

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER II

OR:Eng.

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

Registry: Mr. John M. Kiyeyu

THE PROSECUTOR
versus
JEAN-BOSCO BARAYAGWIZA

Case No. ICTR-97-19-1

DECISION ON THE EXTREMELY URGENT MOTION BY
THE DEFENCE FOR ORDERS TO REVIEW AND/OR NULLIFY THE ARREST AND
PROVISIONAL DETENTION OF THE SUSPECT

The Office of the Prosecutor:

Mr. William T. Egbe, Trial Attorney
Mr. Mathias Marcussen, Legal Advisor

Counsel for the Accused:

Mr. Justry P.L. Nyaberi, Lead Counsel

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| International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda |
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| NAME / NOM: <i>D. MINDUA K. H. Antani</i> |
| SIGNATURE: <i>[Signature]</i> DATE: <i>25.02.1999</i> |

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 the indictment filed on 22 October 1997 by the Prosecutor against Jean-Bosco Barayagwiza pursuant to Article 17 of the Statute of the Tribunal (“the Statute”) and rule 47 of the Rules of Procedure and Evidence of the Tribunal (“the Rules”), which was confirmed by Judge Lennart Aspegren on 23 October 1997;

CONSIDERING THAT the initial appearance of Jean-Bosco Barayagwiza took place on 23 February 1998;

BEING NOW SEIZED OF a motion filed by the Defence Counsel on 19 February 1998, entitled Extremely Urgent Motion by the Defence for Orders for Review and/or Nullify the Arrest and Provisional Detention of the Suspect (hereinafter the “Motion”);

HAVING HEARD the arguments of the parties on 11 September 1998.

PLEADINGS BY PARTIES

Defence Submissions

In the Motion, the Defence submit;

1. That the accused rights, liberties and freedoms under article 20 of the Statute have been violated because: the provisional detention was a miscarriage of justice under rule 5 (Non-compliance with Rules); the Prosecutor’s request for provisional detention was unprocedural and unwarranted; rule 40(*bis*) (Transfer and Provisional Detention of Suspects) was not satisfied regarding the provisional detention; and there was no justification for the arrest or provisional detention.
2. Rule 40 (*bis*) breaches the provisions of articles 17, 18 and 19 of the Statute.
3. The provisional charges were illegal.

The Defence requests the Trial Chamber to declare;

1. The arrest and provisional detention *unlawful, null and void*.
2. The entire proceedings are a nullity.
3. The accused be set free.
4. In the alternative, that the accused be released on bail pending further hearing.

Prosecutor’s Response

1. Even if there was a defect in the procedure, then that defect is now cured and the accused is

before this Tribunal on a proper legal basis.

2. There is nothing in the Statute or Rules that allows the relief sought.
3. The Defence submission is based upon a faulty procedural analysis.
4. Rule 40 (*bis*) is valid legislation.
5. The Defence has failed to show exceptional circumstances to justify release under rule 65.

Chronology of Events:

Because much of the dispute between the parties is based on the chronology of events since the arrest of the accused, and the authority under which the accused was subject at particular stages of his detention, the Trial Chamber provides an outline below.

In relation to the events the Defence contend:

On 15 April 1996, the accused was detained in Cameroon *at the behest of the Prosecutor*.

On 15 October 1996, the Prosecutor withdrew her case against accused.

On 23 January 1997, other suspects detained with accused were transferred (according to the Defence, this shows discrimination by the Prosecutor).

On 21 February 1997, the accused is released by Cameroonian court. The accused is re-arrested at the behest of the Prosecutor who referred to rule 40 (provisional detention).

On 6 May 1997, the accused first received reasons for detention from Prosecution.

On 22 October 1997, an indictment is submitted to ICTR Judge.

On 23 October 1997, the indictment is confirmed.

Therefore, the defence contends the accused was detained at the behest of the Prosecutor for 20 months prior to transfer with no formal indictment.

In relation to the events the Prosecution contend:

On 15 April 1996, the accused is detained *at the behest of the Rwandan and Belgian governments*.

On 21 February 1997, the accused released by Cameroonian court after rejecting request for extradition by the Rwandan government. The decision did not mention the ICTR as a party.

On March 3 1997, the Prosecutor, pursuant to rule 40 (*bis*), requests the transfer of accused to Arusha.

On 22 October 1997, the indictment is submitted to ICTR Judge.

On 23 October 1997, the indictment is confirmed.

On 19 November 1997, the accused is transferred to Arusha.

On 23 February 1998, the accused has his initial appearance.

Although the Cameroonian authorities were very slow to respond to the transfer request however, this was out of the Prosecutor's control.

DELIBERATIONS

In their entirety, the Defence and Prosecution submissions raise a number of questions relating to the interpretation of the Statute and Rules and the Trial Chamber's power to grant certain relief. However, if the Trial Chamber finds that the Defence has failed to prove violation of the accused rights, then the Trial Chamber need not address the jurisprudential questions which flow from such a violation.

Chronology of Events:

The Trial Chamber considers that there are two fundamental stages during which the Defence must show a violation of the accused rights under the jurisdiction of the Tribunal:

1. *The period between the arrest on 15 April 1996 and the transfer request on 3 March 1997.*

The Defence claims that the accused was initially arrested at the request of the Prosecution. The Prosecution claims that the accused was initially detained at the behest of the Rwandan and Belgian governments. The Defence has provided no evidence to support its version. Conversely, a letter dated 15 October 1996 from the Prosecutor to the accused indicates that the Prosecution version is correct in stating that "Cameroonian authorities arrested 12 individuals from Rwanda on the basis of international warrants of arrest issued by the Public Prosecutor's Offices in Kigali and Belgium." (Defence exhibit at p. 8). The Defence did not challenge the accuracy of this document in its written motion and failed to substantiate its objection to this factual assertion during the hearing. The Defence objected during the Prosecution submission which relied upon this document. However, despite being invited to address the matter in reply, it failed to do so (Transcript at p. 60). In the absence of any other evidence, the Trial Chamber accepts that the accused was arrested at the behest of the Rwandan and Belgian governments.

