



**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

Original: English

TRIAL CHAMBER II

Before: Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Mehmet Güney

Registry: Antoine Mindua
John Kiyeyeu

Decision of: 21 February 2001

JUDICIAL RECORDS ARCHIVES
ICTR
REC 21/01

2001 FEB 21 P 5:27

THE PROSECUTOR

v.

Joseph KANYABASHI

Case No. ICTR-96-15-T

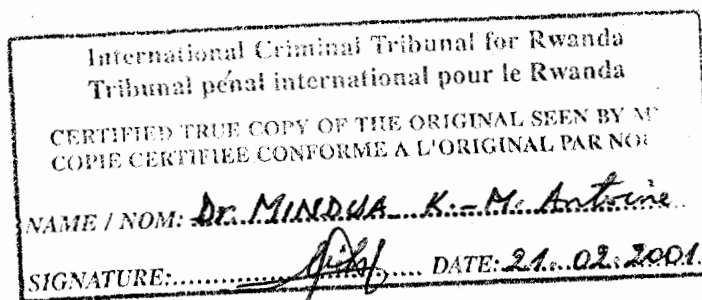
**DECISION ON THE DEFENCE MOTION FOR THE
PROVISIONAL RELEASE OF THE ACCUSED**

The Office of the Prosecutor:

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21.02.2001

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 Mehmet Güney;

CONSIDERING that the Accused's initial Indictment was confirmed on 15 July 1996 by Judge Yakov Ostrovsky, that he was transferred to the Tribunal on 8 November 1996 and that he has since then been held in the custody of the Tribunal at the United Nations Detention Facilities ("the UNDF") in Arusha;

BEING SEIZED of:

A "Requête pour mise en liberté provisoire (Article 65 du Règlement de Procédure et de Preuve)" filed by the Defence on 12 December 2000 ("the Motion");

A "Prosecutor's Response to the Defence Motion for Provisional Release (Bail) (Rule 65 of the Rules of Procedure and Evidence)" filed on 11 January 2001;

A "Réplique à la Réponse du Procureur à la Requête pour mise en liberté provisoire (Article 65 du Règlement de Procédure et de Preuve)" filed by the Defence on 22 January 2001;

CONSIDERING the provisions of the Statute of the Tribunal ("the Statute"), specifically Articles 19 and 20 of the Statute and the Rules of the Tribunal, in particular Rules 65 and 73 of the Rules;

CONSIDERING that the Court Management Section informed the Parties on 15 December 2001, *inter alia*, that the Motion would be reviewed by the Trial Chamber on the basis of written briefs only, pursuant to Rule 73 of the Rules of Procedure and Evidence ("the Rules");

NOW CONSIDERS the Motion.

ARGUMENTS OF THE PARTIES:

1. The Defence requests the provisional release of the Accused pending trial, once his trial has commenced, each time the hearings are postponed for a period exceeding one month, on the basis of, *inter alia*:

- (a) The fact that the requirement of "exceptional circumstances" as a *sine qua non* condition for any provisional release was removed from Rule 65 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("the ICTY Rules"), at an ICTY Plenary Session of 30 November 1999, which amendment was subsequently held to be in accordance with "*the internationally recognised standards regarding the rights of the accused which the International Tribunal is obliged to respect*" (ICTY, *Prosecutor v. Blagoje Simic and*

others, "Decision on Milan Simic's Application for Provisional Release", Case No. IT-95-9-AR65, 29 May 2000);

- (b) In the alternative, the following "exceptional circumstances", within the meaning of Rule 65 of the Rules:
 - (i) The length of the Accused's detention (more than five years) without a trial date being set;
 - (ii) The delay incurred with respect to the commencement of his trial, following the joinder of his case to that of five other Accused;
- (c) His good behaviour as a detainee, as ascertained by a statement by Mr. Saidou Guido, Commanding Officer of the UNDF;
- (d) The solemn undertakings by the Accused, if provisionally released, to appear at trial and, while his trial remains pending, or is adjourned for a period exceeding one month, *inter alia*:
 - (i) To remain at all times with his wife Bernadette Kamandi within the confines of the municipality of Wevelgem, Belgium;
 - (ii) To surrender his passport to the Police of the said municipality;
 - (iii) To report each day to the Police of the said municipality;
 - (iv) Not to harass or in any way interfere with any witnesses the Prosecutor intends to call to testify against him at trial;
- (e) The further guarantee provided by the Mayor of the said municipality to ascertain that the Accused complies with his above undertakings;

