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

UNITED NATIONS
NATIONS UNIES

Original: French

TRIAL CHAMBER II

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

Registry: Antoine Mindua
John Kiyeyeu

Decision of: 7 September 2000

THE PROSECUTOR
v.
JOSEPH NZIRORERA
Case No. ICTR-98-44-T

JUDICIAL RECORDS/ARCHIVES
ICTR
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**DECISION ON THE DEFENCE MOTION CHALLENGING THE LEGALITY OF
THE ARREST AND DETENTION OF THE ACCUSED AND REQUESTING THE
RETURN OF PERSONAL ITEMS SEIZED**

The Office of the Prosecutor:
Ken Fleming
Don Webster
Ifeoma Ojemeni

Counsel for the Defence:
Andrew McCartan

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“THE TRIBUNAL”),

SITTING as Trial Chamber II, composed of Judges Laïty Kama, presiding, William H. Sekule and Pavel Dolenc,

REGARDING the internal Memorandum (Ref. No. PO-IOM/29-5-00/TCIII) of 29 May 2000 by which the President of the Tribunal assigned Judge Pavel Dolenc to replace Judge Mehmet Güney for the purposes of hearing the present motion,

CONSIDERING that Joseph Nzirorera (“the Accused”) was arrested and held in custody on 5 June 1998 in Benin following a request made by the Deputy Prosecutor, Bernard Muna, pursuant to Rule 40 of the Rules of Procedure and Evidence (“the Rules”),

CONSIDERING the Order of 22 June 1998, issued under Rule 40 *bis* of the Rules, by Judge Navanethem Pillay authorizing the transfer of the Accused to the seat of the Tribunal,

CONSIDERING that on 10 July 1998 the Accused was transferred to the Detention Facility of the Tribunal in Arusha, pursuant to Rule 40 *bis* of the Rules, and at the hearing of 10 August 1998, Judge Laïty Kama authorized that the Accused be held in provisional detention for a further period of twenty days from that date,

CONSIDERING that on 29 August 1998 the Tribunal, acting in the person of Judge Navanethem Pillay, designated by the President of the Tribunal, pursuant to Rule 28 of the Rules, confirmed the indictment of 26 August 1998 submitted by the Prosecutor against Joseph Nzirorera and seven other persons,

CONSIDERING the arrest warrant and the order for detention issued by Judge Navanethem Pillay against the Accused on 29 August 1998, pursuant to Rule 55 of the Rules,

CONSIDERING that, under Rule 62 of the Rules, the Accused made his initial appearance on 7 and 8 April 1999 and that on 8 April 1999 he entered a plea of not guilty to all eleven counts charged in the indictment against him,

HAVING BEEN SEIZED OF the Defence Motion, filed on 8 December 1999, pursuant to Rule 73 of the Rules, challenging the legality of the arrest and the detention of the Accused and requesting the restitution of his seized personal property,

CONSIDERING the Prosecutor’s reply received on 22 March 2000,

CONSIDERING the Statute and the Rules of the Tribunal, notably Rule 73 of the Rules,

HAVING HEARD THE PARTIES at a hearing on 2 June 2000.

ARGUMENTS OF THE PARTIES

Submissions of the Defence

The Defence argues, *inter alia*:

The Arrest

1. In violation of Articles 17 and 18 of the Statute and Sub-Rules 55(A) and 55(B) of the Rules, no arrest warrant, indictment or any other document was presented to the Accused at his arrest on 5 June 1998 in Cotonou, Benin.
2. The arrest of the Accused was in violation of Rule 40 of the Rules, which provides that "In case of urgency, the Prosecutor may request any State [...] to arrest a suspect and place him in custody..." In support of this argument, the Defence submits that at the time of the arrest of the Accused, there was no urgency, as envisaged in Rule 40 of the Rules. Accordingly, the Defence argues that the provisions of Rules 40 and 40 *bis* of the Rules do not apply in the instant case. The Defence concludes that there was no legal basis for the arrest of the Accused and that it was illegal.
3. Moreover, the Accused was not informed of the reasons for his arrest during questioning on 12 and 13 June 1998.
4. Despite the Accused's repeated requests, Benin government authorities did not timely notify him of the 27 May 1998 letter from the Deputy Prosecutor requesting his arrest by the Ministry of Justice. It was only on 10 July 1998, at Cotonou airport during his transfer that the Accused was provided with said letter.
5. The Defence further contends that the Accused was arbitrarily detained for more than one month because he was not promptly informed of the reasons for his arrest. The Chamber should therefore rule, firstly, that his arrest was unlawful and, secondly, that his current detention is arbitrary because it is a result of an unlawful arrest.
6. Furthermore, in its motion filed on 8 December 1998, the Defence argues that on 29 August 1998, while the Accused was in custody at the Detention Facility of the Tribunal, the Office of the Prosecutor served him with a warrant of arrest written in English, in the name of Mathieu Ngirumpatse, and not in his name, which he was ordered to sign. The Accused maintains that to date he has never signed an appropriately written warrant of arrest in his name.
7. At the hearing held on 2 June 2000, the newly assigned Defence Counsel, Andrew McCartan, Esq., affirmed that said arrest warrant, written in English and in the name of Mathieu Ngirumpatse, was not served on the Accused until 1 September 1998, that is, after