The Defence has provided no evidence to support its contention that the accused *remained* in detention due to a request by the Prosecutor while he was in Cameroon prior to 21 February 1997. Although it is clear that for a certain period the Prosecutor was interested in investigating the accused. On the 17 April 1996 she requested that provisional measures under rule 40 be taken in relation the accused along with thirteen others, but, on the 16 May 1996 the Prosecutor informed Cameroon that she only wished to pursue the case against four of the detainees. The accused was not one of the four. This period is not undue delay, particularly considering that, in any event, the accused was being held at the request of the Rwandan and Belgian governments. On 21 February 1997, the Prosecution made a request under rule 40 for the provisional detention of the accused. (Defence exhibit, letter dated 16 May 1997 from James Stewart of Prosecution to President Kama). For these reasons the Trial Chamber finds that the Defence failed to show that the accused was kept in custody because of the Prosecutor, on the basis of a rule 40 request or for any other reason, before 21 February 1997.

It is the view of the Trial Chamber that detention under rule 40 for a period between 21 February 1997 and 3 March 1997, when the Tribunal made a rule 40 (*bis*) request, does not violate the rights of the accused under rule 40.

2. *The period between 3 March 1997 and the actual transfer of the accused on 19 November 1997.*

The Tribunal issued a request under rule 40 (*bis*) on 3 March 1997 requesting the Cameroonian authorities to proceed with the transfer of the accused to the Tribunal's Detention Facilities. (Decision Confirming the Indictment dated 23 October 1997, Defence exhibit at p. 46). The maximum time periods for provisional detention provided for under rule 40 (*bis*) take effect from *the day after the accused is transferred*. At the end of the maximum time periods provided for under rule 40 (*bis*), if the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or delivered to the authorities of the State to which the request was initially made. In the instant case the indictment of the accused was confirmed before the accused was even transferred. Accordingly, in relation to the time periods for provisional detention, there has been no violation of the defendant's rights under rule 40 (*bis*).

What the Prosecution did, if anything, after the rule 40 (*bis*) request was made in order to ensure that the accused was transferred is unclear. No credible evidence has been adduced. In any event, once the transfer request has been made the matter rests with the State authority to comply. In the instant case the Cameroonian government did not transfer the accused until November 1997. This cannot amount to a breach of the Rules by the Prosecution. Furthermore, as accepted by the Defence, there are no Rules which provide a remedy for a provisionally detained person before the host country has transferred him prior to the indictment and the warrant for arrest (Motion at p. 4).

It is regrettable that the Prosecution did not submit an indictment until 22 October 1997. However, the indictment has now been confirmed and the accused is legally before the Tribunal. In any event, under rule 40 (*bis*) the time in which the indictment must be submitted does not start to run until the day after the accused is transferred. Again, in the instant case the indictment of the accused was confirmed before the accused was even transferred.

For the above reasons, the Trial Chamber finds that the Defence has not shown that the Prosecution violated the rights of the accused due to the length of detention or delay in transferring the accused.

Other Legal Issues

1. *Was provisional detention justified?*

The Defence suggests that the provisional charges of conspiracy to commit genocide, direct and public incitement to commit genocide, and crimes against humanity, were totally different in form and nature from the confirmed indictment and, therefore, the provisional charges were unnecessary and illegal. This position is without merit. The Defence is wrong to claim that the provisional charges were *totally different in form and nature*. The fact that the indictment contained different information merely reflects the process of investigation and Prosecutorial discretion. Evidently, the Prosecution satisfied Honourable Judge Aspegren that there was a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction. Accordingly, the Defence has not shown that the provisional charges submitted by the Prosecution were merely aimed at keeping the suspect in custody indefinitely.

2. *Did the Prosecution discriminate against the accused?*

The Defence assert that the accused was intentionally discriminated against because the Prosecution transferred some accused from Cameroon but left others there. This position is without merit. The Prosecutor may exercise her valid discretion regarding persons against whom she wishes to proceed. The Defence has adduced no evidence which illustrates an act of the Prosecution which could be considered outside the realms of Prosecutorial discretion.

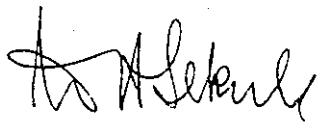
3. *Is rule 40 (bis) valid?*

Rule 40 (*bis*) is valid; it does not contradict articles 17-20 but compliments them. Nowhere in articles 17-20 is it mandated that an indictment must be confirmed before a suspect can be provisionally detained. Rule 40 (*bis*) was properly created during a plenary session as provided under article 14 of the Statute and rule 6 of the Rules. Further, although rule 40 (*bis*) is a complex and flexible rule, the Defence did not pinpoint which sections of rule 40 (*bis*) it considers to be *ultra vires*, or which parts of articles 17-20 are violated by rule 40 (*bis*).

FOR ALL THE ABOVE REASONS, THIS TRIAL CHAMBER

DISMISSES the Defence motion.

Arusha, _____ November 1998



William H. Sekule
Presiding Judge



Yakov A. Ostrovsky
Judge



Tafazzal H. Khan
Judge

Seal of the Tribunal

