiding Judge



Yakov A. Ostrovsky
Judge



Tafazzal H. Khan
Judge

