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UNITED NATIONS
NATIONS UNIES**Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda****BEFORE A BENCH OF THE APPEALS CHAMBER**

Before : Judge Fausto POCAR
Judge Lal Chand VOHRAH
Judge Rafael NIETO-NAVIA

Registrar : Mr Agwu U. OKALI

Decision of : 23 February 2001

Joseph NZIRORERA
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR 98-44-A

ICTR. 98-44-A

23 FEBRUARY 2001

(250/H - 246/H)

ICTR Appeals Chamber
Date: 23/February/2001
Action:
Copied To: All Judges, Parties, Judicial Archives (original)
ALOs, MD
<i>[Signature]</i>

DECISION

Counsel for Joseph Nzirorera:

Mr Andrew J. McCartan

Counsel for the Prosecutor :Mr Ken Fleming
Mr Don WebsterICTR
JUDICIAL ARCHIVES
2001 FEB 21 A 9:52

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THIS BENCH OF THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("the Bench" and "the Tribunal" respectively),

BEING SEIZED OF an appeal filed on 18 September 2000 ("the Appeal") by Joseph Nzirorera ("the Appellant") against the Decision of Trial Chamber II on the Defence Motion ("the Motion") Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, filed on 11 September 2000 ("the Impugned Decision");

NOTING that the Impugned Decision

- (a) found that the arrest and detention of the Accused did not violate the provisions of the Statute of the Tribunal ("the Statute") and the Rules of Procedure and Evidence ("the Rules");
- (b) requested the parties to establish a date, at the earliest possible time, to remove the seals placed on seized articles in the presence of both parties and to prepare an inventory report to be signed by the parties; and
- (c) directed the Prosecutor
 - (i) to return to the Defense, within sixty days of removal of the seals, all items seized during the 5 June 1998 search which the Prosecutor does not intend to use as evidence or retain for the purposes of investigation;
 - (ii) to allow the Defense, 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 Appellant; and
 - (iii) to disclose to the Defense exculpatory evidence in the custody of the Prosecution;

NOTING the "Response of the Prosecutor to Notice of Appeal" filed on 14 November 2000 ("Prosecution Response");

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NOTING the "Defence Reply to Prosecutor's Response in Appellant Proceedings" filed on 8 December 2000 ("Defense Reply"), within the time limit established by the Order issued by this Bench on 1 December 2000;

NOTING that in his first ground of appeal concerning illegal arrest, the Appellant alleges that

1. the Chamber did not define the word "urgency," contained in Rule 40 of the Rules, but only stated that such urgency was "implicitly recognized";
2. the Chamber made an error of law in finding that the Prosecutor had acted in accordance with Rule 40 of the Rules in arresting the Appellant, and the Prosecutor can only arrest an individual pursuant to Article 28 of the Statute;
3. the Chamber accepted without justification the Prosecutor's argument that the Appellant was arrested by Benin authorities, and did not provide any reasons for preferring the Prosecutor's version of the facts rather than the Defense version, according to which the Appellant was illegally arrested by the Prosecutor's agents;
4. as a result, the Chamber did not address the status of the Appellant between 5 June 1998 and 22 June 1998, and furthermore, it did not provide any explanation for its failure to either accept or reject the Defense contention that the Appellant was held by the Prosecutor;
5. the Chamber committed an error of law in not addressing the requirements of Rule 40 of the Rules, namely, that the only authority provided is to the State concerned or the Tribunal; and
6. there is an inconsistency in the decision of the Chamber concerning the period of extended detention, which demonstrates the lack of attention of the Chamber;

NOTING that in his second ground of appeal concerning illegal seizure, the Appellant alleges that

1. there is an inconsistency in the decision which implies in paragraph 29 that seizure was legally effected in terms of Rule 40 of the Rules, but also states in paragraph 32 that the question of the admissibility of the seized documents

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can be raised in terms of Rule 95, thereby giving rise to the inference that the Prosecutor may rely on paragraph 29 when the issue of admissibility arises;

2. there was no official record of the seized articles or the search process; anything therefore could be included as a seized article, impacting the fairness of the proceedings under Article 20(4)(a) of the Statute; and the articles were placed under seal by the Prosecutor without the accused being present; and
3. the Defense submissions regarding seizure were not addressed by the Chamber and their dismissal was not explained by the Chamber;

NOTING that Rule 72(D) of the Rules of Procedure and Evidence ("the Rules") provides that decisions on preliminary motions are without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal lies as of right;

CONSIDERING that the Appeals Chamber has held that a challenge to the legality of detention raises the issue of personal jurisdiction;¹

CONSIDERING that the Motion raises the issue of the legality of detention, and may be capable of satisfying in substance the requirements of Rule 72(D) of the Rules;

CONSIDERING however that the Motion was formally based on Rule 73;

CONSIDERING further that in the circumstances of this particular case it is for the full bench of the Appeals Chamber to decide whether a decision dismissing a motion brought under Rule 73, but in substance raising an issue under Rule 72, may be subject to appeal;

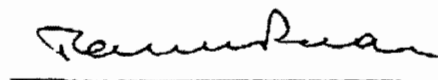
HEREBY refers the Appeal to the full bench of the Appeals Chamber.

¹ See *Barayagwiza v. Prosecutor*, Decision and Scheduling Order, Case No. ICTR-97-19-A, 5 Feb. 1999; *Kabili v. Prosecutor*, Arrêt: sur l'appel interlocutoire de la décision du 13 avril 2000 de la chambre de première instance III, Case No. ICTR-97-34-A, 13 Nov. 2000.

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Done in both French and English, the English text being authoritative.

[signed]



Fausto Pocar
Presiding Judge

Dated this 23rd day of February 2001

At The Hague,

Netherlands.

[Seal of the Tribunal]

