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Tribunal pénal international pour le Rwanda

685

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TRIAL CHAMBER I

Before Judge: Andrézia Vaz, designated pursuant to Rule 73(A) of the Rules of Procedure and Evidence

Registry: Adama Dieng

Date filed: 28 February 2002

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THE PROSECUTOR

v.

JEAN MPAMBARA

Case No. ICTR-2001-65-I

DECISION

**(DEFENCE MOTION FOR DISCLOSURE OF DOCUMENTS AND OBJECTIONS
REGARDING THE LEGALITY OF PROCEDURES)**

Rules 40, 40 bis, 53, 54, 66, 69, 70, 72, and 73 of the Rules of Procedure and Evidence

Counsel for the Defence:

Mario Spandre

Office of the Prosecutor:

Richard Karegyesa

Holo Makwaia

Andra Mobberley

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MPAM(C)02-009 (E)

The International Criminal Tribunal for Rwanda (the "Tribunal")

684

Sitting as Trial Chamber I, before Judge Andréia Vaz, designated pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules¹");

Being seized respectively of the motion titled "*Motions, Preliminary Motions and other Objection Pursuant to Rules 72 and 73*" filed by Counsel for Jean Mpambara on 12 October 2001 (the "Motion"), the *Prosecutor's Response* filed on 21 December 2001 (the "Response") and the *Defence Reply to the Prosecutor's Response*, upon leave being granted by the Trial Chamber and filed on 5 February 2002 (the "Reply");

Noting that in its Reply, the Defence submitted the following new requests for the disclosure *inter alia*, of:

- (i) Documents in the language the Accused understands;²
- (ii) "Detailed information on the manner in which the Prosecutor conducts her investigations, particularly on the manner... in which she relies on the Rwandan authorities to obtain statements...";³
- (iii) Information on the progress in the proceedings, other than the instant matter, involving "(witnesses) or potential witnesses for the Prosecution who have testified, are testifying or will be called to testify in other cases on the facts contained in the indictment of the Accused";⁴
- (iv) The written statements of the said witnesses;
- (v) The dates on which such statements were given.

Considering that such new requests are not allowed in those circumstances,

Rules accordingly that said requests, in the circumstances, are denied;

Considers all the other motions and objections by the Defence solely on Briefs filed by the Parties, pursuant to Rule 73(A).

SUBMISSIONS

1. The Defence motion addresses several issues: (i) the Prosecutor's disclosure obligations regarding; and (ii) objections regarding the legality of the proceedings instituted against the Accused (II).

1. As amended on 31 May 2001.

2. Item 1 of the Reply pp. 2 and 3 (of the French text).

3. Reply p. 16(i) (e) (of the French text).

4. Reply p. 16(i) (d) (of the French text).

683

I. The Prosecutor's disclosure obligations

2. Rules 66(A) and (B) apply in the instant case. Exceptions to the obligations are set out in Rules 66(C), 69 and 70.

A. Disclosure pursuant to Rule 66(A)(i) of the Rules⁵

3. The Defence submits that its right to disclosure of materials accompanying the indictment was violated in respect of "the Prosecutor's Explanatory Notes and" the witness statements.

1. Prosecutor's Explanatory Notes

4. The Defence argues that it was wrong and prejudicial to the Accused for the confirming judge to have ruled that, as internal working documents of the Office of the Prosecutor, the Explanatory Notes submitted to him by the Prosecutor were not subject to the disclosure requirements under Rule 70(A).⁶ In its opinion:

*"... from the moment materials or documents, ... were submitted to a Judge in ex parte proceedings arising from an application by the Prosecutor; which proceeding result in the Applicant's status changing from that of a suspect to that of an Accused, and whereas said Explanatory Notes ... were obviously intended to convince the Judge of the need to have the indictment confirmed, then said documents can no longer be characterized as internal working documents and for that reason not covered by Rule 66(A) (i)."*⁷

5. The Defence is of the view that this objection forms part of the preliminary motions earmarked under Rule 72 (B)(ii). It argues that, the supporting materials submitted for the confirmation of the indictment form an integral part of the indictment and failure to disclose said material amounts to a defect in the form of the indictment.

