



ICTR-01-62-I  
20-6-2002  
(1854-1848)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

1854  
Musamp

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding  
Judge Winston C. Matanzima Maqutu  
Judge Arlette Ramarason

Registrar: Adama Dieng

Date: 20 June 2002

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The PROSECUTOR

v.

Samuel MUSABYIMANA

Case No. ICTR-2001-62-T

**DECISION ON MUSABYIMANA'S MOTION ON THE VIOLATION OF RULE 55  
AND INTERNATIONAL LAW AT THE TIME OF HIS ARREST AND TRANSFER**

**The Office of the Prosecutor:**

Silvana Arbia  
Jonathan Moses  
Faria Rekkas

**Defence Counsel for the Accused:**

Gerardus Knoops

to MS

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the "Tribunal"),

**SITTING** as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Winston C. Matanzima Maqutu and Judge Arlette Ramarosan (the "Chamber");

**BEING SEIZED** of;

- (i) the Defence's "Preliminary Motion on the Violation of Rule 55 and International Law at the Time of Arrest and Transfer," filed on 5 October 2001 (the "Motion"); and
- (ii) the "Response by the Prosecutor to the Motion on the Violation of Rule 55 and International Law at the Time of Arrest and Transfer," filed on 9 November 2001 (the "Prosecutor's Response"); and
- (iii) the "Additional Response by the Prosecutor to the Motion on the Violation of Rule 55 and International Law at the Time of Arrest and Transfer," to which is attached; a Confidential Report of 25 September 2001 to the Prosecutor from the Director of the Criminal Investigations Department in the Office of the President of Kenya regarding the execution of the warrant of arrest of the Accused, filed on 19 November 2001 (the "Additional Response of the Prosecutor"); and
- (iv) the "Reply to Prosecutor's Response to (Preliminary) Motion on the Violation of Rule 55 and International Law at the Time of Arrest and Transfer," of 31 January 2002 (the "Defense Reply to the Prosecutor's Response");

**CONSIDERING** the Indictment against Samuel Musabyimana (the "Accused") of 21 February 2001 confirmed by Judge Asoka de Z. Gunawardana on 13 March 2001 (the "Indictment");

**CONSIDERING FURTHER** the "Warrant of Arrest and Order for Detention" against the Accused issued by Judge Asoka de Z. Gunawardana on 13 March 2001 (the "Order of Arrest and Transfer of 13 March 2001");

**CONSIDERING** the provisions of the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rule 55;

**NOW DECIDES** the Motion;

**SUBMISSIONS OF THE PARTIES**

*Submissions of the Defence*

1. The Defence brings the Motion pursuant to Rule 72 and/ or 73 of the Rules for a declaration that the arrest and transfer of the Accused was null and void or, alternatively, that Rule 55 of the Rules was violated at the time of the arrest of the Accused.
2. The Accused was arrested on 26 April 2001 in Nairobi, Kenya, by the Kenyan authorities pursuant to the Order of Arrest and Transfer of the Accused of 13 March 2001. The Defence submits that at the time of the Accused's arrest, the Accused was neither served with the above-mentioned order nor was the statement of his rights read to him, as provided under Rule 55(A) of the Rules. The Defense relies on the "Defence's Extremely Urgent

Request to Quash the Arrest, Search, Deportation and Detention of Bishop Samuel Musabyimana as Unlawful and Null. Urgent Motion for the Release of the Applicant,” filed before the High Court of Kenya by the Kenyan lawyer who represented the Accused in Kenya, Mr. Agina. According to the Defence, this Urgent Motion before the High Court of Kenya, which is attached to the present Motion, serves to confirm the events that occurred during the arrest of the Accused on 26 April 2001.

3. The Defence argues that the above-mentioned acts constitute a violation of Rule 55(A) and (B) of the Rules, as well as Articles 9 and 14 of the United Nations International Covenant on Civil and Political Rights (the “ICCPR”) and Article 5 and 6 of the European Convention on Human Rights (the “ECHR”).

4. In support of its arguments, the Defence refers to the Appeals Chamber Decision of 3 November 1999 in *Barayagwiza v. Prosecutor*, in which the Chamber deduced that the Accused had a right to be promptly informed of the charges lodged by the Prosecutor against him during the first period of detention.

