



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

UNITED NATIONS
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ORIG: Eng.

TRIAL CHAMBER II

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

Registry: Mr. John Kiyeyeu

Decision of: 4 November 1999

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ICTR
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**THE PROSECUTOR
versus
GRATIEN KABILIGI**

Case No. ICTR-97-34-DP

**DECISION ON THE DEFENCE MOTION
FOR NULLITY OF PROCEEDINGS AND RELEASE**

Office of the Prosecutor:
Mr. William Egbe

Counsel for the Accused:
Mr. Jean Yaovi Degli

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**
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SIGNATURE: *[Signature]* DATE: 09/11/99

Kabiligi nullity&release/4/11/99

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 Order for the transfer of Gratien Kabiligi (“the accused”), which was made on 16 July 1997 by Judge Laïty Kama pursuant to Rule 40 *bis* (B) of the Rules of Procedure and Evidence (“the Rules”);

CONSIDERING that the Kenyan authorities, in conjunction with the Office of the Prosecutor (“the Prosecutor”), arrested the accused in Nairobi, Kenya on 18 July 1997, after which he was transferred by the Prosecutor to the United Nations Detention Facility (“UNDF”) in Arusha on the same day;

GIVEN that on 14 August 1997 an order for extended provisional detention of the accused was made by Judge Laïty Kama pursuant to Rule 40 *bis* (F) of the Rules for another thirty days commencing from 18 August 1997;

TAKING INTO ACCOUNT the fact that the Prosecutor filed, on 11 September 1997, another request for a further extended provisional detention of the accused for a period of thirty days pursuant to Rule 40 *bis* (G) of the Rules;

CONSIDERING that the Prosecutor’s request above mentioned was granted by Judge Pillay on 16 September 1997 to commence on 17 September 1997 and expire 16 October 1997, as the final period of provisional detention of the accused;

CONSIDERING that a joint Indictment was issued by the Prosecutor against Gratien Kabiligi and Aloys Ntabakuze and confirmed by Judge Aspegren on 15 October 1997 pursuant to Rule 47 (D) of 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 17 February 1998 when he pleaded not guilty to all counts of the Indictment;

BEING NOW SEIZED of the motion filed by the defence filed on 24 February 1998 for Nullity of Proceedings and Release based on Rules 40 (C) and (D) and 40 *bis* (K) of the Rules;

CONSIDERING that the Prosecution did not file a response to the motion but made oral submissions;

NOTING that on 11 May 1998, the Trial Chamber was seized of several similar Motions filed by the accused and his co-accused, Ntabakuze, some of which were heard on the same day whilst others were heard on subsequent days but were all deliberated upon on 15 May 1998;

OWING perhaps to the existence of Motions as above mentioned, there appears to have been an oversight with regard to the writing of this particular decision, which was not intended by the Trial Chamber and is regrettable;



WHEREAS the Trial Chamber decided on a similar matter in its decision of 25 September 1998 in respect of Ntabakuze, a co-accused, in which the Trial Chamber dismissed the defence motion for nullity;

CONSIDERING that Counsel for the accused, Mr Yaovi Degli, in a letter dated 22 October 1999 brought the oversight in rendering a written decision for the accused to the attention of the Trial Chamber and also noting that this was the first time that the Trial Chamber had been notified of this issue by the accused or his Counsel;

WHEREAS the Trial Chamber II, which heard this Motion, no longer exists and considering that Judge Khan's mandate expired on 24 May 1999;

NOTING the authorization granted by President Pillay on 3 November 1999, in which she considered Judge Khan's expiry of mandate as an exceptional circumstance pursuant to Rule 15 (F) of the Rules;

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

ARGUMENTS BY THE PARTIES

1. The Defence argued, *inter alia*, that:

- 1.1 The Prosecutor had no evidence against the accused before he was arrested, but that she nonetheless arrested him while she was seeking evidence against him so as to ensure that his status would be changed from being that of a *suspect* to that of being an *accused*. Hence, the proceedings which followed regarding the detention of the accused are vitiated by nullity and render all actions taken against the accused unlawful;
- 1.2 Articles 17, 18, and 19, interpreted together, provide that even before the transfer to the UNDF and before the accused is subject to provisional detention, an indictment must be confirmed and served upon the accused and a warrant of arrest must be issued against him by the Tribunal. When the accused was arrested, on 18 July 1997, however, neither an arrest warrant nor an indictment was served upon him. The Prosecutor infringed upon the provisions of Article 19 since the accused was not informed of the charges against him;
- 1.3 According to Rule 40 of the Rules, a person simply suspected, and against whom an indictment has not been confirmed and an arrest warrant issued, should not be placed under provisional detention but, instead, under provisional arrest. This interpretation of Rule 40 is corroborated by other provisions contained in the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal ("Detention Rules"). Rule 7 of the Detention Rules states that "No person shall be received in the detention unit without a warrant of arrest duly issued by a Judge or a Chamber of the Tribunal." Rule 8 of the same Rules confirms this provision when it stipulates that a complete, secure and current record shall be kept concerning each

detainee received. It shall include: "the date of issue of the indictment against the detainee and of the warrant of arrest." (Rule 8(b)). This is part of the evidentiary materials to be entered, obligatorily, on the register of the UNDF;