6. For its part, the Chamber, same as the Prosecutor, holds that supporting materials are not an integral part of the indictment. This opinion was indirectly underscored by Trial Chamber II of the International Criminal Tribunal for former Yugoslavia ("ICTY") in its decision on the *Brdjanin* case when it stated that "It is clear that so far as the Statute itself is concerned, it is only the indictment which needs to disclose a prima facie case" and "that the jurisdiction of a criminal court is founded upon, and invoked by, the indictment and the indictment alone" as opposed to the supporting material.⁸

7. Though one may agree with the Defence that ICTY decision cited above applied to a preliminary motion on the jurisdiction of the Tribunal rather than to defects in the form of the indictment as is the case in the instant matter, however, ICTY judges were unequivocal in

5. Rule 66(A) provides that: "The Prosecutor shall disclose to the Defence... within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought ...".

6. See ICTR, *The Prosecutor v. Jean Mpambara*, Case No. ICTR-2001-65-I, Judge Erik Mose, "Decision Confirming the Indictment" 23 July 2001, Order, p. 2.

7. Motion p. 6.

8. See ICTY, Trial Chamber, (hereinafter "TC" II, *The Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-PT "Decision on Motion to Dismiss Indictment", 5 October 1999, para. 12.

emphasizing the marked difference between supporting materials accompanying an indictment and the indictment in support of which they are submitted to the confirming judge. Moreover, the Chamber noted further that supporting materials are not meant to supplement the indictment which in itself should enable the Accused to be informed of the purport of the charges against him.

8. Non-disclosure of supporting materials of an indictment cannot therefore be equated to a defect in the form of the indictment. Consequently, Rule 72(B) (ii) cannot apply in the instant case.

9. Lastly, assuming the objection was considered in light of Rule 73 as requested in the alternative by the Defence, the Chamber observes that decisions rendered by a Trial Chamber or by a single judge should not have been referred to another Trial Chamber for ruling.⁹ The Trial Chamber shall not therefore consider this objection because it is without legal merit.

2. Witness statements submitted to the confirming judge

10. The Defence complains that the Prosecutor redacted witness statements submitted to the confirming judge before disclosing them. Further, that some information, mainly pertaining to the circumstances under which the witness statements were recorded, including the date on which such statements were taken, had also been rubbed out. The Defence seeks disclosure of the information and the unredacted statements.

11. For the reasons set out in paragraphs 6 to 8 *supra*, the Trial Chamber will consider this objection under Rule 73 rather than Rule 72(B)(ii).

12. The Chamber, same as the Defence in its Reply notes that witness statements were redacted by the Prosecutor without first obtaining a court order. The Prosecutor admits but explains that:

(i) First, an order had been sought in that regard in her *ex parte* application of 20 July 2001 seeking confirmation of the indictment;¹⁰

(ii) Second, her request had not been expressly denied and therefore was implicitly accepted by the confirming judge; and

(iii) Lastly, that she was bound to proceed the way she did in order to protect the witnesses.

13. The Chamber is not convinced. The Statute and the Rules suffer no equivocation when they state that non-disclosure measures cannot be applied without a court order,¹¹

⁹ See ICTR, TC II, *The Prosecutor v. Edouard Karemera*, Case No. ICTR-98-44-T, "Decision on the Defence Motion Pursuant to Rule 27 of the Rules of Procedure and Evidence, pertaining to, *inter alia*, Lack of Jurisdiction and Defects in the Form of the Indictment", 25 April 2001 para. 13 p. 6.

¹⁰ See *The Prosecutor v. Jean Mpambara*, Case No. ICTR-2001-65-I, "Brief in support of the Prosecutor's *ex parte* Application for Review and Confirmation of an Indictment and Related Orders" 20 July 2001, particularly the passage entitled "Application for Orders for Non-Disclosure, paras. 9 to 18.

which, as the Defence recalls, finds support in the Tribunal's case-law.¹² In that respect, the Prosecutor cannot even seek succour in a so-called "practice of the Tribunal"¹³ to justify the redaction. It was therefore wrong of the Prosecutor to redact witness statements submitted to the confirming judge before disclosing them to the Defence without first seeking a court order.

