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UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER II

OR: ENG

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

Registrar: Dr. Agwu U. Okali

Decision of: 23 May 2000

THE PROSECUTOR
v.
JOSEPH KANYABASHI

Case No. ICTR-96-15-I

DECISION ON THE DEFENCE EXTREMELY URGENT MOTION FOR HABEAS CORPUS AND FOR STOPPAGE OF PROCEEDINGS

The Office of the Prosecutor:

Carla Del Ponte
Japhet Mono
Andra Mobberley

Defence Counsel for the Accused:

Michel Marchand
Michel Boyer

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

SITTING as Trial Chamber II composed of Judge Laïty Kama, Presiding, Judge William H. Sekule and Judge Pavel Dolenc, as designated by the President;

CONSIDERING the indictment submitted by the Prosecutor against Joseph Kanyabashi, on 11 July 1996, confirmed by Judge Yakov Ostrovsky on 15 July 1996, and subsequently amended on 12 August 1999 for the crimes of genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto;

BEING SEIZED of a Defence motion, filed on 25 February 2000, entitled "Extremely Urgent Motion on *Habeas Corpus* and for Stoppage of Proceedings (objection based on lack of jurisdiction)" (the "Motion");

CONSIDERING the Prosecutor's Response to the Motion filed on 10 April 2000;

HAVING HEARD the parties at a hearing on 13 April 2000;

CONSIDERING the provisions of the Statute of the Tribunal ("the Statute") and the Rules of Procedure and Evidence (the "Rules");

RECALLING the Chamber's decision in this case of 18 June 1997 on the Defence motion on jurisdiction, the Appeals Chamber's decision of 21 January 2000 rejecting the notice of appeal, and the oral decision of the Chamber of 29 February 2000 denying a request for an extension of the time limit provided for under Rule 72(A).

SUBMISSIONS OF THE PARTIES

Submissions of the Defence

1. The Defence submits, in the Motion, that the Chamber should reject the charges as a remedy following the violation of several of the Accused's fundamental rights.

2. The Defence argues that the Accused was unlawfully detained in Belgium at the request of the Tribunal, from 13 February 1996 to 15 July 1996, because the "warrant of arrest" dated 24 January 1996, which was issued by the Prosecutor but not confirmed by a judge, was valid only for twenty days, as provided by Rule 40.

3. The Defence submits that the Accused was not informed promptly of the reason for his arrest at the behest of the Tribunal and was not informed speedily of the charges against him because the Prosecutor's "warrant of arrest" became ineffective on 13 February 1996. It is only on 12 August 1996 that the Accused was served with the warrant of arrest issued on 15 July 1996. The Defence also submits that after the confirmation of the indictment, he was questioned by investigators without being informed that he was no longer a suspect but an Accused, and that the Prosecutor hence was able to benefit from this violation to collect illegal statements by the Accused.

4. The Defence contends that the Accused was not transferred quickly to the seat of the Tribunal for his initial appearance before the Tribunal because the Prosecutor sought to

extend the provisional detention. This was despite the fact that the Belgian Court of Cassation had ruled on deferral to the Tribunal on 15 May 1996. The transfer occurred only on 8 November 1996.

5. The Defence submits that the Registrar assigned to the Accused a Defence counsel who was unable to communicate with him because they shared no common language. Therefore, there was a violation of his right to counsel. Furthermore, the Accused did not have defence counsel of his own choosing.

6. The Defence asserts that the actions of the Tribunal prejudiced the fair nature of the proceedings because:

   (a) The Prosecutor ought not to have requested the deferral;

   (b) The Prosecutor's motion for joinder of the Accused's trial, which was dismissed by both Judge Khan and the Appeals Chamber, jeopardised the rights of the Accused to a prompt and fair trial;

   (c) In September 1998, the proceedings on the request for leave to amend the indictment and the motion for joinder of the accused should not have been joined;

   (d) The Prosecutor did not act expeditiously as regards her obligation to disclose material;

   (e) Two Affidavits filed in at least two separate cases by the Prosecutor violated the fair nature of the proceedings;

   (f) The Victims and Witness Support Section Unit did not act with due diligence to protect defence witnesses.

7. The Defence maintains that the Chamber should apply two major principles of law, that is, the doctrine of abuse of procedure and the remedy applied in cases where there are violations of the rights of the Accused to trial without undue delay.

8. The Defence contends that the Accused was unable to act on the basis of Rule 72 because of time limits and because of violation of his right to defence counsel, and submits that the present motion is based on general principles of law.

9. The Defence submits that the Prosecutor's inability to ensure compliance with the fundamental rights of the Accused, since his arrest on 28 June 1995 until today, and her inability to determine when he shall be brought to trial, mandate that the Chamber grant the Motion for *habeas corpus* and a stay of the proceedings.

Submissions of the Prosecutor

10. The Prosecutor submits that the Accused misconceives the purposes of a writ of *habeas corpus*. The Accused erroneously wishes to use this writ to cause the rejection of the charges and the proceedings against him.

