



ICTR-99-50-T
25/7/2001
(2503 — 2498)

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

2503

OR. ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 25 July 2001

THE PROSECUTOR

vs.

Jérôme-Clément BICAMUMPAKA

Case No. ICTR-99-50-T

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**DECISION ON THE DEFENSE'S MOTION FOR PROVISIONAL RELEASE
PURSUANT TO RULE 65 OF THE RULES**

The Office of the Prosecutor

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25.7.2001

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”);

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Judge Winston C. Matanzima Maqutu and Judge Arlette Ramaroson (the “Chamber”);

BEING SEIZED of:

- (i) the “Requête de la Défense pour mise en liberté provisoire selon l’article 65 du Règlement,” filed on 5 June 2001 (the “Motion”);
- (ii) the “Prosecutor’s Response to the Defence Motion for Provisional Release (Bail)(Rule 65 of the Rules of Procedure and Evidence),” annexed to which is the Affidavit of Dr. Ghiorghis Belai, filed on 9 July 2001 (the “Prosecutor’s Response;”)

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), specifically Rule 65;

NOW CONSIDERS the Motion solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73(A) of the Rules.

ARGUMENTS OF THE PARTIES

1. The Defense requests the provisional release of the Accused pursuant to Rule 65 of the Rules for the following “exceptional circumstances;”

- (i) The length of detention resulting in an undue delay;
- (ii) That, as a result of his detention, the Accused is seriously ill;
- (iii) That, the evidence against the Accused is not conclusive.

2. The Defense, submits that Canada is prepared to accept the Accused once provisional release is granted.

3. Furthermore, the Defense essentially submits that the Accused assures the Chamber that he will appear on the date fixed for trial, and that he poses no danger to victims, witnesses, or anyone else and stands no chance of recidivism under the following conditions; (a) He will not leave Canada during the period of his provisional release, (b) He will refrain from communicating with witnesses in any way (c) He will report once a week to the *Gendarmerie Royale du Canada* and (d) He is prepared to post a bail bond, with the Accused’s family being prepared to act as guarantors of said bail bond.

4. The Prosecutor submits that the Defense request should be denied for failure to establish *inter alia* “exceptional circumstances.” The Prosecutor maintains that pursuant to Rule 65(B) of the Rules, the Chamber has not heard the Host country, that it has satisfied itself that the Accused will appear for trial, and that if released, the Accused will not pose a danger to any victim or witness or other person.

5. As regards the right of the Accused pursuant to Article 20 of the Statute, the Prosecutor maintains that provisional release is not one of the rights enumerated there under but that it is at the discretion of the Tribunal.

6. The Prosecutor maintains that, as concerns the “exceptional circumstances” relied upon by the Defense;

- (i) On the question of undue delay, the Accused’s trial is on the verge of starting;
- (ii) On the question of the length of the Accused’s detention and the Defense’s argument that the evidence against the Accused is not conclusive, the Prosecutor maintains that the Accused’s detention, on balance does not amount to an “exceptional circumstance” warranting his provisional release at this stage.
- (iii) As to the Accused’s allusion to his state of health, the Prosecutor maintains that this does not qualify as “exceptional circumstances” pointing out that the health facilities provided by the United Nations Detention Facilities (“UNDF”) are adequate as stated by Dr. Ghiorghis Belai in an Affidavit attached to the Prosecutor’s Response.

7. As regards the further submissions concerning the Accused’s family member’s undertaking and the Government of Canada’s undertaking, the Prosecutor submits that neither have the Accused’s family members sworn an Affidavit, nor has the Tribunal received official correspondence from the Canadian government indicating that the Defense has contacted the Canadian Foreign Ministry to that effect.

8. As regards the Accused’s undertaking that he will not communicate with any witnesses, the Prosecutor maintains that this undertaking is not sufficient in the circumstances of the case. The Prosecutor further argues that there is a grave risk that the Accused will not appear at trial having regard to the likely sentence if he is found guilty. The Prosecutor maintains that the Accused and his collaborators enjoy sympathy and refuge in war zones such as the Democratic Republic of Congo where he can escape to gain refuge and his re-arrest will be almost impossible.