14. The Defence submits that documents, on the basis of which an indictment is confirmed, should not, in principle, be subject to non-disclosure, not even partially. This argument is not supported by any particular provision of the Statute or the Rules but ties in with what is highlighted in paragraph 4 of this Decision regarding the non-disclosure of the Explanatory Notes.

15. The Trial Chamber is of the opinion that the Rule 66(A)(i) materials may either not be disclosed or may be disclosed partially to the Defence, particularly in light of Rule 66 (C) providing that "*where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any reasons may be contrary to the public interest or affect the security interests of any State*" and Rule 69(A) so requiring in the case "*of a victim or witness who may be in danger or at risk*"

16. The fact still remains that, in view of the transgression of the rights of the Accused in the preparation of his defence exceptional measures such as these ought to be sought in advance, explained by the requesting party and ultimately ordered by the Chamber or the judge seized of the request.

17. In the alternative, to the earlier submissions just rejected by the Trial Chamber, the Prosecutor renewed her request pursuant to Rule 66(A)(i) for an order for non-disclosure of statements to the Defence based on Rule 53(C).¹⁴ The Trial Chamber, however, subscribes to the Defence argument that Rule 53(C) only allows orders for non-disclosure *to the public* and not to *the Accused and his Counsel*.

18. As the measures sought by the Prosecutor do not fall within the ambit of Rule 53(C), the Trial Chamber maintains that the Prosecutor must within 30 days, file a motion before the Chamber for the protection of victims and witnesses based on Rule 69 in view of her explanation that she had redacted the statements in order to protect the victims and witnesses.

19. In view of the fact that, in conformity with Article 19 of the Statute, it is the duty of the Trial Chamber not only to ensure full respect for the rights of the Accused but due regard for the protection of victims and witnesses, it shall, pending a ruling on the motion to be filed by the Prosecutor, allow her, on a provisional basis and on the strength of Rule 54, not to

11. See, for example, regarding witness protection, Article 19(1) of the Statute (Commencement and conduct of trial proceedings) which includes witness protection as one of the main duties of the Trial Chamber or, in more general terms, Rules 53, 66(C) and 69 which provide that the Trial Chamber may order non-disclosure.

12. See *The Prosecutor v. Obed Ruzindana* ICTR No. 95-I-T & 96-10-T, "Decision on the Motion Filed by the Prosecutor on the Protection of Victims and Witnesses" of 4 March 1997, Title B 2nd Whereas: "...the Prosecutor wrongfully submitted to the Defence versions in which identifying information on victims and witnesses were redacted, even if, had the Prosecutor first obtained an order to that effect, she would have been legally entitled to do so. ..."

13. See Prosecutor's Response para. 30

14. See Prosecutor's Response para. 31.

disclose redacted information which, in her opinion, might reveal the identity of the witnesses concerned.

20. Moreover, since the Defence affirms that some other information, such as the circumstances under which statements were recorded and the dates on which they were taken, had been redacted; which affirmation the Prosecutor has not reacted to, the Trial Chamber urges the Prosecutor to provide an explanation in light of the Statute and the Rules, within 30 days, for it to decide on whether there is need to issue an order thereon.

B. Disclosure pursuant to Rule 66(A) (ii): “list of witnesses who testified in other cases pending before the Tribunal or who the Prosecutor intends to call to testify in other cases before the Tribunal”

21. The Chamber holds that under Rule 66(A)(ii) which provides that “*the Prosecutor shall disclose to the Defence...no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify*”, the Prosecutor is neither bound to inform the Defence that she intends to call, some of the witnesses whose statements have been disclosed to the Defence in other trials nor to provide the list of their pseudonyms. She is only required under this provision, to disclose, all the statements made by witnesses, whom she has decided to call to testify at the trial of the Accused and which are under her custody and control as and when they are obtained, including testimonies given at other trials.

22. Nevertheless, the Chamber wishes to recall that once the Prosecutor decides to call some witnesses to testify, it goes without saying that she is bound, under Rule 66(A)(ii), to provide the Defence with all their statements in her custody or control regardless of whether such statements were obtained by her or from other sources.

