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UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER II

OR: ENG

Before: Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Pavel Dolenc

Registry: John M. Kiyeyeu

Decision of: 10 December 1999

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THE PROSECUTOR
v.
MATTHIEU NGIRUMPATSE

Case No. ICTR-97-44-I

**DECISION ON THE DEFENCE MOTION CHALLENGING THE
LAWFULNESS OF THE ARREST AND DETENTION AND
SEEKING RETURN OR INSPECTION OF SEIZED ITEMS**

The Office of the Prosecutor:

Don Webster
Ifeoma Ojemeni

Counsel for the Accused:

Charles Roach



INTRODUCTION

1. The International Criminal Tribunal for Rwanda (Tribunal), sitting today as Trial Chamber II, composed of Presiding Judge Laïty Kama, Judge William H. Sekule, and Judge Pavel Dolenc, decide the Accused Matthieu Ngirumpatse's "Application Challenging the Lawfulness and Propriety of the Arrest and Detention of the Suspect" (Motion) filed 9 November 1998.

BACKGROUND

2. In a letter dated 27 May 1998 and addressed to the Mali Ministry of Justice, Deputy Prosecutor Bernard Muna requested the arrest and provisional detention of the Accused (Request for Arrest), pursuant to Rule 40(A).

3. On 5 June 1998, authorities of Mali arrest the Accused in Bamako, Mali.

4. On 16 June 1998, Judge Kama receives a Prosecution motion, pursuant to Rule 40 *bis*, for the transfer and provisional detention of the Accused.

5. On 29 June 1998, Judge Kama hears the Prosecution on its Rule 40 *bis* motion.

6. On 30 June 1998, Judge Kama grants the Rule 40 *bis* motion.

7. On 11 July 1998, authorities transfer the Accused to the custody of the Tribunal at the United Nations Detention Facility in Arusha, Tanzania.

8. On 16 July 1999, the Accused appears before Judge Kama. Judge Kama grants the Prosecution until 9 August 1998 to prepare and Indictment. *See* Transcript of 16 July 1998, at 8.

9. On 10 August 1998, Judge Kama grants a motion by the Prosecution to extend the provisional detention for a period of twenty days. *See* Transcript of 10 August 1998, at 20.

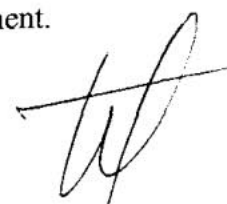
10. On 26 August 1998, the Prosecution files an Indictment, pursuant to Rule 47, and files a motion for non-disclosure, pursuant to Rule 53(C).

11. On 28 August 1998, Judge Navanethem Pillay presides over an *ex parte* hearing with the Prosecution on the Indictment.

12. On 29 August 1998, Judge Pillay signs her Order of "Confirmation and Non Disclosure of the Indictment" (Confirmation Order).

13. On 1 September 1998, the Accused signs an acknowledgment form of receipt of the Indictment. *See* Response, Annex C (*récépissé*).

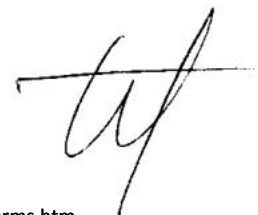
14. On 14 October 1998, the Prosecution files the redacted Indictment.