11. The Prosecutor asserts that it is instructive to note that the Motion also is subtitled "objection based on lack of jurisdiction". The Prosecutor submits that no provisions in

the Rules relating to the alleged objections based on lack of jurisdiction are cited in support of this Motion because it does not qualify as such a motion under the Rule 72B(i).

12. The Prosecutor submits that the issues raised by the Accused are not tenable before the Chamber because there is not an issue relating to jurisdiction before this Chamber. In the absence of a jurisdictional issue, this Chamber must dismiss the Motion.

13. The Prosecutor contends that on 4 February 2000 after failing to impugn the jurisdiction of the Chamber, the Accused filed the Motion in an attempt to obtain undue advantage and a second opportunity to impugn the jurisdiction of this Chamber. Rather than accept the decision of 29 February 2000 of this Chamber, the Accused has filed this Motion in a bid to re-litigate issues that already have been dealt with. Therefore, the Motion is not admissible under the doctrine of *res judicata.*

14. The Prosecutor maintains that the Motion cannot be considered a writ of *habeas corpus,* a writ which applies only in cases of detention or imprisonment without access to legal process. In the instant case the Accused had access to legal process *ab initio.*

15. The Prosecutor alleges that the Accused is abusing the process because he had ample time within which he could have entered his objections, but he did not. Pursuant to Rule 72(F) such failure amounts to a waiver of his rights and, as such, the Motion constitutes an abuse of process.

16. The Prosecutor asserts that the remedy sought by the Accused is disproportionate to the set of circumstances that he has set out in this Motion. Although the Prosecutor strongly challenges the assertions of the Accused, even if all were true and proved, stoppage of the proceedings is not a remedy available to him. That remedy is unavailable under the Statute or Rules. The Prosecutor further submits that the remedies sought have no foundation in law.

17. The Prosecutor submits that no rights of the Accused have been violated. In the alternative, The Prosecutor submits that if the rights of the Accused were violated from 1996, or even 1995, the Accused has acquiesced and waived his rights.

18. The Prosecutor submits that the Chamber should dismiss the Motion in its entirety.

DELIBERATION

Objection Based on Lack of Jurisdiction

19. The Chamber notes that the motion also is subtitled "objection based on lack of jurisdiction". Such a motion is a preliminary motion that an accused may bring under Rule 72(B). Rule 72(A) provides that preliminary motions "shall be brought within thirty days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(i), and in any case before the hearing on the merits". In the "Decision Rejecting Notice of Appeals" of 21 January 2000, the Appeals Chamber ruled that should the Accused wish to challenge jurisdiction under Rule 72(B)(i) in relation to the second amended indictment, he must do so within the period specified in Rule 72(A). *See Kanyabashi v. Prosecutor*, ICTR-96-15-I, at para. 28 (Decision Rejecting Notice of

Appeal) (21 January 2000) (Appeals Chamber). In fact, the time limit has elapsed.

20. On 4 February 2000, the Defence filed a motion asserting that the Chamber lacked jurisdiction to conduct the proceeding based on the amended indictment. The Defence, pursuant to Rule 72(F), requested the Chamber to extend the time limit for filing such preliminary motion. In its oral decision of 29 February 2000, the Chamber rejected the request, holding:

> [T]he Chamber is of the opinion that the reasons for the belated filing of the above-mentioned preliminary motion are not considered good cause for a waiver of the time limit provided for under Rule 72(A), and consequently, the Trial Chamber decides not to allow the preliminary motion.
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> Transcript of 29 February 2000, at 104.

21. During the hearing of the Motion on 13 April 2000, the Chamber reminded the Defence that it had not granted Counsel an extension of time to file a preliminary motion objecting jurisdiction. The Defence agreed and explained that the Motion was not a preliminary motion brought under Rule 72. The Defence brought the Motion "on the basis of *habeas corpus*, which should lead the Tribunal to decide on the jurisdiction to detain [the Accused] on the basis of legality or illegality". Transcript of 13 April 2000, at 7. Consequently, the Chamber notes that the Defence files the Motion under Rule 73.

Habeas Corpus

22. The Chamber notes that the *writ of habeas corpus* is a common law legal procedure. Under English law, a *writ of habeas corpus* is directed to a person who detains another in custody and commands him to produce or have the body of that person before the court for a specified purpose. This writ was formerly much used for testing the legality of imprisonment for political reasons, especially during the reigns of the Stuarts. John Burke, Jowitts Dictionary of English Law, at 881(2nd ed. 1977).

23. In Canada, the Canadian Bill of Rights provides, *inter alia*, that no law of Canada shall be construed or applied so as to deprive a person who has been arrested or detained of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful. Canadian Bill of Rights, Part I, 2(c)(iii).