23. It also goes without saying that this requirement applies not only to all the prior statements obtained by the Prosecutor but also to testimonies before the Tribunal in other proceedings.¹⁵ The Defence is entitled to said statements under Rule (66)(A)(ii). The Defence is not required to prove that they are material to its preparation of the trial as is the case for other items listed in Rule 66(B).

24. Lastly, it is but obvious that, for the Defence to have a better understanding of the Prosecution’s case and to prepare its case effectively and in good time, the Prosecutor should not wait for the 60th day before the commencement of trial to disclose the statements of witnesses whom she intends to call¹⁶. She should on the contrary, endeavour to disclose the

15. On this principle, See ICTY, TCI, *The Prosecutor v. Zoran Kupreskic and Others*, Case No. IT-95-16-PT “Decision on the Prosecutor’s Request to Release Testimony Pursuant to Rule 66 of the Rules of Procedure and Evidence given in closed session under Rule 79 of the Rules.” 29 July 1998. Fourth Preambular para. “*it cannot be contested that the transcript of the testimony of a witness constitutes a statement within the meaning of Sub-rule 66 (A)(ii)*” and at ICTR, TC II, *The Prosecutor v. Pauline Nyiramasuhuko and others*, Case No. ICTR-97-21-T, “Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor’s Witnesses Detained in Rwanda . and all other Documents or Information Pertaining to the Judicial Proceedings in their Respect”, 18 September 2001 paras. 6 to 9.

16. See, ICTR, TC II, *The Prosecutor v. Bagambiki, Imanishimwe and Munyazaki*, Case No. ICTR-97-36-I “Decision on the Defence Motion for Disclosure in respect of Samuel Imanishimwe,” 21 October 1998: “*As a general principle, the Prosecutor should not necessarily wait for the arrival of the 60th day before the commencement of trial, to fulfill its disclosure obligation.*” Still on the same issue. see. TC II *The Prosecutor v. Eliézer Niyitegeka*, “Decision on the Defence Motion for Disclosure of Evidence” 4 February 2000, para. 18. On the

said statements to the Defence “as far in advance of the trial as is possible (...), even if this means that statements are disclosed sequentially and that statements are disclosed of witnesses who eventually are not called to testify in the matter.”¹⁷

3. Disclosure pursuant to Rule 66 (B) of the Rules: documents about the 6 April 1994 attack

25. The Defence requested, “on the strength of Rules 73 and 66(B), and for the purposes of a fair and expeditious trial (...), the disclosure of the United Nations internal memorandum prepared by Michael Hourigan and dated 1 August 1997 on the circumstances of the 6 April 1994 attack on the plane carrying the Presidents of Rwanda and Burundi among others, (“the Hourigan Report”); and (...) that the Trial Chamber order the Prosecutor to allow the Defence to inspect all documents in her possession pertaining to the matter.”¹⁸

26. Said request, the Defence submits, arises from the fact that Mpambara’s indictment refers to the attack which it describes as “widely acknowledged”¹⁹ as the element that triggered the massacres against the Tutsi population in Rwanda in 1994 though the indictment also talks about a planned genocide. It is therefore vital, in the opinion of the Defence that it be allowed access to the document and to other materials containing information about the attack while emphasizing the fact that “ascertaining the identity of the perpetrators of this attack is important for the purpose of apportioning responsibility and clarifying the roles played by the protagonists in this tragedy”.²⁰

27. The Prosecutor submits, in her response, that she was not in possession of the Hourigan report and that, at any rate, the document is not under her control since the President of the Tribunal ordered that it be placed under seal. That having been stated, the Prosecutor does not object to the Defence’s request provided it can establish the materiality of such request to the preparation of the Accused’s defence. In that regard, the Prosecutor wishes to reiterate that the Accused is not charged with the killing of President Habyarimana but with genocide, the factual allegations of which are contained in his indictment.

28. The Chamber, same as the Defence, is amazed at the Prosecutor’s submission that she was not in possession of the Hourigan report. She did, however, have access to it initially.²¹

Prosecutor’s obligation to disclose witness statements pursuant to Rule 66 (A)(ii) and its features, See ICTR, TC II, *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramashuhuko*, Case No. ICTR-97-21-T, “Decision on Defence Motion for Disclosure of Evidence” 1 November 2000, paras. 39 to 40.

