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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

ENGLISH
ORIGINAL: FRENCH

Before Judge: Andrezia Vaz

Registrar: Adama Dieng

Decision of:

2002 MAY 30 A 11:40

THE PROSECUTOR

v.

SIMEON NSHAMIHIGO

Case No. ICTR-2001-63-I

DECISION ON THE DEFENCE MOTION FOR THE RELEASE OF THE ACCUSED
Rule 40bis, 72 and 73 of the Rules

Office of the Prosecutor

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Translation certified by LCSS, ICTR

NSHA(D)01-007 (E)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 460
(hereinafter, "the Tribunal");

Sitting as Trial Chamber I, in the person of Judge Andrésia Vaz, designated by the President of the Tribunal pursuant to Rule 73(A) of the Rules of Procedure and Evidence ("the Rules") to consider and rule on the present Motion;

Considering the "Notice of Motion" for the Release of the Accused filed on 23 July 2001 by Nshamihigo's Defence ("the Motion"), and the Prosecutor's Response filed on 1 August 2001 ("the Response");

Considering the 21 May 2001 Order for Transfer and Provisional Detention of Nshamihigo on the basis of Rule 40bis of the Rules ("Order of 21 May 2001"):

Considering Nshamihigo's initial appearance on 29 June 2001;

Considering the Statute of the Tribunal ("the Statute") and the Rules, notably Rules 40bis and 72 and 73 thereof;

Hereby considers this day, the Motion based solely on briefs submitted by the parties, pursuant to Rule 73(A) of the Rules:

Defence Submissions

1. The Defence requests that the Order of 21 May 2001 be set aside as it amounts, in its opinion, to a violation of the Statute and the Rules and consequently that the Accused be set at liberty with immediate effect. The Defence submits that the Prosecutor has failed to substantiate the grounds for her application for the arrest, transfer and provisional detention of the suspect for the following reasons:

(a) The affidavit of Mr. Walpen, Chief of Investigations, Office of the Prosecutor, on which the Prosecutor relied, lacks probative value as it was not made before a Commissioner of Oaths or a Magistrate with powers to have such affidavits affirmed or sworn before him or her;

(b) In the absence of witness statements testifying to the facts therein contained, the affidavit on its own is not sufficient to warrant such an order;

(c) The facts alleged in the said affidavit should have been subjected to cross-examination.

2. The Defence also challenges the legality of the Accused's detention and again requests his immediate release, on the grounds that the Prosecutor had not sought an extension of the 30 day detention period as required under Sub-Rules 40bis (C) and (F) of the Rules. In its opinion, said time-limit had expired at the time of the Accused's initial appearance on 29 June 2001.

Prosecutor's Submission

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3. In response, the Prosecutor submits in the main that:

(a) The Rule 40bis application, being an *ex parte* process between the Prosecutor and the designated Judge, bars the Defence from challenging its legality;

(b) The Rule 40bis requirements which resulted in the Order of 21 May 2001 had been met. The Prosecutor submits that indeed, under Sub-Rules 40bis (A) and (B) of the Rules, only the production of a provisional charge and a summary of the material relied upon are required for such an order to be issued. Rule 40bis does not stipulate the form in which the information may be summarized for the judge. Mr. Walpen's affidavit was thus admissible in form and adequate in content to warrant the Order issued. The designated judge had sufficient material to exercise his powers of discretion to order the arrest, transfer and provisional detention of the suspect;

(c) Consideration of evidence in support of the charge is premature. at this juncture. It cannot be argued at this stage of the process;

(d) At the initial appearance, the Judge put to rest the issue of the Prosecutor's failure to comply with the 30-day time-limit under Sub-Rules 40bis (C) and (F) of the Rules, by recalling that the Indictment was confirmed within that time-limit.

After having deliberated

On the Defence objection to the Rule 40bis ex parte process and its right to seek remedy with respect to the unlawful detention of the Accused.