24. In the United States, habeas corpus, in common usage, means *the habeas corpus ad subjiciendum*. It is "a writ directed to the person detaining another, and commanding him to produce the body of the prisoner, or person detained. This is the most common form of habeas corpus writ, the purpose of which is to test the legality of the detention or imprisonment; not whether he is guilty or innocent". The writ now extends to all constitutional challenges. Black's Law Dictionary, at 709 (6th ed. 1990). It is an instrument for safeguarding individual freedom against arbitrary and lawless state action. The case law indicates that the *writ of habeas corpus* can be used when a constitutional right of an accused is deprived during the course of proceedings.

> It has been suggested that the [United States] Supreme Court in the Bowen case, and in other recent cases, intended to say that the *writ of habeas corpus* is available, not only when jurisdiction is lost during the course of the

> proceeding by deprivation of a constitutional right, but also whenever a petitioner is able to allege that he failed to enjoy a constitutional right.
>
> *Dorsey v. Gill*, 148 F.2d 857, at 873, 80 U.S. App. D.C.9. at 24 (1945).

25. Because abuse of the writ may undermine the orderly administration of justice, a petitioner is entitled to *habeas* relief only if it can be established that the constitutional error had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 & n.9 (1993).

26. The use of the *writ of habeas corpus* for seeking remedy for deprivation of constitutional rights must be limited to the exceptional circumstances where it is the only means of preserving such rights.

> Bearing in mind that the use of the writ, in a case involving deprivation of constitutional rights, is limited to the exceptional situation in which it is the only means of preserving such rights, it is obvious that no useful or necessary purpose would be served by trying–over and over again–in *habeas corpus* proceedings, the same questions which were fully considered and fairly determined in the original proceeding.
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> *Dorsey v. Gill*, 148 F.2d 857, at 874, 80 U.S. App. D.C.9. at 26 (1945).

27. The Chamber notes that the Appeals Chamber held that the remedy of *habeas corpus* is a fundamental right and enshrined in international human rights norms. *See Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, at para. 88, (Decision) (3 November 1999) (Appeals Chamber). The notion at the international level, however, has not gone that far. The Inter-American Court of Human Rights has defined the *writ of habeas corpus* as "a judicial remedy designed to protect personal freedom or physical integrity against arbitrary decisions". The purpose is to determine the lawfulness of the detention, and, if appropriate, to order the release of the detainee. *See Barayagwiza, supra* at para. 88. Article 5(4) of the European Convention on Human Rights, which governs *habeas corpus*, provides that a detained person have access to a court and the right to be heard on the issue of the provisional detention. *See Barayagwiza, supra,* footnote 236.

28. The Chamber restates that the Tribunal is not bound by any national law. It finds the notion of *habeas corpus* at the international level is limited to a review of the legality of detention. The Accused's Motion, apart from the submission of violation of the right to protection from unlawful detention, is beyond that scope and, therefore, is not proper. Thus, the Trial Chamber concludes that a *writ of habeas corpus*, as such, does not apply in this case and in these circumstances, particularly where a valid indictment charges the Accused.

29. Furthermore, in the case of *Prosecutor v. Brdanin*, the ICTY opined 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.

Prosecutor v. Brdanin, IT-99-36, at paras. 5-6. (Decision on Petition for A *Writ of Habeas Corpus* on Behalf of Radoslav Brdanin) (8 December 1999).

30. The Chamber is of the opinion that the Motion could be admissible under Rule 72 if it includes an objection based on lack of jurisdiction of the Tribunal, or under Rule 73. A motion on the legality of detention, regardless of the title, is not a special motion which falls out of the scope of the Rules. The Chamber could wholly reject the Motion for the reason that a Rule 72 motion is out of time. Nevertheless, the Chamber considers those submissions within the scope of whether and to what extent, if any, the fundamental rights of the Accused have been violated, and what proper remedy exists under the Statute, the Rules, and international human rights law, if the Chamber finds any such violation.

Alleged Violation of the Accused's Rights

a. Violation of Right to Protection from Unlawful Detention

31. The Chamber notes that the Accused was arrested on 28 June 1995 in the territory of the Kingdom of Belgium based on an indictment charging him with international crimes and under a warrant of arrest issued by a Belgian judge on the same day. The Accused never challenged the lawfulness of his arrest and detention before the Tribunal.

32. On 11 January 1996, the former Trial Chamber II, upon the Prosecutor's motion, requested the Kingdom of Belgium to defer the criminal proceedings against the Accused instituted by its national jurisdictions. On 24 January 1996, the Prosecutor wrote to the Kingdom of Belgium to request for provisional arrest of the Accused, then a suspect, and to take all necessary steps to prevent his escape. The Defence argues that it was a "warrant of arrest" issued under Rule 40, which was valid only twenty days, and was never renewed.

33. The Chamber has examined the relevant Rules and has determined whether such a request amounts to a warrant of arrest and whether it is valid for only twenty days.

34. Rule 54 provides that "[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial." It indicates that only a Judge or a Trial Chamber has the authority to issue a warrant. Consequently other persons or organs have no such a power to issue warrant.