17. ICTY, TC II, *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. ICTR IT-95-14/2 “Order on Motion to Compel Compliance by the Prosecutor with Rules 66(A) and 68”, 26 February 1999, [Emphasis added].

18. Motion p. 2 para. 4.

19. Motion p. 13.

20. *Idem*.

21. The First Decision rendered by Trial Chamber I ordering the disclosure of the Hourigan Report to a Defence team also instructed the Registrar “to make available a copy of the memorandum to the Prosecution, if it so desires” (*The Prosecutor v. Ignace Bagilishema* Case No. ICTR-95-1A-T “Decision on the request of the Defence for an order for service of a United Nations Memorandum prepared by Michael Hourigan, former ICTR investigator. “ 8 June 2000- hereinafter “Bagilishema Decision of 8 June 2000”) Moreover, Counsel for Ignace Bagilishema subsequently had this document admitted as evidence (id. “Judgment” 7 June 2001, para. 17). The Prosecutor therefore had access to this report in that case.

Then, each of the Trial Chambers either instructed the Registry to make the report available to the Prosecutor or as in several other cases gave the report directly to the Prosecutor.²² What is more, the Prosecution itself did acknowledge at the "Media Trial"²³ that it had obtained the document. It is therefore, still deemed to be in her possession so much so that Rule 66(B) should apply.

29. All the same has the Defence succeeded in establishing the materiality of this document to the preparation of the Accused's defence to warrant a disclosure order under Rule 66(B)?

30. Jean Mpambara is charged with genocide for acts he allegedly committed between 1 January and 16 April 1994 in Kibungo *préfecture* in Eastern Rwanda; *inter alia*, for preparing and participating in a campaign of extermination against the Tutsi in Rukara *commune* of which he was *bourgmestre*.²⁴ Contrary to what the Prosecutor asserts, the strategy of the Defence is not for the Accused to be charged with any involvement whatsoever in the attack.

31. The Defence has indeed pointed out that the indictment makes mention of the events which immediately preceded the outbreak of the 1994 massacres all over the country and refers to the specific crimes with which Jean Mpambara stands charged in Rukara *commune* and Kibungo *préfecture*. According to the Prosecutor, reference to the 6 April attack among other events, even for background or historical purposes, does demonstrate that the charges against the Accused also form part of a larger picture, namely that of the 1994 massacres in Rwanda and the events that preceded them including the 6 April 1994 attack on the President's plane. In that regard, the Trial Chamber holds that the Hourigan Report could turn out to be useful to the Defence.

32. Furthermore, the Appeals Chamber ordered the disclosure of the Hourigan Report to the Defence Counsel for Clément Kayishema after having stated that:

- (i) The Prosecutor had received the document in other cases;
- (ii) "Some accused charged with the same crime were in possession of the said Report following decisions rendered by Trial Chambers;"²⁵

22. See TC III, *The Prosecutor v. Gratien Kabiligi and Alois Ntabakuze*, Case No. ICTR-97-34-I, "Decision on Kabiligi's Supplementary Motion for Investigation and Disclosure of Evidence", 8 June 2000, Order No. 18 (b); TC III, *The Prosecutor v. Gratien Kabiligi and Alois Ntabakuze*, Case No. ICTR-97-34-I "Decision on Ntabakuze's Supplementary Motion for Investigation and Disclosure of Evidence." 8 June 2000, Order No. 25(b); ICTR TC III (Judge Yakov Ostrovsky), *The Prosecutor v. André Ntagerura*, Case No. ICTR-96-10A-I "Decision on the Defence Motion for Disclosure of Evidence (...)" 26 June 2000, para. 13, Second Order; TC I, *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, "Decision on the Request of the Defence for an Order for Service of a United Nations Memorandum Prepared by Michael Hourigan, Former ICTR Investigator" 7 July 2000; TC II, *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Defence Motion for Disclosure of Evidence" 8 September 2000 para. 11 and the Order.