5. The Defence finds further support in case law from the ECHR to argue that the Accused should have been informed of the reasons for his arrest and of any charges against him at the time of his arrest or within 24 hours following his arrest.<sup>1</sup> However, the Defence acknowledges that the Accused, who was arrested on 26 April 2001, did challenge the legitimacy of his arrest during his initial appearance on 2 May 2001.

6. The Defence also submits that Article 9(4) of the ICCPR and Article 5(4) of the ECHR guarantee the right of the Accused to file a writ of *habeas corpus* before domestic courts. The Defence argues that, by transferring the Accused to the Seat of the Tribunal on 26 April 2001, without granting his right to the *habeas corpus* application before the High Court of Kenya decided upon, the Accused rights under the ICCPR and ECHR Statutes, have been violated.

7. The Defence thus prays that the Tribunal:

- (i) Declare the arrest and transfer of the Accused on 26 April 2001 null and void;
- (ii) Order the release of the Accused immediately and unconditionally from the Tribunal’s Detention Facilities (the “UNDF”); or
- (iii) Order the provisional release of the Accused from the UNDF under Rule 65; or, alternatively;
- (iv) Make such orders or grant such remedy as the Tribunal may deem fit in the circumstances.

#### *Submissions of the Prosecutor*

8. The Prosecutor submits that a member from the Investigation Section of the Tribunal was present at the time of the arrest and transfer of the Accused on 26 April 2001. The Prosecutor argues that, at the time of his arrest, the Accused was made aware of the reason for his arrest and his rights were read to him. However, the Accused was uncooperative and refused to sign any acknowledgement of the matters that were presented to him. The Prosecutor’s Additional Response to the Motion supports this submission.

<sup>1</sup> See in particular the case of *Foti v. Italy*, ECHR of 10 December 1982, Series A-56; *X v. Denmark*, no. 673074, 1 digest 457 (1975); *Delcourt v. Belgium*, No. 2689/65, 10 Yearbook on the ECHR (1967) 238, at 252 and 272.

9. Regarding the service of the warrant of arrest and informing the Accused of his rights, the Prosecutor argues that this does not need to be done at the precise time of the Accused arrest. The Prosecutor recalls the Order of Arrest and Transfer of the Accused of 13 March 2001, which states that these matters can be attended to at the earliest time practicable.

10. Furthermore, the Prosecutor recalls that both the Appeal Chamber Decision of 31 March 2000 in *Barayagwiza* as well as the Trial Chamber's "Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment" of 1 December 1997 in the case of *Prosecutor v. Ntagerura*, are consistent with the provisions of the ICCPR and the ECHR in as much as the remedy offered to victims of wrongful arrest has been compensation in the case of an acquittal, or reduction of the length of sentence in the case of a conviction.

11. The Prosecutor, citing the Appeals Chamber Decision in *Semanza* of 1 June 2000 submits that the Tribunal is able to hear any *habeas corpus* application filed on behalf of the Accused. The Prosecutor further argues that the Accused has not been deprived of his rights to bring a writ of *habeas corpus* before the Tribunal although no such writ has been filed before the Tribunal by the Accused.

12. Accordingly, the Prosecutor prays for the dismissal of the Motion, or, in the alternative, adjournment until such time as the Trial Chamber is able to determine whether there has been a violation of the Accused's rights.

## HAVING DELIBERATED

### *The Legal Basis of the Motion*

13. The Chamber notes that the Defence has filed the Motion pursuant to Rule 72 and/or 73 of the Rules. Under Rule 72 of the Rules, Preliminary Motions are limited to: "(i) objections based on lack of jurisdiction; (ii) objections based on defects in the form of the indictment; (iii) applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82(B); and (iv) objections based on the denial of request for assignment of counsel." The Chamber notes that the instant Motion does fall under any of the aforementioned four categories outlined under Rule 72 of the Rules. It is therefore not proper to bring the Motion pursuant to said Rule.

14. Nevertheless, the Chamber notes that the Defense also brings the Motion alternatively pursuant to Rule 73 of the Rules, which allows either party the right to apply to a Trial Chamber for an appropriate ruling or relief after the initial appearance of the accused. The Chamber finds that the Motion may properly be considered under Rule 73 of the Rules. Accordingly, the Chamber shall decide the Motion on the basis of the written briefs of the Parties, pursuant to sub-paragraph (A) thereof. Indeed, Facsimile Transmission issued by the Tribunal's Registry to the Parties on 22 January 2002 the Chamber was formerly scheduled to consider the Motion pursuant to Rule 73(A) of the Rules.