35. Rule 55 provides that "a warrant of arrest shall be signed by a Judge and shall bear the seal of the Tribunal. It shall be accompanied by a copy of the indictment, and a statement of the rights of the Accused", and shall be transmitted to the national authorities of the State by the Registrar. In this case, the Prosecutor's request for arrest of the Accused was neither signed by a Judge, nor accompanied by an indictment, nor transmitted by the

Registrar. It was not a warrant of arrest under Rule 55.

36. Rule 40 on provisional measures provides:

> (A) In case of urgency, the Prosecutor may request any State:
>
> (i) To arrest a suspect and place him in custody;
> (ii) ....
> (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.
>
> ....
>
> (B) Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country of the Tribunal and the Registrar.
>
> (C) ....
>
> (D) The suspect shall be released if (i) the Chamber so rules; or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer.

Here, the Prosecutor's request was made under Rule 40, as the Defence submitted, or more specifically under Rule 40(A)(i) and (iii). The request did not constitute a warrant of arrest, but one of the provisional measures. In fact, "[t]he Statute and Rules, unlike many national jurisdictions, do not require a warrant to arrest a suspect". *See Prosecutor v. Ngirumpatse*, ICTR-97-44-I, at para. 63 (Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items) (10 December 1999).

37. Rule 40 does not stipulate the length of time such a request remains valid. Rule 40(D) indicates the suspect shall be released if the Chamber so rules. However, thus far the Chamber has not so ruled. The twenty days validity, according to Rule 40 (B) and (D), applies only to the situation when, after a suspect is transferred to the seat of the Tribunal, or to such other place as the Bureau may decide, he or she may be detained provisionally by a designated Judge's order. In this case, the twenty day time limit does not start to run from the date on which the order is issued but from the date on which the suspect is transferred.

38. For these reasons, the Chamber concludes that the Defence's allegation of unlawful detention of the Accused from 13 January 1996 to 15 July 1996 has no legal basis. The Accused's right to protection from unlawful detention has not been violated.

b. Violation of the Right to Be Promptly Informed

39. The Defence submits that the Prosecutor's "warrant of arrest", dated 24 January 1996,

became ineffective on 13 February 1996. Thus, from 24 January 1996 to 12 August 1996, the Accused was not informed of the reasons for his detention at the request of the International Criminal Tribunal for Rwanda. *See* Motion, at paras.130-31.

40. The Chamber notes that this allegation is based on the ineffectiveness of the Prosecutor's request for the arrest of the Accused as a provisional measure. Because the Chamber already has determined above that the latter has no legal basis, it, therefore, need not consider this allegation.

41. The Defence also submits that the warrant of arrest issued on 15 July 1996 was served on the Accused on 12 August 1996. After confirmation of the indictment against the Accused, he was questioned by investigators of the Office of the Prosecutor without being informed that he was an accused. Instead, he was informed of the rights of a suspect. *See* Motion, at paras. 133-35.

42. Concerning information of the charges, the Chamber bears in mind the right of the Accused to be informed promptly of the nature and cause of the charges against him, pursuant to Article 20 of the Statute, which is partially reflected in Rule 40 *bis* (E). This right corresponds literally to Article 14(3) of the International Covenant on Civil and Political Rights ("ICCPR"), which requires that information must be provided with the lodging of charges or directly thereafter.

43. Rule 55 provides that the Registrar take responsibility to transmit the warrant of arrest and the annexed documents to the national authorities of the State concerned and to instruct the said authorities to cause the arrest of the accused and serve the documents upon the accused. It is the responsibility of the national authorities to execute and serve the warrant of arrest, and consequently to inform the accused of charges against him.

44. The Trial Chamber notes that the following facts are not in dispute:

    (a) On 15 July 1996, the date on which the indictment against the Accused was confirmed, Mr. Hugues Verita, the then Deputy Registrar, sent a letter to the Minister of Justice of the Kingdom of Belgium informing him of the warrant of arrest and the order to surrender, along with a copy of the indictment, the confirmation of the indictment and a document recalling the rights of the accused.

    (b) On 22 July 1996, Mr. Visart de Bocarme, the Deputy Private Secretary of the Minister of Justice, received the said warrant of arrest on behalf of the Government of the Kingdom of Belgium.

    (c) On 12 August 1996, the Forest Prison in Brussels was notified of the warrant of arrest, the indictment, and the annexed confirmation thereof. On the same day the said warrant of arrest was served on the Accused.

45. The above undisputed facts show that the Deputy Registrar acted fully in accordance with Rule 55. If there was any delay for the Accused to be informed of charges against him, the delay can not be attributed to the Tribunal.

46. With regard to the allegation that the Accused was informed of the rights of a suspect after the indictment against him was confirmed, the relevant Rules are 42, 43 and 63.

Rule 42: Rights of Suspects during Investigation

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:

(i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it;
(ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and
(iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Rule 63: Questioning of the Accused

(A) After the initial appearance of the accused, the Prosecutor shall not question him unless his counsel is present and the questioning is audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. Furthermore, the Prosecutor shall, prior to the questioning caution the accused that he is not obliged to say anything unless he wishes to do so, but that whatever he says may be tendered as evidence.