15. On 9 November 1998, the Defence files the Motion at bench.
16. On 10 March 1999, the Accused appears, but the Trial Chamber adjourns the Initial Appearance.
17. On 7 April 1999, the Accused makes his Initial Appearance and enters a plea of not guilty to each count of the Indictment.
18. On 7 April 1999, the Prosecution files its "Prosecutor's Response to Accused's Application Challenging the Lawfulness and Propriety of the Arrest and Detention of the Suspect" (Response).
19. On 13 September 1999, the Prosecution files a motion seeking the rescission of the order of non-disclosure contained in the Confirmation Order.
20. On 7 October 1999, Judge Pillay files her "Rescission of the Order for Non-Disclosure," finding that the redactions of the Indictment serve no further purpose.
21. On 17 November 1999, Judge Pillay, President of the Tribunal, specially assigns Judge Pavel Dolenc to the Trial Chamber for purposes of hearing the Motion. *See Memorandum, ICTR/Pres/133/99.*
22. On 17 November 1999, the Trial Chamber continues the hearing on the Motion until the next day following a defence motion on disqualification.
23. On 18 November 1999, the Bureau of the Tribunal decides the defence motion on disqualification. *See Prosecutor v. Ngirumpatse, ICTR-98-44-T (Determination of the Bureau in terms of Rule 15(B)) (18 November 1999).*
24. On 18 November 1999, the Trial Chamber hears the parties at a hearing on the Motion.

SUMBISSIONS OF THE DEFENCE

25. The Defence submits that the arrest and detention of the Accused are unlawful because the Prosecution has violated the Tribunal's Statute (Statute) and the Tribunal's Rules of Procedure and Evidence (Rules), including Statute Articles 17, 18, 19, and 20(4)(a) and Rules 40(D), 40 *bis*, 55, and 62.
26. The Defence alleges that the Prosecution, in its Request for Arrest, falsely and intentionally misrepresented to the authorities of Mali that, "the Prosecutor . . . has already instituted before the Tribunal proceedings for the confirmation of an indictment against him." This misrepresentation was the basis for the arrest.
27. The Defence argues that the Deputy Prosecutor also made false statements to the Accused himself, shortly after his arrest, that an indictment already existed and that the Prosecution promptly would serve it on the Accused.



28. The Defence moves that the Trial Chamber should sanction the Prosecution for such misconduct.

29. The Defence contends that there existed no urgency to arrest the Accused, and that no evidence supports the Prosecution's representation of urgency in the Request for Arrest.

30. The Defence submits that representatives of the Prosecution searched the home of the Accused in Mali and seized items (including documents) belonging to him, his wife, daughter, and cousin.

31. The Defence asserts that it requires the documents belonging to the Accused to prepare its case.

32. The Defence alleges that the Accused never received a record of the items seized.

33. The Defence argues that the Prosecutor failed to serve an indictment on the Accused.

34. The Defence contends that the redactions to the Indictment violated Rule 53(C), especially in that the names of the alleged co-conspirators remained unknown to the accused.

35. The Defence urges that the arrest of the Accused was unlawful for lack of a warrant, and that all national jurisdictions require a warrant for such an arrest.

36. The Defence alleges that the extensions of the Accused's detention violated Rule 40(D) because the Prosecution did not file an Indictment in a timely manner.

37. The Defence submits that Rule 40 *bis* violates Articles 17 and 18 of the Statute and Rule 40(D). Rule 40 *bis* lacks a legal basis and departs from the Statute, the Tribunal's basic legal instrument. Rules 40 and 40 *bis* are contradictory. Rule 40 provides only twenty days to prepare an Indictment, whilst Rule 40 *bis* provides thirty days, and two possible extensions up to a period of ninety days maximum.

38. The Defence prays that the Trial Chamber rule that Prosecutor violated the Statute and Rules in the case of the Accused, and rule that the Accused was unlawfully arrested, and detained exclusively under the unlawful provisions of Rule 40 *bis*. The Trial Chamber, therefore, must nullify the proceedings, order the immediate release of the Accused, and order the return of the seized belongings of the Accused.

39. The Defence, in the alternative, prays that the Trial Chamber order the Prosecution to return those items not relevant to its case, and the inspection of the items seized and photocopies of those items the Defence deems necessary for the preparation of the defence of the Accused.



SUBMISSIONS OF THE PROSECUTION

40. The Prosecution submits that the arrest and detention of the Accused are lawful, and that the Trial Chamber must deny the Motion.

41. The Prosecution represents that the authorities of Mali arrested the Accused based on a valid and lawful request under Rule 40(A). *See* Request for Arrest.