### *Right to Be Promptly Informed*

15. The Chamber notes that the Accused was arrested under Rule 55 of the Rules. Sub-paragraph (B), (C) and (D) of this Rule provide:

#### **Rule 55: Execution of Arrest Warrant**

- (A) [...]
- (B) The Registrar shall transmit to the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, three sets of certified copies of:
  - (i) The warrant of arrest of the accused and an order for his surrender to the Tribunal;
  - (ii) The confirmed indictment;
  - (iii) A statement of the rights of the accused; and if necessary a translation thereof in a language understood by the accused.
- (C) The Registrar shall instruct the said authorities to:
  - (i) Cause the arrest of the accused and his transfer to the Tribunal;
  - (ii) Serve a set of the aforementioned documents upon the accused;
  - (iii) Cause the documents to be read to the Accused in a language understood by him and to caution him as to his rights in the that language; and
  - (iv) Return one set of the documents together with proof of service to the Tribunal.
- (D) When an arrest warrant issued by the Tribunal is executed, a member of the Prosecutor's Office may be present as from the time of arrest.

16. In regard to Rule 55(D) of the Rules, the Chamber recalls the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") in the "Decision on the Motion for Release by the Accused," of 22 October 1997 in the case of *Slavko Dosmanovi*. In this Decision it was held, at para. 51 that when a member of the Prosecutor's Office is present during the arrest of the accused, that member has the authority to inform the accused of his rights and of the charges against him. The Chamber agrees with the ICTY that an accused may be informed of the charges against him by either national authorities who execute the arrest warrant or a member of the Prosecutor's Office who is present during the arrest.

17. In the instant case, the Chamber notes the Defense argument that the Accused should have been informed of the reasons for his arrest and of any charges against him at the moment of his arrest or within 24 hours following his arrest. The Defense submits that the Order for Arrest and Transfer of the Accused of 13 March 2001 was not served on the Accused at the time of his arrest. The Chamber also notes the Defense reference to international human rights jurisprudence, in particular the ICCPR and the ECHR.

18. In response to the Defense argument, the Prosecutor maintains that in accordance with the Order of Arrest and Transfer of the Accused of 13 March 2001 the charges against the Accused need not be communicated at the precise moment of the Accused's arrest but at the earliest time practicable.

19. On this issue, the Chamber recalls the above-mentioned Order of 13 March 2001 in which Judge Asoka de Z. Gunawardana requested, "[t]he Government of Kenya to, *inter alia*, serve on the Accused, at the time of arrest, or as soon as is practicable immediately following arrest in a language he understands [...] a certified copy of this warrant of arrest, accompanied by a copy of the indictment certified in accordance with Rule 47(g) and statement of the rights of the accused."

20. The Chamber further notes that according to the texts and jurisprudence of the United Nations Human Rights Committee and the ECHR, Article 9(2) of the ICCPR has been construed by scholars to be that "[i]nitial information must be provided at the time of arrest

[...] this may usually be limited to a general description of the reasons for arrest.”<sup>2</sup> In fact, a Motion brought by Liberia before the Third Committee of the General Assembly to the effect that a warrant is essential was defeated by a clear majority of the members.<sup>3</sup> Indeed, the ECHR delivered a similar opinion that “[w]hile this information must be conveyed promptly, it need not to be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.”<sup>4</sup>

21. Consequently, the Chamber notes that under the Order of Arrest and Transfer of the Accused of 13 March 2001, the Accused could have been served with the arrest warrant and indictment at the time of arrest, or as soon as is practicable immediately following arrest. Similarly, the Chamber notes that the texts and jurisprudence of the ICCPR and ECHR are to the effect that an accused, at the time of arrest, can be generally informed of the reasons for his arrest. Furthermore, said jurisprudence is to the effect that service of the arrest warrant and indictment is one way of informing the accused of the charges against him although such service is not essential at the precise moment of the arrest of an accused. The Chamber thus concludes that the Accused must be given sufficient information about the legal basis for his arrest and the charges against him at the time of arrest, or as soon as is practicable immediately following arrest. (emphasis ours)