(B) The questioning, as well as any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42(A)(iii).

47. The Chamber notes that Rule 63, which governs the questioning of an accused, applies Rules 42(A)(iii) and Rule 43, which govern the investigation of suspects. A suspect's rights to be assisted by counsel and to have the free assistance of an interpreter are the same as the rights of an accused person under Article 20 of the Statute. Thus, the rights of an accused during questioning are the same as those of a suspect during investigation. The only difference between rights of a suspect during investigation and the rights of an accused when being questioned is that the accused shall be cautioned before the questioning that whatever he or she says may be tendered as evidence. The Chamber is of the view that the fact that the Accused, as an accused, was informed of the same rights as those of a suspect when being questioned can not prove that he was wrongly informed of his status. Thus, there was no violation of the Accused's right to being informed promptly of the charges against him. With regard to not being cautioned before the questioning, the Chamber shall take this allegation into consideration at the time when it may deal with this possible evidence at trial.

c. Violation of the Right to Have Legal Assistance of His Own Choosing

48. The Defence submits that the Registrar assigned counsel to the Accused, who did not share common language, on the eve of his initial appearance. The Accused was not assigned a French-speaking counsel until 16 April 1997. The Accused alleges that this constitutes a violation of his fundamental rights.

49. The Chamber notes that the Tribunal in 1996 addressed this issue regarding assignment of counsel to the Accused. *See Prosecutor v. Kayanbashi*, ICTR-96-15-I, (Decision Following the Initial Appearance) (29 November 1996)

> Giving serious consideration to the concerns expressed by the accused concerning the difficulties in communicating with his assigned defence counsel through an interpreter;
>
> Being of the opinion, however, that the Registrar, in assigning Mr. Evans Monari as defence counsel for the accused, has complied properly with the provisions in Article 20 of the Statute of the Tribunal. Rule 45 (C) of the Rules of Procedure and Evidence ("the Rules") and Article 10 of the Directive on Assignment of Defence Counsel ("the Directive");
>
> Being convinced, therefore, that at this stage of the proceedings, the rights of the accused to counsel have been respected;
>
> ....
>
> Reminding the accused of the provision in Article 19(D) of the Directive, which entitles him to request assignment of another counsel for his defence, should the difficulties in communicating with his assigned counsel amount to an exceptional circumstance at any later stage of the proceedings.

50. Following the above instruction of the former Trial Chamber II, the request for assignment of another counsel to the Accused was accepted and a French-speaking co-counsel was assigned.

51. On 29 October 1997, the Trial Chamber II granted the oral request of the lead counsel of the Accused to withdraw from the case during the hearing of the Accused's motion for withdrawal of his lead counsel. On 5 December 1997, Mr. Michel Marchand, then the co-counsel, was assigned lead counsel for the Accused.

52. The Chamber notes that neither Rule 45 nor Article 10 of the Directive on the Assignment of Defence Counsel provides that the Registrar shall consult with an accused before he assigns counsel from the list. The Chamber also notes that Article 20(4)(d) of the Statute stipulates that an accused shall be entitled to be tried through legal assistance of his own choosing. The Accused has been represented by counsel throughout the proceedings. The Accused has had the free assistance of an interpreter for his communication with his first assigned lead counsel. He was assigned a French-speaking co-counsel on 16 April 1997. He has been assigned a lead counsel of his own choosing since 5 December 1997.

53. Moreover, the Chamber finds that the right to counsel does not mean that an indigent accused has a unfettered right to choose appointed defence counsel provided to him at Tribunal expense. The appointment of counsel may depend on the availability of counsel at the time when a decision on the assignment is made. Thus, the Chamber finds there is no violation of his right to counsel.

Alleged Violation of the Right to Trial without Undue Delay

a. Transfer to the Headquarters of the Tribunal

54. The Chamber recalls that a formal request for deferral was made to the Kingdom of Belgium on 11 January 1996. The Government of the Kingdom of Belgium did not adopt the law relating to the recognition of the Tribunal and cooperation with the Tribunal until 22 March 1996. The said law entered into force as from 27 April 1996. On 15 May 1996, the Appeals Chamber of Belgium pronounced the relinquishment of Belgian authorities of the case files of Joseph Kanyabashi and the others. In the Chamber's view, it is only on 15 May 1996 that the transfer of the Accused from Belgium to the Tribunal became practicable. Therefore, the Chamber will not consider the period before that date on the issue of prompt transfer of the Accused to the seat of the Tribunal.

55. The Chamber notes that the issue concerning the transfer of the Accused covers two periods. The first period is from 15 May 1996 to 15 July 1996, the date on which the indictment against the Accused and the warrant of arrest were issued. The second period is from 15 July 1996 to 8 November 1996, the date of issuance of the warrant of arrest to the date of the transfer of the Accused.