42. The Prosecution contends that the Request for Arrest is accurate. It is not a misrepresentation, nor an intentional misrepresentation because the Prosecution anticipated indicting the Accused within a larger, single, "global indictment" filed on 6 March 1998. *See Prosecutor v. Bagosora and 28 Others*, ICTR-98-37-I (Dismissal of Indictment) (31 March 1998). This Indictment was before the Tribunal at the time of the Request for Arrest, and later was the subject of an appeal.

43. The Prosecution represents that the Request to Arrest was based on urgency. The urgency arose from a risk of flight, the possible destruction of evidence, and an attempt to coordinate the arrest of several suspects by national authorities from several States on a single day, and, thus, avoid the flight of other suspects.

44. The Prosecution submits that neither the Statute nor the Rules require an arrest warrant, and that the lack of a warrant does not vitiate the legality of an arrest.

45. The Prosecution argues that Judge Kama lawfully extended the Accused's detention twice, on 16 July 1998 and 10 August 1999, under Rule 40 *bis*.

46. The Prosecution contends that the provisions of the Statute and the Rules governing arrest and detention are valid and complementary.

47. The Prosecution submits that the Confirmation Order of 29 August 1998 satisfied both the Rules governing pre-Indictment detention and Judge Kama's second order extending the provisional detention, and, thus, rendered lawful the continued detention of the Accused.

48. The Prosecution represents that the Accused received a copy of the Indictment, as evidenced by an acknowledgment of receipt form dated 1 September 1998. *See* Response, Annex C (*récépissé*).

49. The Prosecution asserts that it complied with the Confirming Order by filing a redacted Indictment on 14 October 1998. The redactions were well founded because four accused persons charged in the Indictment remained at large.

50. The Prosecution submits that the redactions of the Indictment, ordered by Judge Pillay, considered that some accused persons named in the Indictment remained at large.

51. The Prosecution represents that the search and seizure by the authorities of Mali were lawful and do not violate Rule 40(A)(ii) and (iii).



52. The Prosecution submits that the Accused signed an express consent form to the search and seizure. The authorities of Mali properly prepared vouchers and an inventory of the items seized. See Response, Annex B.

53. The Prosecution objects to any return of items because the Prosecution's investigation is ongoing, but does not object to an inspection by the Defence of the items seized, under Rule 66(B).

DELIBERATION

Arrest and Detention

54. The Trial Chamber notes that Rule 40(A) provides that, "[i]n case of urgency, the Prosecutor may request any State: (i) [t]o arrest a suspect and place him in custody; (ii) to seize all physical evidence" In the case at Bench, the authorities of Mali executed the arrest, custody, search, and seizure based on the Request for Arrest.

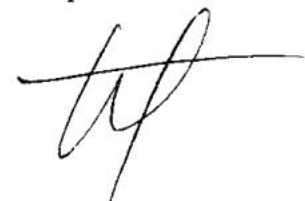
55. The Statute and Rules do not define the form that the Prosecutor's request may take. Such a request could be oral or written (as in the case at Bench, by the Request for Arrest).

56. It is a sovereign State that executes the request, controls the authorities executing the request, and against whom the person arrested may seek a remedy against the arrest, custody, search, and seizure under the laws of the requested State. The Tribunal is not competent to supervise the legality of arrest, custody, search, and seizure executed by the requested State. The laws of the requested State may or may not require an arrest warrant or impose other legal conditions.

57. As stated by Trial Chamber III, "an accused, before his transfer to the custody of the Tribunal, has no remedy under the Statute and Rules for the detention and acts by sovereign States over which the Tribunal does not exercise control." *Prosecutor v. Semanza*, ICTR-97-20-I, at para. 30 (Decision on the "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful") (6 October 1999).