22. In the instant case, the Chamber observes that a member of the Investigation Section of the Tribunal was present at the time of arrest. According to the Prosecutor’s submission, the Accused was made aware of the reasons for his arrest as corroborated by the Confidential Report from the Director of Criminal Investigations Department in the Office of the President of Kenya in the Additional Response of the Prosecutor. The said report on the execution of the warrant of arrest states that: “[a]fter his (the Accused) arrest, he was accorded opportunity to read all the documents, which he did. When he was requested to sign the said documents after reading them, he refused to do so.” In this connection, the Chamber notes endorsements of 26 April 2001 by the Kenyan arresting officer on the Indictment, the Confirmation of the Indictment, the Order for Arrest and Transfer of 13 March 2001, the rights of the accused under Article 20 of the Statute, and the rights of suspects under Rule 42 of the Rules in French and English that, “[d]ocument read by suspect but he refused to sign.” Under these circumstances, the Chamber finds that responsibility for the Accused’s actions on the day of his arrest cannot be shifted to Kenyan national authorities, who executed the arrest, or to the Prosecution, and that the Accused’s refusal to co-operate with the arresting officers cannot be construed as a breach of his right to be informed promptly of the charges against him.

23. The Chamber thus finds that the execution of the arrest and transfer was made in accordance with the orders and practice of the Tribunal and the provisions of the Statute and Rule 55 of the Rules. Accordingly, the Chamber denies the Defence Motion to declare null and void the arrest, transfer and detention of the Accused.

<sup>2</sup> See Manfred Nowak, “UN Covenant on Civil and Political Rights,” ICCPR Commentary, 1993, pg. 175

<sup>3</sup> See Manfred Nowak *supra* pg. 174

<sup>4</sup> See *Fox, Campbell and Hartley v. United Kingdom*, Judgement of 30 August 1990, Series A no.182, para. 40

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*Habeas Corpus*

24. The Chamber notes that the remedy of *habeas corpus* is a fundamental right enshrined in international human rights norms and the Tribunal's jurisprudence, in particular the Appeals Chamber Decision of 3 November 1999 in *Barayagwiza v. Prosecutor*, at para. 88. However, the Defence has not provided sufficient information about the *habeas corpus* Motion it filed on behalf of the Accused before the High Court of Kenya prior to the Accused's transfer to the UNDF. The allegation raised by the Defence regarding violation of the Kenyan Constitution falls outside the Chamber's jurisdiction. The mandate of this Tribunal is to prosecute persons responsible for serious violations of international humanitarian law pursuant to the Statute.

25. Nevertheless, the Chamber notes that it has the authority to hear a Motion for *habeas corpus* as was the ruling of the ICTY Trial Chamber in the "Decision on Petition for A Writ of Habeas Corpus on Behalf of Radoslav Brdanin" of 8 December 1999 in *Prosecutor v. Brdanin*, states at paras. 5 –6 that, "[t]he Tribunal certainly does have both the power and the procedure to resolve a challenge to the lawfulness of a detainee's detention. With respect, it did not need the decision of the Appeals Chamber of the ICTR to establish the existence of such a power. A detained person whose case has been assigned to a Trial Chamber has recourse to the Tribunal in order to challenge the lawfulness of his detention by way of motion pursuant to Rule 72 of the Rules of Procedure and Evidence ("Rules") if the application amounts to a challenge to jurisdiction, or pursuant to Rule 73 if it does not."

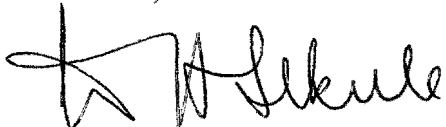
26. The Chamber thus finds that in essence, the Accused has brought a *habeas corpus* application before the Tribunal and therefore rejects his submission that he has been deprived of his rights to bring a *habeas corpus* application.

27. The Chamber thus denies the Motion in its entirety.

**FOR THESE REASONS, THE CHAMBER;**

**DENIES** the Motion in its entirety.

Arusha, 20 June 2002



William H. Sekule  
Judge, Presiding



Winston C. Matanzima Maqutu  
Judge



Arlette Ramaroson  
Judge



Seal of the Tribunal