23. See *The Prosecutor v. Jean Bosco Barayagwiza et al* (Case No. ICTR-97-19-I), "... Prosecutor's Response to the Defence Motion requesting the UN Investigator M. Hourigan Report (...)" 27 July 2001. para. 8(i)...the Prosecution having already received [the Hourigan report] pursuant [to] the decision of the Trial Chamber dated 6 July 2000... (Emphasis added).

24. See, *The Prosecutor v. Jean Mpambara*, Case No. ICTR-2001-65-I, Indictment, 23 July 2001 (original version: English) and 7 August 2001 (French Translation).

25. Appeals Chamber of the Tribunal, *Clément Kayishema v. The Prosecutor*, Case No. ICTR-95-1-AR72, "Decision (Motion for disclosure of the United Nations Memorandum on the 1994 Rwandan Genocide prepared by Michael Hourigan)", 27 July 2000. p. 3. The judges of

677

(iii) "Equal access must be given to all parties."²⁶

33. On the above grounds and for the reasons set out in paragraph 31, the Trial Chamber agrees with the prayer that the Prosecutor, be ordered pursuant to Rule 66(B), to disclose the Hourigan Report to Counsel for Mpambara solely for the purpose of the instant case; said document is to remain confidential. Further, parties seeking to use the report at trial would have to convince the Trial Chamber of its materiality to their case.

34. The Prosecutor also denies having in her custody or control, any other documents pertaining to the 6 April 1994 attack.

35. In its Reply, the Defence explains why it was of the view that other documents pertaining to the attack against the President's plane could be in the Prosecutor's custody: indeed, in her written and oral arguments in response to the Defence Motion for the Disclosure of the Hourigan Report in the (Bagilishema) case, the Prosecutor had admitted that she had authorized a French magistrate to conduct a *commission rogatoire* and was "awaiting the outcome of that investigation to determine the requirements of any follow-up action that might be needed by her office."²⁷ The Defence further indicates that on that same occasion, the Prosecutor had declared that "there [was] already an investigation."²⁸

36. The Trial Chamber is of the opinion that the Defence should have specified, in its first motion, why it felt that documents pertaining to the 6 April 1994 attack other than the Hourigan Report could be in the Prosecutor's custody. In like manner, it ought to have indicated what particular document or type of document it was being referred to so that the Prosecutor's response to that first motion could be more precise. Be that as it may, the Trial Chamber notes that in her response, the Prosecutor affirms that she is not in possession of any other document pertaining to the 6 April attack and accordingly holds that the arguments advanced by the Defence in its Reply have not provided sufficient cause to doubt the Prosecutor's assertions.

II. Alleged violation of Rules 40 and 40 bis

37. The Defence submits that the rights of the Accused were violated in several ways since his transfer to the Tribunal Headquarters. Contrary to what the Prosecutor affirms in her Response, it does not appear to the Chamber that in so alleging the Defence was relying on Rule 72 (preliminary motions) but rather on Rule 73 (motions filed by parties at any stage in the trial, on any subject).

the Appeals Chamber referred to three decisions rendered by Trial Chamber III in the cases of *Kabiligi*, *Ntabakuze*, 8 June 2000 and in that of *Ntagerura*, 26 June 2000. See footnote 22 above.

26. *Ibid.*

27. See Bagilishema Decision of 8 June 2000, para. 4.

28. *Id.* para. 11 (exerpts from the Transcript of the hearing on the motion dated 30 May 2000).

(A) The allegation on the illegal detention of the Accused

38. Jean Mpambara was arrested by the Tanzanian authorities on 20 June 2001, under Rule 40 urgency measures, at the request of the Prosecutor.²⁹

39. The Defence argues that the Prosecutor failed to submit Jean Mpambara's indictment for confirmation within 20 days of his transfer whereas he was still a suspect; which failure was in breach of Subparagraph 40(D) of the Rules.

40. The Prosecutor responded that after the arrest warrant and transfer order were issued by Judge Lloyd Williams on 21 June 2001,³⁰ Rule 40 *bis* of the Rules became applicable to Jean Mpambara and that after his transfer on 23 June 2001, his indictment was indeed confirmed on 23 July, in other words, within the time frame prescribed by the Rule 40 *bis* (C) (i.e. not exceeding 30 days from the day after the transfer of the suspect to the Tribunal's Detention Facility).