56. Concerning the first period, the Chamber observes that the Belgian authorities informed the Registrar that by virtue of Article 12 of the said law, the Accused would be released on 12 August 1996 if a final warrant of arrest from the Tribunal was not served upon them before that date. The indictment against Kanyabashi was confirmed on 15 July 1996 and the warrant of arrest was issued on the same day, i.e. approximately one month earlier than the time limit. There is no reason to find that the issuance of the indictment and the warrant of arrest constitutes a delay.

57. With regard to the second period, the Chamber notes that Rule 57 of the Rules provides that, "... The transfer of the accused to the seat of the Tribunal ... shall be arranged by the State authorities concerned, in liaison with the authorities of the host country and the Registrar" (emphasis added). The transfer of the Accused was clearly not fully under the control of the Tribunal. Considering that the transfer of the Accused depends on the cooperation between the Belgian Government and the Tribunal, the Chamber does not find merit in the allegation that the period of less than four months constitutes an undue delay.

58. Concerning the initial appearance, Rule 62 provides as follows, "[u]pon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber without delay, and shall be formally charged...." Article 9(3) of the International Covenant on Civil and Political Rights also provides that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." Article 7(5) of

the American Convention on Human Rights and Article 5(3) of the European Convention on Human Rights contain the same provisions. The international instruments have not established specific time limits for the initial appearance of detainees, though the UN Human Rights Committee and the European Court of Human Rights opined that such delays must not exceed a few days. *See Barayagwiza, supra*, at para. 70. In the instance case, the period between the transfer of the Accused to the seat of the Tribunal and his initial appearance is twenty-one days.

59. The Chamber notes, however, firstly, the issue of promptness must be assessed in each case according to its special features. *See De Jong Baijet and van den Brink*, 22 May 1984, Series A, no.77 at para. 52, European Court of Human Rights; *Van der Sluijs, Zuiderveld and Klappe*, 22 May 1984, Series A, no. 78, at para. 49; *Brogan and Others*, 29 November 1988, Series A, no. 145-B, at para. 58.

60. Secondly, the above-mentioned provisions of various international instruments address a different situation from that envisaged by the Tribunal and serve a different purpose than does Rule 62. The European Court of Human Rights expressed that "it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his (the arrested or detained) right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness." *Brogan and Others, supra*. The Court further identified that the officer authorised by law should be independent of the executive and of the parties. "In addition, under Article 5(3), there is both a procedural and substantive requirement. The procedural requirement places the 'officer' under the obligation of hearing himself the individual brought before him; the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and ordering release if there are no such reasons." *Schiesser*, 4 December 1979, Series A, no. 34, at para.31.

61. In the case of *Kelly v. Jamaica*, Mr. Bertil Wennergren, who concurred with the opinion of the UN Human Rights Committee, said in his individual opinion that "[i]t should be noted that the words 'shall be brought promptly' reflect the original form of habeas corpus ("habeas corpus NN ad sub-judiciendum") and order the authorities to bring a detainee before a judge or judicial officer as soon as possible, independently of the latter's express wishes in this respect." Communication No. 253/1987, Report of the Human Rights Committee, General Assembly Official Records: Forty-Sixth Session, Supplement No. 40 (A/46/40).

62. Clearly, such provisions are based on national systems in which judicial organs are not involved in the arrest of individuals. Domestic law needs those provisions to place the executive action under judicial control after arrest and detention of individuals and to minimise the unlawful deprivation of the individuals' right to liberty. It is for this reason that international human rights law requires that a detainee shall be promptly brought before a Judge or officer who is "empowered to direct pre-trial detention or to release the person arrested. Thus custody must end within a few days with either release or remittal by a judge to pre-trial detention". Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, at 177, 1993.

63. The setting of the Tribunal defers from that of a national society. Judges are involved in the arrest and detention of an accused by confirming indictments and issuing warrants of arrest and orders of transfer. The function of an initial appearance before a Trial Chamber is not to ensure the lawfulness of the continuous detention of an accused, but to charge him or her formally, to ensure that his or her right to counsel is respected and to call upon the accused to enter a plea. Therefore, those provisions in international instruments, though with the wording similar to that in Rule 62, do not apply to the setting of the Tribunal. Consequently, the interpretation of the word "without delay" in Rule 62 is not necessarily the same as the interpretation of the word "promptly" in those international instruments.

64. The Chamber finds in the instant case, the period of twenty-one days between transfer of the Accused to the seat of the Tribunal and his initial appearance caused no material prejudice to the Accused. Consequently, the Accused's right to be tried without undue delay has not been violated. In the Chamber's view, even if there is a delay and if the delay is not so extensive, it will not necessitate a remedy of a stay of the proceedings.

b. Disclosure of Evidence

65. The Chamber notes that disclosure of materials by the Prosecutor is closely linked to the date of the initial appearance of the Accused and the date set for trial. Therefore, the Chamber finds without merit the Defence's allegation on the issue of untimely disclosure of materials by the Prosecutor before the further appearance of the Accused on the amended indictment, which took place on 12 August 1999. Because there is no date set for trial, the allegation that "the Prosecutor did not act with due diligence regarding her obligation to disclose evidence" lacks basis. However, bearing in mind that the materials subject to disclosure to the Defence are important for the preparation of the defence, the Chamber reminds the Prosecutor to disclose in a timely manner the materials, information, and evidence, pursuant to Rules 66 and 68.

c. Joinder of Trials

66. The Defence submits that the Prosecutor had an inappropriate strategy, which resulted in the delay of the proceedings. The Chamber recalls that an indictment that jointly charged 29 accused persons, including the Accused, was submitted by the Prosecutor on 6 March 1998. The indictment was not confirmed by Judge Khan, and the Prosecutor's notice of appeal from the said decision was rejected by the Appeals Chamber on 6 June 1998. In the view of the Chamber, this did not cause any material prejudice to the Accused.