the expiration of the twenty-day time-limit granted to the Prosecutor to prepare an indictment against the Accused. The Defence deems that the provisions of Rules 47(G) and 55(B) of the Rules have been violated.

- 8. The Defence further claims that the Accused was not served with the arrest warrant written in French until 22 September 1998. The Defence submits that Article 20 (4) (a) of the Statute was violated, as no arrest warrant was served on the Accused between 10 July 1998 and 22 September 1998.

Property Seized

- 9. Representatives from the Office of the Prosecutor, who accompanied the Beninese policemen, conducted an unlawful search and seizure of the residence of the Accused. Indeed, the Defence claims that the Accused was subjected to an arbitrary invasion of his privacy, the privacy of his family, the privacy of his residence and of his personal mail, and that his honour and reputation were impugned, in breach of basic principles recognized under *jus cogens* and international standards defined by the United Nations, notably Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights. The Defence further submits that the arrest of the Accused and the seizure of his personal effects constituted a violation of the provisions of Article 20 of the Statute and Rules 40(A)(i), 42 and 45(D) of the Rules. The Chamber should therefore bar the Prosecutor from using documents and other confiscated property, or any information similarly obtained.

Restitution of Confiscated Documents and Property

- 10. The Defence prays the Chamber to order the Prosecutor to return all documents and objects seized within ten days of this decision, as some of these materials are crucial to the defence of the Accused.
- 11. The Defence submits that at the 10 August 1998 hearing the Prosecutor was ordered to return to the Accused documents and other objects that were seized at his residence at the time of his arrest. The Defence demands that documents and other objects seized be returned to the Accused under seal and requests that the Prosecutor be barred from using such materials at trial, pursuant to Rule 95 of the Rules. Regarding the seized documents and property, the Defence stresses the significance of the MNRD records, seized at the residence of the Accused, which it deems to be material for the preparation of his defence. The Defence also requests that all such records be returned to the Accused within ten days of the present decision, should the Chamber grant its motion.

Statements by Jean Kambanda

- 12. To prepare for his defence, the Accused prays the Chamber to order the Prosecutor to make available to him the entire case file on Jean Kambanda, which, according to the Defence,

includes statements made by the Accused which may be used against him. Should the Chamber grant this motion, the Defence further requests that such files be made available within ten days of this decision.

Recordings of the Interrogations of the Accused

13. Lastly, the Defence prays the Chamber to order the Prosecutor to disclose, within ten days of this decision, the original cassettes or copies thereof containing statements made by the Accused under questioning on 12 and 13 June 1998, should the Chamber grant this motion.

Submissions of the Prosecutor

The Prosecutor argues, *inter alia*:

The Arrest and Seizure at the Time of Arrest

14. Refuting the submissions of the Defence, the Prosecutor asserts that the arrest of the Accused was made pursuant to the provisions of Rule 40 of the Rules, under which an arrest warrant or an indictment is not required at the time of arrest. Rule 40 *bis* of the Rules, under which the Accused was transferred, refers to the transfer and provisional detention of a *suspect* as part of an investigation. It is only upon confirmation of an indictment that a *suspect* becomes an *accused* person. The Prosecutor further submits that there is no contradiction in the provisions of Articles 17 and 19 of the Statute and Rules 40 and 40 *bis* of the Rules.
15. The Accused was arrested by the Benin police. The search and seizure were also conducted by the Benin police. The Prosecutor therefore contends that, with regard to both the arrest and the seizure, the Accused may seek redress only from the Benin police.
16. The Prosecutor submits that, under established ICTR case law, the Trial Chambers have consistently ruled that the manner in which a sovereign State exercises its powers is beyond their authority.
17. There is no legal basis to the complaints raised by the Accused about the service of the warrant for arrest, since the arrest warrant was signed.