2. The Prosecutor submits that the Motion should be dismissed on, *inter alia*, the following grounds:

- (a) The Trial Chamber cannot be requested to abide by the Rules of another International Tribunal so as to bypass the "exceptional circumstances" requirement in force under Rule 65(B) of the ICTR Rules;
- (b) The length of the Accused's detention is justified under International law, and the grounds submitted by the Defence to justify the provisional release of the Accused do not amount to "exceptional circumstances", considering, *inter alia*:
 - (i) The seriousness of the crimes, including that of genocide, the Accused has allegedly committed;
 - (ii) The complexity of the case, in terms of the investigations required before the trial, and of the joinder of his trial to that of the other Accused, which circumstances necessarily cause some justifiable delay in the proceedings and warrant his prolonged remand in detention;

- (iii) The fact that the Accused himself contributed to the said delay by lodging "sundry" motions, some of which were aiming at unnecessarily delaying the proceedings;
 - (c) The Accused's provisional release would necessarily jeopardize the Prosecutor's witnesses safety;
 - (d) The Accused does not provide sufficient guarantees in support of his request and should specifically have taken all the necessary steps to ascertain the collaboration and consent of the national authorities at stake.
- 3. The Defence *inter alia* replies to the above submissions that the Accused cannot be held responsible for the length of his detention in so far as he exercised his fundamental rights recognised in the Statute and Rules of the Tribunal to file pre-trial Motions and to contest the Decisions of the Trial Chamber before the Appeals Chamber of the Tribunal.

HAVING DELIBERATED,

- (a) **The Rule governing provisional detention before the ICTR**
- 4. In requesting the application of Rule 65(B) of the Rules without the requirement of "exceptional circumstances", in accordance with the current formulation of Rule 65(B) of the ICTY Rules, the Defence in fact requests the Trial Chamber to apply the latter Rule instead of the one governing provisional detention before the ICTR. Such could not be the case, as Article 1 of the Statute clearly establishes the Tribunal as a separate and sovereign body, with a competence *ratione materiae* and *ratione temporis* distinct from that of the ICTY.
- 5. Further, pursuant to Article 14 of the Statute, "[t]he judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence (...) of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary" (our emphasis). It is the Trial Chamber's view that, as a consequence, amendments to the Rules of the ICTY, like that of 30 November 1999 to Rule 65 of the said Rules, could only be incorporated in the Rules of the Tribunal if the Judges of the Tribunal for Rwanda decided to do so, and to the extent they deem necessary.
- 6. Therefore, pursuant to Rule 65 of the Rules, the provisional release of an Accused may only be ordered if the Defence satisfies the Chamber that the provisional release is justified by "exceptional circumstances" (first condition); if the Defence provides sufficient guarantees "that the Accused will appear for trial" (second condition) and, "if released, [that he] will not pose a danger to any victim, witness or other person" (third condition). Further, a provisional release may be ordered only "after hearing the host country" (fourth condition).
- 7. The Trial Chamber will apply these four criteria in the above order for, as demonstrated in the jurisprudence of the ICTY and of the ICTR, where the Trial

Chamber is not satisfied of the existence of exceptional circumstances, no provisional release shall be ordered, without any need to consider the other criteria (*See, inter alia*, at the ICTY: *Prosecutor v. Tihomir Blaskic*, "Décision portant rejet d'une demande de mise en liberté provisoire", 25 April 1996; *Prosecutor v. Delalic et al.*, "Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic", 25 September 1996; *Prosecutor v. Simo Drljaca and Milan Kovacevic*, "Decision on Defence Motion for Provisional Release", 28 January 1998; *Prosecutor v. Simic et al.*, "Décision relative à la Requête déposée par Simo Zaric aux fins de mise en liberté provisoire", 15 April 1999; and, at the ICTR: *Prosecutor v. Rutaganda*, Decision on the Request submitted by the Defence, 25 September 1996 and "Decision on the Request filed by the Defence for Provisional Release of Georges Rutaganda", 7 February 1997).