67. The Chamber also recalls its Decision on the Prosecutor's Motion for Joinder of Trials of 5 October 1999, in which it granted the joint trial of the Accused with other five accused persons based on, *inter alia*, the interest of justice. *See Prosecutor v. Kanyabashi*, ICTR-96-15-T, (Decision on the Prosecutor's Motion for Joinder of Trials) (5 October 1999). The Defence's appeal from the decision lodged on 2 November 1999 was rejected by the Appeals Chamber on the basis that the appeal was filed out of time. *See Kanyabashi v. Prosecutor*, ICTR-97-21-A, (Decision, Appeal Against Trial Chamber II's Decision of 5 October 1999) (13 April 2000) (Appeals Chamber). The Chamber, therefore, deems it unnecessary to consider this allegation.

68. The Chamber examines the Defence allegation regarding the Prosecutor's conduct and

concludes that there is no violation of the Accused's right to be tried without undue delay. The Chamber notes that the issue of reasonable length of proceeding has been addressed by the U.N. Human Rights Committee, the European Court of Human Rights and the Inter-American Commission on Human Rights. "The reasonableness of the period cannot be translated into a fixed number of days, months or years, since it is dependent on other elements which the judge must consider." *Firmenich v. Argentina*, the Inter-American Commission on Human Rights Resolution No.17/89, (13 April 1989). In the opinion of the European Court of Human Rights, "the reasonableness of the length of the proceedings coming within the scope of Article 6(1) must be assessed in each case according to the particular circumstances. The Court has to have regard, *inter alia*, to the complexity of the factual or legal issues raised by the case, to the conduct of the applicants and the competent authorities and to what was at stake for the former, in addition to complying with the 'reasonable time' requirement.[four factors]" *Zimmermann and Steiner*, 13 July 1983, Series A, No. 66, at para. 24. Consequently, "the Strasbourg organs have deemed trials that even lasted longer than 10 years to be compatible with Article 6(1) of the ECHR, holding, on the other hand, others lasting less than one year to be in violation of the provision." Nowak, *supra*. at 257.

69. In the instant case, the Chamber finds that there is no need for discussion of all the above four factors. However, the Chamber emphasises that the conduct of both parties can cause the trial of an Accused to be unduly delayed and reminds both parties to perform their duties in a manner to expedite the proceedings so as to ensure respect of the Accused's fundamental human right to trial without undue delay.

Prejudice to the Fair Nature of the Proceedings

a. Deferral

70. The Defence submits that on 8 January 1996, the Prosecutor filed a motion to obtain a formal request for deferral addressed to the Kingdom of Belgium concerning the Accused and other accused persons in Belgium. On 11 January 1996, the former Trial Chamber II granted the Prosecutor's motion and officially asked the Kingdom of Belgium to transfer the criminal proceedings instituted by its national jurisdiction against the Accused and other accused persons. The Defence asserts that the Prosecutor ought not to have requested the deferral, because the Prosecutor was not ready to prosecute in this case.

71. The Chamber recalls that Article 8(2) of the Statute grants the Tribunal primacy over the national courts of all States. At any stage of the procedure, the Tribunal may formally request national courts to defer to its competence in accordance with the Statute and the Rules.

72. Under Rule 9, which provides for a Prosecutor's application for deferral, where, *inter alia*, the crimes which are the subject of investigations or criminal proceedings instituted in the courts of any State are the subject of an investigation by the Prosecutor, the Prosecutor may apply to the Chamber designated by the President to issue a formal request that such court defer to the competence of the Tribunal. The Accused acknowledged that the Prosecutor had already conducted investigations relating to the Accused. He only challenged that the Prosecutor's investigation was not very advanced. However, readiness for prosecution of a case is not a requirement for the Prosecutor's request for deferral under Rule 9.

73. Further, Rule 10(A) provides that "[i]f it appears to the Trial Chamber seized of a request by the Prosecutor under Rule 9 that paragraphs (i), (ii) or (iii) of Rule 9 are satisfied, the Trial Chamber shall issue a formal request to the State concerned that the Court defer to the competence of the Tribunal." Thus, a Trial Chamber shall determine the matter whether the Prosecutor ought to make a request for deferral. It appeared that the requirements for the Prosecutor's request for deferral of this case satisfied the Trial Chamber seized of the request so that the Trial Chamber granted a formal request for deferral. No Rules provide that the decision is subject to any review or appeal. The Chamber, therefore, dismisses this allegation.

b. Affidavits

74. The Defence submits that two affidavits filed in two separate cases by the Prosecutor deliberately concealed, from the Accused and his counsel, information that the Defence alleges is false. The Accused believes that it is likely to adversely influence the judges against him. The Accused, therefore, asks for, *inter alia*, a stay of proceedings.