9. The Prosecutor further draws the attention of the Chamber to the words “host country” within the meaning of Rule 65(B) of the Rules, to refer the United Republic of Tanzania and not Canada, as the Defense suggests in its Motion. Within that meaning, the Prosecutor submits that the Host Country, the United Republic of Tanzania, must be heard pursuant to Rule 65(B) of the Rules before the Accused can be granted provisional release.

AFTER HAVING DELIBERATED

10. The Chamber notes that the Parties agree that Rule 65 of the Rules governs the granting of provisional release. In the instant matter, the sub-Rules of relevance are the following:

Rule 65: Provisional Release

- (A) Once detained, an accused may not be provisionally released except upon an order of a Trial Chamber.
- (B) Provisional release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.



11. As to "Host Country" within the ambit of Rule 65(B) of the Rules, the Chamber notes that there is discord between the Parties as to which country this refers to. Although "Host Country" is not specifically defined under the Rules of Procedure and Evidence, the Chamber recalls a number of instances where the United Republic of Tanzania could be considered as such. These include: (i) the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, (the "Rules of Detention") at Rule 1(A), "Host State" is defined to mean "[t]he United Republic of Tanzania," and (ii) Rule 64 of the Rules providing for Detention on Remand states that "Upon his transfer to the Tribunal, the accused shall be detained in facilities provided by the host country or by another country. ()," the facilities for the detention of Accused persons before the Tribunal being the UNDF are located in Arusha in the United Republics Tanzania. On these grounds, for the purpose of this Decision, the Chamber considers that "Host Country" within the purview of Rule 65(B) of the Rules to be the United Republic of Tanzania.

12. Moreover, in its appreciation of Rule 65 of the Rules, the Chamber recalls its jurisprudence, in particular in the "Decision on the Defense Motion for the Provisional Release of the Accused," of 21 February 2001 in *the Prosecutor vs. Joseph Kanyabashi*, ICTR-96-15-T ("*Kanyabashi*"), whereby the Chamber enumerated four pre-conditions to be satisfied before provisional release is granted. These four pre-conditions are; "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.)

13. The *Kanyabashi* Decision elaborated further that "[i]f the Chamber is not satisfied of exceptional circumstances, no provisional release shall be ordered, without the need to consider the other criteria."

Regarding the Presence of Exceptional Circumstances

14. Although Rule 65(B) of the Rules does not elaborate on those factors that could amount to "exceptional circumstances" as to warrant an Order for provisional release by the Chamber, the jurisprudence of the Tribunal and the ICTY has made such an elaboration. After an appraisal of the said jurisprudence, the Chamber notes that the Defense seeks the provisional release of the Accused relying on the following as amounting to exceptional circumstances within the meaning of Rule 65(B) of the Rules; (i) Length of detention resulting in undue delay and the alleged lack of conclusive evidence against the Accused, and (ii) Serious illness. The Chamber shall therefore consider whether the said bases do indeed amount to "exceptional circumstances" within the meaning of Rule 65(B) of the Rules so as to grant the provisional release of the Accused.

Length of Detention resulting in an undue delay and the alleged lack of conclusive evidence against the Accused

15. The question of length of Detention was exhaustively considered by the Chamber in the *Kanyabashi* Decision where it cautioned, quoting the European Court of Human Rights in the case of *Zimmerman and Steiner* of 13 July 1983, Series A, No 66, that "[c]onsistent 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...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."

16. In its appraisal of this factor in the instant case, the Chamber balances the length of detention of the Accused, which the Defense argues amounts to an undue delay against other factors, including the alleged lack of conclusive evidence against the Accused.

17. In its Motion, the Defense points out that the Accused was arrested on 6 April 1999, and that his trial is not likely to commence before 2002, which the Defense maintains amounts to a violation of the Accused's right to be tried without undue delay. The Prosecutor argues that the Accused has never been deprived of his right to an expeditious trial since the steps to trial are almost completed so that it is on the verge of starting and releasing him at this stage will be inimical resulting in a further delay.