41. In its Reply, the Defence states that it was satisfied with the Prosecutor's explanation and was thus "withdrawing its request for the release, at least, at this stage of the proceedings".³¹ The Trial Chamber took due note.

B. Other Objections

It does not appear to the Chamber that the Defence has not withdrawn the other objections raised in its motion regarding the legality of the proceedings viz:

(i) "No hearing was held after the Applicant's transfer ...to Arusha on 21 June 2001 (sic) and the hearing of 23 July 2001 for the review and subsequent confirmation of the indictment" contrary to Rule 40 *bis* (J);³²

(ii) "That it does not appear from the record of the proceedings prior to the order of 23 July 2001 for the Arrest and for the Transfer and Provisional Detention [of the Accused] that he was notified of the statement regarding his rights as set out in Rules 42 or 43, to the Applicant before that date."³³

43. The Prosecutor has not reacted to these allegations.

44. A brief perusal of the Accused's file at the Registry shows that the Rule 40 *bis* (J) hearing took place six days after the transfer of the Accused to the Tribunal, that is, on 29

29. Rule 40 of the Rules provides that "In case of urgency, the Prosecutor may request any State [...] to arrest a suspect and place him in custody".

30. ICTR, Judge Lloyds Williams, *The Prosecutor v. Jean Mpambara*, Case No. 2001-DP "Order for Transfer and Provisional Detention Under Rule 40 bis of the Rules of Procedure and Evidence" 21 June 2001.

31. Reply p. 7 point 3.

32. Motion, p. 8.

33. *Ibid.*

June 2001.³⁴ Consequently, the Trial Chamber is of the opinion that this first objection by the Defence has to be dismissed.

45. At the hearing, Judge Pavel Dolenc ensured that the rights of Jean Mpambara, who was assisted by Mr. Chadha, the Duty Counsel, were respected. In particular, Judge Dolenc inquired from the Accused if he had indeed received a copy of the Prosecutor's Motion for an Arrest Warrant to be issued, a copy of the arrest warrant issued by Judge Lloyd Williams on 21 June 2001 and a copy of the statement of his rights as a suspect under the Statute and the Rules. Jean Mpambara responded in the affirmative.³⁵ The Chamber consequently dismissed the latter objection by the Defence.

DISPOSITION

For these reasons

The Tribunal

- I. **Acknowledges** the right of the Defence to withdraw in the circumstances its request for the release of the Accused;
- II. **Orders** the Prosecutor to file in conformity with Rule 54 and within 30 days from the date of this decision, a motion for the protection of victims and witnesses based on Rule 69 of the Rules, which motion will include a request for the non-disclosure of the items mentioned in the paragraphs above;
- III. **Authorizes** the Prosecutor, pursuant to Rule 54 and on a provisional basis, not to disclose information which in her opinion might reveal the identity of witnesses, until the Trial Chamber rules on the motion in Order No. II above;
- IV. **Orders** the Prosecutor, in conformity with Rule 54 and within 30 days from the date of this decision, to seek leave of the Trial Chamber to issue an order for the non-disclosure of information on the circumstances under which the said witness statements were recorded and to provide support for such a request from the provisions of the Statute and the Rules.
- V. **Authorizes** the Prosecutor, pursuant to Rules 54 of the Rules and on a provisional basis, not to disclose information about the circumstances under which the witness statements were taken until a ruling is delivered on the motion in Order No. IV.
- VI. **Orders** the Prosecutor to disclose to the Defence, a copy of the Report prepared by M. Hourigan and dated 1 August 1997 in conformity with Rule 66(B) of the Rules, exclusively for use at this trial.

³⁴ See the transcript of the hearing on the implementation of Rule 40 *bis* (f) of the Rules, dated 29 June 2001.

³⁵ *Ibid.*, pp. 5 and 6 of the English version.

V11. Denies all other issues raised in the Motion.

Arusha, 28 February 2002

Judge Andréia Vaz

(Seal of the Tribunal)