- 1.4 Rule 40 *bis* is contrary to other provisions of the Statute of the Tribunal ("the Statute"), thus the instituted proceedings must be declared null and void. Further, the Statute is the fundamental text. Hence, where two provisions contradict one another, it is a general principle of criminal law that the most favorable provision to the accused is preferable. In the instant case, Rule 40 and not Rule 40 *bis* favors the accused. In any event, Rule 40 *bis* concerning suspects should be reviewed. Hence, there is no need to proceed with this trial on the basis of these provisions and the accused should be released;
- 1.5 In accordance with Rules 7 and 8(b) of the Detention Rules, it is clear that suspects should not be detained under Rule 40 *bis*, but solely under Rule 40 relating to provisional arrest. Rule 40 *bis* must bow to the provisions of the Statute, which is silent on the fundamental difference between provisional detention and provisional arrest and instead talks of "suspects." In fact, when faced with contradiction resulting from one provision of the Statute and another from the Rules, it is the Statute that must apply. Therefore, it is in order that the provisions of Articles 17, 18, and 19 of the Statute which give him the status of suspect and consequently subject him only to provisions of Rule 40 of the Rules, are applicable to the accused;
- 1.6 Rule 40(D) of the Rules states that "The suspect shall be released if (i) the Chambers so rules, or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer." Yet, seventy days following the transfer and detention of the accused, no Indictment had been submitted by the Prosecutor to the Tribunal for confirmation;
- 1.7 Even if an Indictment was subsequently to be submitted to the Tribunal or to a Judge for confirmation, that cannot change the nullity of the proceedings and the right of accused to be released. Pursuant to Articles 17, 18, and 19 of the Statute, and Rules 40(D) and 40 (*bis*)(K) of the Rules, it is necessary to declare the proceedings flawed. The reason for this is that the legal time limit, allowed for the notification of an Indictment by the Prosecution, has long expired. Hence, the Trial Chamber should order the immediate release of the accused.

2. The Prosecution submitted, *inter alia*, that:

- 2.1 The presumption of innocence is being turned into a presumption of persecution of the Prosecutor and that the Defence delayed to file his motion and this is now being excused on the ground that the document disappeared, which in itself is an insinuation;
- 2.2 There is no irregularity regarding the detention of the accused in this case. Rules 40 and 40 *bis* operate at different levels. 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. Further, the operation of Rule 40 automatically triggers the provisions that are contained in Rule 40 *bis*.

- 2.3 From the moment a detainee or suspect appears at the UNDF, the provisional measures give way and the substantive provisions of Rule 40 *bis* are automatically triggered.
- 2.4 Under the provisions of Rule 40 (D), which stipulates for twenty days of detention after which the suspect may be released, once suspect is accepted at the UNDF, the thirty days provision in Rule 40 *bis* (C) comes into effect. Hence, there is no irregularity. In any case, detention in law cannot be irregular when it is a result of a judicial act. In this particular case, the detention of the accused was not arbitrary since it was pursuant to an order of the Tribunal.
- 2.5 The ninety days of detention being referred to by the Defence are covered by provisions of Rules 40 *bis* (F), 40 *bis* (G) and at the end of the 90 - day limit, the Prosecutor filed an indictment. Hence, the Prosecutor was within her rights and the arrest was neither arbitrary nor illegal;
- 2.6 The detention of the accused was not arbitrary since under Rule 40 of the Rules a warrant of arrest is not required. Rule 7 of the Detention Rules, which requires that a warrant be issued by a judge or a trial chamber before a person is received in the detention facility, is inapplicable to the extent that it contradicts the substantive provisions of Rule 40;
- 2.7 The arrest of the accused was legal and regular since his rights as a suspect under Rule 42 were respected. Upon his arrest, he was informed of his rights, the reasons of his arrest, and the crimes with which he was charged. Even in cases of irregularity, Rule 5 refers to two conditions, among which there is one pertaining to causing a substantial miscarriage of justice. This is the one for which nullity is contemplated. However, in the present case, the question of irregularity does not arise because all the processes as provided for in the Rules were followed. Therefore, the arrest of the accused was legal and his detention was not arbitrary as it was preceded by a court order.

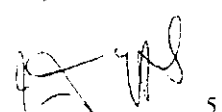
Reply By The Defence

3. The Defence submitted, *inter alia*, that to date, there is no document showing that, at the time of his arrest, the accused signed a document informing him of his rights.

AFTER HAVING DELIBERATED

The Tribunal issues its decision:

4. The Trial Chamber has considered the arguments by both parties regarding the difference between Rules 40 and 40 *bis* of the Rules. The Trial Chamber finds that there is no conflict between these provisions. Rule 40 applies only in cases of



urgency and only to those who have been transferred pursuant to it. Under this Rule the Indictment must be issued within 20 days of such transfer of the suspect to the custody of the Tribunal. In the instant case, although the accused was arrested under Rule 40, he was, however, transferred and provisionally detained under Rule 40 *bis* of the Rules.

5. Rule 40 *bis* is interpreted to allow the Prosecutor up to 90 days from the day after the transfer of the suspect to the UNDF to issue an Indictment, if the period of provisional detention is extended twice pursuant to the provisions of the Rule. In the instant case, the accused was provisionally detained at the UNDF under Rule 40 *bis* for less than 90 days.
6. Consequently, it is the Trial Chamber's view that from the moment the accused was transferred to the UNDF, he was treated in accordance with the Statute and the Rules.

FOR ALL THE ABOVE REASONS, THE TRIBUNAL

DISMISSES the Defence Motion to release the accused.

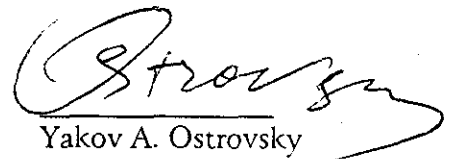
Arusha, 4 November 1999



William H. Sekule
Presiding Judge



SEAL OF THE TRIBUNAL



Yakov A. Ostrovsky
Judge