4. The Defence appears to object the fact that the judge's Order for the arrest, transfer and provisional detention of the Accused was grounded solely on the written and oral submissions made by the Prosecutor. It does not otherwise substantiate its objection. Now, Rule 40bis expressly provides for an *ex parte* process. In fact, it could be so because at the time the process is initiated at the Prosecutor's request, the individual to whom it applies, is not party to a process before the Tribunal and, at any rate, the decision as to whether or not he or she is a suspect is made *prima facie* by the designated judge.

5. Be that as it may, the process being *ex parte* does not prevent the individual concerned, once a suspect or an accused, as in the instant case, from subsequently challenging its legality as applied to him. Indeed, the Prosecutor is reminded that, "[a]lthough neither the Statute nor the Rules specifically address *writs of habeas corpus* as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules (...)" and "is a fundamental right (...) enshrined in international human rights norms, (...)." Appeals Chamber Decision in *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, "Decision" of 3 November 1999, para. 88).

6. Consequently, although, the Motion, which fails to mention the legal basis on which it is brought before the Chamber, is excluded under Rule 72(H) on the ground that the

objection based on lack of jurisdiction does not relate to the Accused's Indictment, it nonetheless is catered for in the category of Rule 73 motions which Parties may bring at any stage of the proceedings.

The alleged nullity of the Order of 21 May 2001

7. Rule 40*bis* (A) of the Rules states, "[I]n the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made (...) shall include a provisional charge and a summary of the material upon which the Prosecutor relies."

8. Rule 40*bis* (B)(ii), for its part, states, "The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met (...) [A]fter hearing the Prosecutor, [he/she] considers that there is 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 (...)".

9. In the instant, one notes that the Order of 21 May 2001 was not based solely on Mr. Walpen's affidavit, but also, as the Ordering Judge noted, after the Prosecutor had been heard. The Judge found that there was good cause shown for the Motion and that the provisional charge presented by the Prosecutor was sufficiently substantiated and accompanied by a summary of the materials contained in Mr. Walpen's affidavit, as well as from the *ex parte* hearing.

10. On the probative value of the affidavit, the Chamber notes, in light of the Prosecutor's submission, that Rule 40*bis* does not stipulate the form in which the information may be summarized. Mr. Walpen's affidavit was thus entirely admissible though it was not made before a Commissioner of Oaths with powers to have such affirmations done before him.

11. For the aforementioned reasons, the Chamber holds that the 21 May 2001 Order was consistent with the law in regard to Rule 40*bis* (B). The Motion on this point is accordingly rejected.

12. On the Defence objection to the facts the Prosecutor relied upon to justify the charge, the Chamber is of the opinion that this issue, which will be addressed at the trial on the merits, cannot be considered as being preliminary.

On the objection based on violation of the 30-day time-limit for under Rule 40*bis* (C), requiring that the suspect be indicted, unless the Prosecutor obtains a Rule 40*bis* order for the extension of the provisional detention for a period not exceeding 30 days.

13. On the illegality of the provisional detention of the suspect, the Chamber notes that this matter was raised at the initial appearance on 29 June 2001. After hearing the parties, the Presiding Judge held that *a priori*, there had been no violation of Sub-Rules 40*bis* (C) or (F) of the Rules (See transcript of the hearing of 29 June 2001, pp. 7 and 8 of the French version).

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14. Whether or not the Defence objection is sustained in light of *res judicata*, the Chamber holds the view, as the Judge states, that the Rule 40bis (C) time-limit was not violated in the instant. Indeed, the suspect was transferred to ICTR Detention Facility on 25 May 2001 and had his Indictment confirmed on 23 June 2001 and served on him the next day, 24 June 2001. He therefore, became an Accused within 30 days of his transfer to the Seat of the Tribunal as required by Rule 40bis (C).

15. The Chamber notes further that after the confirmation of Nshamihigo's Indictment and the concurrent issuance of a new Warrant of Arrest and Detention against him on 23 June 2001 on the strength of Article 18(2) the Statute and Rule 54, the application of Rule 40bis, including subparagraph (F) thereof, came to an end. Consequently the Defence Motion is rejected.

Disposition

For the foregoing reasons,

The Tribunal

Rejects the Defence Motion.

Arusha, 8 October 2001.

Andrésia Vaz *[signed]*

[Seal of the Tribunal]