75. The Chamber notes that the Defence raised the objection two months earlier in seeking to disqualify Judge Sekule as a member of Trial Chamber II, which is seized with the case of the Accused. The Bureau held in its decision on this matter:

> 7. [A]lthough Trial Chamber II received the affidavit in question, it does not follow ... that that Chamber relied on this document in order to reach its conclusion. ... The fact that the Accused and his Counsel were not invited to participate in those proceedings, is not relevant. The Chamber's task was simply to decide on witness protection in the cases against Mr Nsabimana and Mr Nteziryayo, not to make a finding concerning all allegations against the Accused.
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> 8. Even if the affidavit contained some references to the Accused, this does not in the view of the Bureau give any legitimate reason to fear that a Judge that participated in the witness protection decision will not be impartial in the case against the Accused. The case-law referred to by Defence Counsel gives no support for impartiality in the present case.
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> *Prosecutor v. Kanyabashi*, ICTR-96-15-T, (Determination of the Bureau in terms of Rule 15(B)) (25 February 2000) (Bureau).

The Bureau, therefore, denied the Accused's application for the disqualification of Judge Sekule.

76. The Chamber opines that the Defence's request for a stay of proceeding based on the affidavit in question amounts to disqualification of the whole Tribunal to try the Accused. The Chamber, for the same reason described by the Bureau, considers there are no grounds to grant it.

c. Protection of Defence Witnesses

77. The Defence alleges that the Witness and Victim Support Section did not act with due

diligence in protecting witnesses for the Defence on the basis of the fact that the Trial Chamber granted the Defence motion relating to the protection of Defence witnesses on 25 November 1997. The relevant information was sent to the Witness and Victim Support Section on 2 September and 14 October 1998, respectively. It was only in November 1999 that three Defence witnesses were met by representatives of the Section.

78. The Chamber finds that the ten protective measures granted for the Defence witnesses by the Trial Chamber can be accomplished without meeting with them. For example, the names, addresses, whereabouts of the Defence witnesses and other identifying information about them shall not be disclosed to the Prosecutor, public and media etc. (protective measures (iii), (iv), (v), (vi)). Some of the protective measures shall be taken by the Defence Counsel (protective measures (i), (viii), (ix), (x)). Protective measure (ii) authorises the Registrar to solicit for the assistance of the Republic of Kenya and the UNHCR. Protective measure (vii) concerns the protection of the Defence witnesses when they are within the premises of the Tribunal. *See Prosecutor v. Kanyabashi*, ICTR-96-15-T (Decision on the Protective Measures for Defence Witnesses and Their Families) (25 November 1997).

79. The Chamber finds that this allegation is without merit.

Remedy

80. The Defence cites the decision of 3 November 1999 of the Appeals Chamber in the case of *Barayagwiza v. Prosecutor*, and requests a stay of the proceedings. The Chamber notes that the remedy ordered by the Appeals Chamber for the violations to Barayagwiza in that decision was based on the totality of the violations of his fundamental rights that were repeatedly violated and due to the Prosecutor's negligence. In its subsequent decision of 31 March 2000, the Appeals Chamber found:

> The new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant. The cumulative effect of these elements being thus reduced, the reparation ordered by the Appeals Chamber now appears disproportionate in relation to the events. The new facts being therefore facts which could have been decisive in the Decision, in particular as regards the remedy it orders, that remedy must be modified.
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> ....
>
> Accordingly, the remedy ordered by the Chamber in the Decision which consisted in the dismissal of the indictment and the release of the Appellant must be altered.
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> *Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, at paras. 71, 74 (Decision, Prosecutor's Request for Review or Reconsideration) (31 March 2000) (Appeals Chamber).

81. In the Chamber's view, even if there is a violation and if the violation is not so extensive, it will not necessitate a remedy of a stay of the proceedings.

82. The Chamber recalls that Rule 5 on "Non-compliance with Rules" provides the remedy when the Rules or Regulations are violated by a party. It sets forth three principles. First, the party must raise an objection on the ground of non-compliance with the Rule or Regulations at the earliest opportunity. Second, the alleged non-compliance must be proved and it must cause material prejudice to that party. Third, the relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness.

83. In the case at bench, the Chamber finds there are no violations of the Accused's fundamental rights. Therefore no remedy is warranted.

84. **FOR THESE REASONS, THE CHAMBER**

DISMISSES the Motion.

Arusha, 23 May 2000.

Laïty Kama Judge, Presiding	William H. Sekule Judge	Pavel Dolenc Judge

Seal of the Tribunal