MRND Records Seized at the Residence of the Accused at the Time of his Arrest

18. The Prosecutor argues that the Defence has never requested that the MNRD records be returned but rather has elected to file a motion. However, the Prosecutor acknowledges that such documents may fall within the category of materials envisaged in the provisions of Rule 66(B) of the Rules, in accordance with which the Defence should be allowed

inspection within due course.

The Interrogations on 12 and 13 June 1998

- 19. No provision in the Rules prohibits questioning a person held in custody, pursuant to Rule 40 of the Rules. The only requirement is that the person held in custody shall be informed of his rights, articulated in Rule 42, which he may choose to exercise or waive.
- 20. The interrogations of the Accused on 12 and 13 June 1998 were recorded on cassettes which were placed under seal at the time of questioning and which are still on file in the archives of the Evidence Unit of the Office of the Prosecutor in Kigali. They still have not been transcribed. The Prosecutor suggests meeting with the Defence to unseal the cassettes in the presence of Defence Counsel and forthwith to provide counsel with copies of said recordings. The cassettes will then be transcribed and said transcripts will also be provided to the Defence at the earliest possible date.

Statements by Jean Kambanda

- 21. The Prosecution submits that it is under no duty to disclose whether it is in possession of any statement by Jean Kambanda against the Accused or to disclose such deposition, if any, unless it is to be used as inculpatory or exculpatory evidence.
- 22. Furthermore, the Prosecution submits that, should it intend to use any statement by Jean Kambanda against the Accused, it would be bound, subject to the provisions of Rule 66(C) of the Rules, to comply with the provisions of Rule 66(B) of the Rules. The Prosecution maintains that it has no intention of using statements by Jean Kambanda against the Accused, given that the Accused was not a member of the Interim Government.

Restitution of Seized Property

- 23. At the hearing on 10 August 1998, according to the Prosecution, no order was issued for the restitution to the Accused of seized documents and property. Moreover, the Prosecutor maintains that the issue of restitution of seized documents and property was not considered on the merits at said hearing. However, the Prosecution wishes to comply with its duties under the Rules and agrees to allow the Accused to inspect the seized items and to return such property which is not material to the Prosecution's case.

AFTER HAVING DELIBERATED***The Arrest of the Accused Without an Arrest Warrant, Indictment or Any Other Document at the Time of Arrest***

24. In the opinion of the Chamber two issues were raised by the Defence regarding the circumstances surrounding the arrest of the Accused. The Defence raised the question whether a case of urgency existed, warranting said arrest to be made on the basis of Rule 40 of the Rules, and further argued that the arrest was illegal, since the Accused was not served with a warrant of arrest at the time of his arrest.
25. Firstly, in regard to whether a case of urgency existed, warranting the arrest, the Chamber notes that, on 27 May 1998, the Deputy Prosecutor transmitted to the Minister of Justice of Benin a request for the arrest and detention of the suspect, Joseph Nzirorera, under Rule 40 of the Rules. Pursuant to said request and in compliance with its obligations under Article 28 of the Statute, on 5 June 1998, the Benin authorities arrested the suspect and placed him in custody.
26. The Chamber also notes that the Judge, when he ordered the transfer and provisional detention of the suspect pursuant to Rule 40 *bis* of the Rules, took into account the Prosecutor's earlier request to the Benin authorities for the arrest and the detention of Joseph Nzirorera, under Rule 40 of the Rules, and thereby implicitly recognized the existence of a case of urgency at the time of said arrest.
27. Secondly, with regard to whether the absence of a warrant of arrest and an indictment rendered the arrest illegal, as the Defence contends, the Chamber recalls its decisions in *The Prosecutor v. Karemera*, Case No. ICTR-98-44-I, para. 4.3.1 (10 December 1999), *The Prosecutor v. Ngirumpatse*, Case No. ICTR-97-44-I, para. 56 (10 December 1999) and *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44-I, paras. 34 and 35 (8 May 2000), where it held that the Chamber lacks jurisdiction to review the legal circumstances attending the arrest of a suspect, under Rule 40 of the Rules, in so far as the arrest has been made pursuant to the laws of the arresting state.