18. Although the Prosecutor does not mention a specific date as to when the trial of the Accused will commence, the Chamber notes that the Accused's detention amounts to slightly more than two years. It also notes that the Accused is indicted and will be tried with three others for serious crimes including Genocide, Crimes Against Humanity and Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II. The Accused, if found guilty, may be liable to a serious sentence. As regards pre-trial Motions, the Chamber notes that the Accused has exercised his rights and has filed Motions requesting the Assignment of Counsel and on defects in the form of the Indictment and Lack of Jurisdiction. On her part, the Prosecutor has filed Motions requesting a joint trial of the Accused with others, and for the protective measures of her witnesses.

19. Under these circumstances, and, notably (1) the gravity and factual and legal complexity of the charges against the Accused, (2) the "gravity" of the sentence he might be facing, should he be found guilty, (3) the complexity of the joint proceedings which adds to their overall length and (4) the necessity to deliberate and render decisions on the pre-trial Motions filed by the Parties, the Chamber, mindful of the Accused's right to be tried without undue delay envisioned under Article 20(c) of the Statute, concludes that the length of the Accused's detention remains within acceptable limits and in accordance with the interests of justice.

20. As to the alleged lack of conclusive evidence against the Accused, the Defense points out that the evidence against the Accused, which it characterizes as seemingly inconclusive, was gathered after the Accused's arrest. Although the Prosecutor has not specifically responded to this argument, the Chamber notes that the Accused has a confirmed Indictment against him and in any case, it considers that matters of evidence will ultimately be decided upon at trial.

21. For the above reasons the Chamber finds that the length of detention of the Accused does not constitute "exceptional circumstances" within the meaning of Rule 65(B) of the Rules.

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Serious illness

22. On the question of serious illness as amounting to "exceptional circumstances" within the purview of Rule 65(B) of the Rules, the Chamber recalls the jurisprudence of the Tribunal in the "Decision on the request filed by the Defense for the provisional release of Georges Rutaganda," of 7 February 1997 in the Case of *Prosecutor v. Rutaganda*. In the said Decision, Trial Chamber I in denying the Defense request held at para. 7 that, "[s]erious illness does not in itself justify the provisional release of an accused as long as adequate medical treatment can be administered to him by the Tribunal," further adding at para. 8 for want of demonstration of "exceptional circumstances" that, "[t]he Chamber has not been provided with satisfactory documentation of any general and serious regression in the accused's medical condition, calling for an immediate change of the conditions under which the accused is currently held in custody."

23. In the instant case, the Chamber notes that the Defense alleges that, as a result of his detention, the Accused is in a precarious state of health. The Prosecutor on her part relies upon the Affidavit of Dr. Ghiorghis Belai in Annex 1 to refute the Defense's claim of serious illness constituting "exceptional circumstances." The Affiant does not disclose the medical records of the Accused for professional and legal reasons although he attests that the Accused's ailments, which he had prior to his arrival at UNDF, are being treated with the facilities available.

24. The Chamber has not been provided with any documentation of a general and serious regression in the Accused's medical condition, or indication that the Accused's condition is terminal or immediately life threatening calling for an immediate change in the conditions of his custody. On this basis, the Chamber finds that it has not been shown that the Accused's illness is so serious as to amount to "exceptional circumstances" within the meaning of Rule 65(B) of the Rules.

25. For the above reasons, none of the grounds submitted by the Defense 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.

Other requirements under Rule 65(B) of the Rules

26. The provisional release having been denied for lack of exceptional circumstances, the Chamber will not consider whether the other requirements under Rule 65(B) of the Rules are met.

FOR ALL THE ABOVE REASONS THE TRIBUNAL:

DENIES the Motion in all respects.

Arusha, 25 July 2001,



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramarson
Judge

(Seal of the Tribunal)