58. The Trial Chamber finds that the Prosecution's Request for Arrest did not misrepresent, intentionally or otherwise, the stage of the proceedings against the Accused before the Tribunal. The Trial Chamber reads the Request for Arrest's use of the term "proceedings" (*une procedure*, in the original French) within a wide interpretation and the framework of the work of the Office of the Prosecutor. The Trial Chamber finds that the Prosecution considered the Accused as constituting part of a larger indictment (*Prosecutor v. Bagosora and 28 Others, supra*) pending before the Tribunal at the time of the Request for Arrest.

59. Further, the stage of the proceedings of the case of any particular suspect or accused, and a representation regarding the stage of those proceedings to a requested State, does not affect the validity of a Prosecutor's request for arrest and provisional detention, under Rule 40(A).



60. The Trial Chamber notes that, under Rule 46, it may impose sanctions against the Defence and Prosecution for misconduct. The Trial Chamber, however, denies the Defence oral motion seeking sanctions against the Prosecution for alleged misrepresentations. The Trial Chamber finds that this allegation is not well founded, having accepted the representation of the Prosecution regarding the indictment and noted that the Prosecutor need not have initiated any proceedings against a suspect at the Tribunal prior to requesting arrest under Rule 40(A).

61. The Trial Chamber notes that Article 17(2) of the Statute empowers the Prosecutor to question suspects and conduct on-site investigations, and to seek the assistance of State authorities. In the case at Bench, Prosecutor's staff was present at the time the authorities of Mali executed the arrest, custody, search, and seizure. This presence does not violate the Statute or Rules. Any alleged statement by the Prosecution to the Accused regarding the purported existence of certain documents is irrelevant and of no legal effect.

62. The Trial Chamber finds that the situation underlying the Request for Arrest was one of urgency, under Rule 40(A). The Trial Chamber finds that the urgency arose from a risk of flight, the possible destruction of evidence, and the Prosecution's attempt to coordinate the arrest of several suspects by several States and avoid the flight of other suspects.

63. The Trial Chamber finds that the Request for Arrest was valid and does not violate the Statute and Rules, including Rule 40(A). The Statute and Rules, unlike many national jurisdictions, do not require a warrant to arrest a suspect. Thus, the Trial Chamber finds without merit the Defence contention that the arrest, detention and search are unlawful for lack of a warrant.

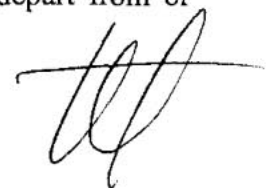
64. The Trial Chamber finds lawful the arrest and detention of the Accused. The arrest and detention of the Accused do not violate the Statute and Rules.

65. The Trial Chamber finds valid the two extensions of the Accused's detention. Both extensions did not violate Rule 40 *bis*. There is nothing in the record to indicate to the contrary.

Validity of Rule 40 bis

66. The Defence challenges the validity of Rule 40 *bis* itself, contending in general terms that Rule 40 *bis* lacks a legal basis and violates the Statute. The Trial Chamber notes the broad delegation of power to the Judges in Article 14 of the Statute to establish and amend the Rules, as they deem necessary. The Tribunal validly adopted Rule 40 *bis*.

67. Articles 17 and 18 of the Statute govern the investigation and preparation of the Indictment and review of the Indictment, and, therefore, do not deal with provisional detention. Rule 40 *bis* governs transfer and provisional detention to conduct the investigation, an area not covered by these Articles of the Statute. Provisions of Rule 40 *bis*, therefore, are not contradictory to the provisions of the Statute. Thus, The Trial Chamber finds that Rule 40 *bis* does not depart from or violate the Statute, including Articles 17 and 18.



68. Also, Rule 40 provides twenty days from the transfer of a suspect for the preparation of an Indictment in case of urgency without investigation, whilst Rule 40 *bis* governs provisional detention in the conduct of an investigation. The Trial Chamber finds that the provisions of these two Rules govern different situations, and, therefore, are not contradictory. The transfer of the Accused was executed under Rule 40 *bis*.