With Regard to the Current Detention of the Accused

28. Following the transfer of the Accused to the Detention Facility of the Tribunal on 10 July 1998, pursuant to the above-mentioned order for transfer and provisional detention, at the hearing of 10 August 1998, the Prosecutor was granted a period of ten days to prepare an indictment against the suspect. Failure to issue an indictment within said period would



result in the provisional release of the suspect or in his transfer to the authorities of the State to which request was initially made. The Chamber notes that the Prosecutor complied with said decision, issuing an indictment dated 26 August 1998, which was confirmed by Judge Pillay on 29 August 1998. The same day the confirming Judge issued a warrant of arrest pursuant to Rule 55 of the Rules. This warrant of arrest is the legal basis for the detention of the Accused to date. Therefore, the Chamber holds that the current detention of the Accused did not violate the provisions of the Statute and the Rules.

With Regard to the Legality of the Search and Seizure

29. The Chamber notes, firstly, that the search and the seizure made at the time of arrest of the Accused were conducted pursuant to Rule 40(A)(ii) and (iii), which provides:

In case of urgency, the Prosecutor may request any State:

- (i) [...]
- (ii) To seize all physical evidence;
- (iii) To take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence. (emphasis added).

30. The Chamber further notes that the Prosecutor does not contest that no official record was made of the search and seizure conducted after the arrest of the Accused.
31. With regard to the inadmissibility alleged by the Defense of all the documents and materials seized which could be tendered as evidence at trial, pursuant to the provisions of Rule 95 of the Rules, the Trial Chamber considers that this issue may not be raised at this stage of the proceedings.

With Regard to the Restitution of Documents and Other Property Seized

32. The Chamber recalls that the Prosecution acknowledged that the seized documents and other materials still have not been inspected but agreed to return items that are not material to the case against the Accused. The Prosecutor also suggested that the seals be removed in the presence of the Defence, while noting certain difficulties in doing so in brief delay.
33. However, notwithstanding the difficulties alleged by the Prosecutor, the Chamber considers that the seized documents and other property continue to be the responsibility of the Prosecution and, accordingly, directs the Prosecutor to resolve said difficulties and to establish a date with the Defence for the removal of the seals, in the presence of the Defence, and to establish at this time an inventory to be included in an official record signed by the parties.
34. With regard to seized documents and property that the Prosecutor intends to retain for the purpose of investigation and prosecution, the Chamber, mindful of safeguarding the rights

of the Defence in all circumstances, reminds the Prosecution of its duty to disclose under Sub-Rule 66(B), which provides:

At the request of the defence, the Prosecutor shall, subject to Sub-Rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

35. In accordance with its decision in *The Prosecutor v. Nsabimana*, Case No. ICTR-97-29-A-I (16 February 2000), the Chamber holds in this regard that the Prosecutor should, insofar as possible, provide the Defence with true copies of the above-referenced documents and materials.

36. Lastly, the Chamber reminds the Prosecution of its duty to disclose exculpatory evidence, under Rule 68 of the Rules which provides:

The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

With Regard to the Statements by Jean Kambanda

37. The Chamber notes that the Prosecution has indicated that it has no intention of using Jean Kambanda's statements as evidence at trial. However, the Chamber reminds the Prosecutor that, should it wish to rely on such statements, it must comply with the provisions of Rule 66(A)(ii), subject to Sub-Rule 66(C) of the Rules.

With Regard to Disclosure of the Recordings of the Accused's Interrogations to the Defence

40. At the 2 June 2000 hearing, Defence Counsel acknowledged that the Prosecutor had disclosed a copy of the recordings of the interrogations of the Accused. The Chamber urges further consultation between the parties, and orders the Prosecutor to disclose to the Defence copies of the transcripts of said interrogations as soon as the Prosecution is in custody thereof.

FOR THE FOREGOING REASONS,

THE TRIBUNAL

FINDS that the arrest and detention of the Accused did not violate the provisions of the Statute and the Rules of the Tribunal,

REQUESTS the parties to establish a date, at the earliest possible time, to remove the seals in the presence of both parties and to prepare an inventory report to be signed by the parties,

DIRECTS the Prosecutor:

- (a) To return to the Defence, within sixty days of removal of the seals, all documents and property seized during the search conducted on 5 June 1998 the Prosecutor does not intend to use as evidence against the Accused or which he does not intend to retain for the purposes of investigation or prosecution;
- (b) To allow the Defence, subject to the provisions of Sub-Rule 66(C), to inspect, within sixty days of removal of the seals, all documents and property in the custody of or under the control of the Prosecutor which belong to or were obtained from the Accused;
- (c) To disclose to the Defence exculpatory evidence in the custody of the Prosecution;

Arusha, 7 September 2000

Judge Laity Kama
Presiding Judge

Judge William Sekule

Judge Pavel Dolenc

(Seal of the Tribunal)