(b) Exceptional circumstances warranting the provisional release of the Accused

Provisional release pending commencement of trial

8. The Trial Chamber is aware of the length of the detention of the Accused since his arrest in 1995, that is, more than five years ago and, indeed, expressed its concern in this regard at the last Status Conference, held on 2 February 2001, thus reminding both Parties that the trial could not be further postponed and had to take place soon for the sake of all the Accused's right to be tried without undue delay envisioned under Article 20(c) of the Statute.
9. In regard to the present Motion for Provisional Release, the Trial Chamber agrees with the ICTY Trial Chamber seized of the Drljaca and Kovacevic Case, which held in a "Decision on the Defence Request for Provisional Release" pertaining to the Accused Milan Kovacevic, dated 20 January 1998, at par. 22, that: "The length of an accused's detention is a factor to be considered in determining whether the accused has shown exceptional circumstances sufficient to justify his provisional release."
10. In arguing that the length of the pre-trial detention of the Accused does not qualify as "exceptional", the Prosecutor submits that the Accused contributed to the delay in the proceedings by filing many pre-trial Motions and Appeals on Decisions rendered by the Trial Chamber. The Trial Chamber, on the contrary, agrees with the Defence that filing pre-trial Motions and Appeals against Decisions, pursuant to the Statute and the Rules and within the limits therein laid out in this regard, is a substantial right afforded to all accused before the ICTR.
11. It however remains that, consistent with international standards, the right to be tried without undue delay and its possible violation has to be assessed on a case by case basis and in the light of several factors that may account for the length of one's proceedings and, hence, the length of one's detention, as notably exemplified in the case law of the European Court of Human Rights (the "ECHR") (*See, for instance, Zimmerman and Steiner*, 13 July 1983, Series A, No 66, at par. 24: "the

applicants and the competent authorities and to what was at stake for the former, in addition to complying with the 'reasonable time' requirement", as quoted, among other references, in the Trial Chamber's "Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings" of 23 May 2000 in the instant case, at par. 68).

12. In the present case, the Trial Chamber concludes that the length of the proceedings and, accordingly, that of the Accused's detention remain within acceptable limits and, further, are in accordance with the interests of justice, as they may be explained by, *inter alia*:

- (a) The general complexity of all proceedings, including the investigations, in terms of the law and of the facts, in the light of the gravity of the offences the Accused is charged with, notably with respect to such allegations as genocide, crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II thereof;
- (b) The number of Motions filed by both Parties, on such various issues as, *inter alia*, protective measures for witnesses, challenges to the jurisdiction of the Tribunal and to the jurisdiction of the Trial Chamber, withdrawal of Lead Counsel, defects in the form of the Indictment, Habeas Corpus and stoppage of proceedings, disqualification of a Judge of the Trial Chamber.

In this respect, the Trial Chamber reminds the Parties of its "Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings" of 23 May 2000 here-above referred to, where it held, at par. 69, that "the conduct of both Parties can cause the trial of an accused to be unduly delayed", and consequently "remind[ed] 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".

- (c) The further complexity brought to the proceedings by the joinder of trials.

13. For the above reasons, none of the grounds submitted by the Defence in support of their request amount to exceptional circumstances, within the meaning of Rule 65(B) of the Rules, justifying a provisional release pending trial.

Proximity of trial

14. The above is especially true since the date for commencement of the joint trial was set on 14 May 2001 by the Chamber, after consultations with all the Parties, at the Status Conference of 2 February 2001. Granting provisional release to the Accused at this stage of the proceedings, on the eve of trial, far from protecting his right to be tried without undue delay, might in fact cause further delays with respect to the Accused himself as well as the other Accused in this case.

Provisional release, once the trial has commenced, any time the hearings are postponed for a period exceeding one month

15. Since the Trial Chamber has hereinabove decided that there are no exceptional circumstances to warrant the provisional release of the Accused, there is no reason to consider the second request made by the Defence, as to provisional release of the Accused, once his trial has commenced, any time the hearings are postponed for a period exceeding one month.

(c) Other requirements under Rule 65(B) of the Rules


16. Similarly, the provisional release having been denied for lack of exceptional circumstances, the Trial Chamber will not consider whether the other requirements under Rule 65 of the Rules are met (*See*, par. 7 above).


FOR ALL THE ABOVE REASONS,

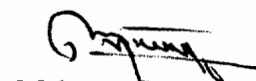
THE TRIAL CHAMBER

DISMISSES the Defence Motion for the provisional release of the Accused.

Arusha, 21 February 2001


Latty Kama
Presiding Judge


William H. Sekule
Judge


Mehmet Güney
Judge

(Seal of the Tribunal)