Redaction of the Indictment

69. The Confirming Order mandated the redaction of the Indictment, under Rule 53(C), based on: the possible flight of the co-accused remaining at large; the possible communication of such information by the Accused; the confidential nature of the identity of confidential informants, and; the interests of justice.

70. The Trial Chamber notes that Judge Pillay rescinded her Confirming Order with regard to the redactions. Thus, the Trial Chamber finds moot any challenge of the validity of the Confirming Order mandated redactions, and need not address the scope of non-disclosure under Rule 53.

71. The Trial Chamber finds that the Defence challenge against the Confirming Order mandated redactions is in substance an appeal. No appeal lies for such an order. *See Prosecutor v. Akayesu*, ICTR-96-4-T, at 4 (Decision on the Prosecutor's Motion to Reconsider and Rescind the Order of 28 January 1997) (6 March 1997) (finding that the Trial Chamber will not allow a motion for review of an earlier decision in the absence of the discovery of a new fact).

72. The Trial Chamber further notes that the delay between the Confirming Order and service upon the Accused of a non-redacted Indictment is not unreasonable nor amounts to undue delay in light of the circumstances of the case and the gravity of the charges. The Accused acknowledged receipt of the Indictment.

Search and Seizure

73. The Trial Chamber finds that the authorities of Mali arrested the Accused and searched several locations and seized several items, in compliance with the Request for Arrest. The authorities of Mali did this in the presence of the Accused and representatives of the Prosecution. *See* Response, Annex B (*procès verbal de perquisition*). Rule 40(A)(ii) and (iii) provide that a State, upon a request of the Prosecutor, may seize all evidence and take all necessary measures to prevent the destruction of evidence. The Trial Chamber finds that the search and seizure do not violate the Statute and Rules.

74. The Trial Chamber, already having found lawful the arrest and search and seizure, finds without merit the Defence prayer for a return of all seized items.

Return or Inspection of Seized Items

75. The Trial Chamber notes the right of the Defence to prepare its case and the obligation on the Prosecutor to return those items not relevant to its case. The Trial



Chamber considers the Motion in the light of a request under Rule 66(B). The Defence asserts that the seized items are material to the preparation of its case, and, in the alternative, moves for the Prosecution to return those items not relevant to the case and for an inspection of all other items.

76. The Trial Chamber notes that the language regarding inspection of Rule 66(B) is mandatory, providing that “[a]t the request of the defence, the Prosecutor shall permit the defence to inspect . . .” (emphasis added). Thus, the Trial Chamber holds that the Prosecutor must comply immediately with Rule 66(B). With regard to those items that the Prosecution decides are not relevant to its case, the Trial Chamber holds that the Prosecution must return these items not later than the conclusion of the inspection.

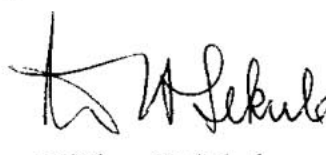
77. The Trial Chamber notes that the Prosecution stores the seized items away from the seat of the Tribunal in Arusha, Tanzania, and that production of the seized items and an inspection may take some time to organise. A period of sixty days should suffice to review the items seized to determine which are relevant, and for the parties to conduct an inspection.

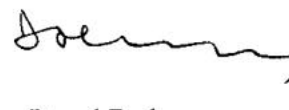
78. **FOR THE ABOVE REASONS**, the Trial Chamber:

- (a) **DENIES** the Defence Motion, however;
- (b) **ORDERS** the Prosecution to submit all materials seized to an inspection by the Defence, pursuant to Rule 66(B), within sixty (60) days of this decision, and to return those items seized that are not relevant to its case, and;
- (c) **ORDERS** the Registrar to facilitate the inspection, including designating a representative to supervise the inspection and photocopying of the documents requested by the Defence.

Arusha, 10 December 1999.


Laity Kama
Judge, Presiding


William H. Sekule
Judge


Pavel Dolenc
Judge

Seal of the Tribunal