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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
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TRIAL CHAMBER III Original: English

Before: Judge Lloyd George Williams, Q.C., Presiding
Judge Pavel Dolenc
Judge Andrésia Vaz

Registrar: Mr. Adama Dieng

Date: **12 July 2002**

THE PROSECUTOR
v.
THÉONESTE BAGOSORA
GRATIEN KABILIGI
ALOYS NTABAKUZE and
ANATOLE NSENGIYUMVA

Case No. ICTR-98-41-T

DECISION ON THE DEFENCE MOTION FOR RELEASE

The Office of the Prosecutor:

Mr. Chile Eboe-Osuji
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Mr. Segun Jegede
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Defence Counsel

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The International Criminal Tribunal for Rwanda (the "Tribunal"), sitting today as Trial Chamber III composed of Judges Lloyd George Williams, Q.C., Presiding, Pavel Dolenc, and Andrésia Vaz (the "Chamber");

BEING SEISED OF the Motion for Release on behalf of the Accused, Bagosora, filed on 8 April 2002 and the Disclosure of Documents in Support of the Motion (collectively, hereinafter the "Motion");

CONSIDERING the Prosecutor's Request for Variation of the Order of 19 April 2002 in the Decision on the Prosecutor's Urgent Motion for Suspension of Time Limit for Response in the Matter of Defence "Requête en Demande de Mise en Liberté," filed on 29 April 2002 (hereinafter the "Prosecutor's Request");

RECALLING the Decision of 21 May 2002, in which the Tribunal granted the Prosecutor's request for additional time within which to file a response to the Motion;

CONSIDERING the Prosecutor's Response in the Motion for Release, filed on 29 May 2002 (hereinafter the "Prosecutor's Response");

THE TRIBUNAL NOW DECIDES the matter on the basis of the written briefs of the parties pursuant to Rule 73(A).

I.

SUBMISSIONS

A. SUBMISSIONS OF THE DEFENCE FOR BAGOSORA

1. In the Motion, the Defence recites the history of this case with respect to the detention of the Accused Bagosora and proceeds to catalogue the failures of the Prosecutor to discharge her duties to make certain disclosures under the Rules and the introduction of motions to amend the indictment, which necessitated adjournments of the trial proceedings on several occasions.

2. Significantly, contends the Defence, despite the many demands of the Bagosora Defence to fix a date for trial, no date was set. The date for trial was not fixed until the Prosecutor requested that the Trial Chamber Co-ordinator set a date, which request the Defence for Bagosora enthusiastically joined with on 26 June 2001. A status conference was held in November 2001 at which the Chamber fixed 2 April 2002 as the date trial was to commence. Moreover, during the Status Conference of 16 November 2001, the Defence recapitulated its various outstanding demands for disclosure of evidence from the Prosecutor. The Defence did not receive any response to its demands until 2 April 2002, more than four years after the demands were made.

3. Pursuant to a decision of the Chamber dated 5 December 2001 and in conformity with the provisions of Rule 73 *bis* on 20 January 2002 the Prosecutor disclosed to the Defence a series of documents, the vast majority of which were in English, and therefore incomprehensible to the Defence. It is not until 26 March 2002, i.e. as late as one week before the commencement date of the trial, that the Defence for Bagosora received the French

versions of the Prosecutor's filings. The Motion goes on to recite particular procedural defects in the Prosecutor's filing of the reports of the expert Ms. Alison Des Forges and Investigator Kwende which caused the trial to again be postponed until September 2002.

4. Relying on the foregoing history of delays in the trial proceedings, the Defence insists that the interest of justice requires that the Accused, who has been detained for more than six years, be provisionally released. In this respect, the Defence remarks that all notions of reasonable procedural delays in proceedings countenanced in most democratic states have been grossly exceeded in this case. Moreover, the Defence claims that the Accused Bagosora did nothing during his period of detention to oppose the commencement of trial. The Defence then asserts that *none* of the delays in the trial proceedings may be imputed to the Accused because the faults or omissions of the Prosecutor occasioned all adjournments in the trial proceedings.

5. The Defence next claims that it will not be possible to know the fate of the Accused for several more years, when one takes into account the large number of witnesses, i.e., 225, the Prosecutor intends to call in her case. The Defence believes that the Chamber was unreasonably optimistic in its 5 December 2001 Decision when it estimated that the trial of this matter may take from one to two years. Therefore, claims the Defence, Bagosora will have spent at least eight years in detention before there is a judgement.

6. The Defence invokes the fundamental right recognised in "civilised judicial systems," which require that an accused be tried without undue delay. The Defence avers that the extraordinarily long detention of Bagosora shocks any sense of justice and would not be countenanced in any of the civilised judicial systems. Among the factors that are ordinarily considered when determining whether delay in proceeding to trial has been reasonable are (i) the complexity of the case; and (ii) the extent to which the accused contributed to delays. While the Defence concedes that the nature of the crimes charged in the Indictment are indeed complex, in its estimation, this does not justify a delay of more than six years. Similarly, the Defence maintains that the current circumstances of the Accused Bagosora are repugnant to the provisions of Article 19(1) of the Statute, which provides: "The Trial Chamber shall ensure that a trial is fair and expeditious. . ." Furthermore, the Defence notes that all major judicial systems impose a sanction for the violation of the right of the accused to a trial free from undue delay. The primary relief, and the only relief here available, contends the Defence, is to release the Accused.

7. The Defence denounces what it perceives as an "obviously excessive" standard for provisional release pronounced in Rule 65. General principles dictate that pre-trial detention should be the exception; freedom being the rule. This principle, states the Defence was endorsed in the deliberations of the United Nations General Assembly on 14 December 1990. The Defence concludes that in comparison the standard announced in Rule 65, allowing release only "in exceptional circumstances" represents legal regression when compared to the more liberal standards adopted in Article 9 of the International Covenant on Civil and Political Rights.

8. Consequently, expostulates the Defence, Rule 65 should be construed in its broadest possible sense to bring it into conformity with the principles in the international instruments. The Defence notes that the ICTY Statute and practice diverge from those of this Tribunal with regard to provisional release. Finally the Defence contends that similarly situated Rwandan citizens, who are charged with crimes against humanity, are subject to

discrimination when it comes to entitlement to provisional release. The Tribunal in rendering its decision on this Motion should therefore set aside Rule 65 as contrary to the standards of international law and practice extant in civilised judicial systems.

9. Nevertheless, the Defence argues that even if the Tribunal adheres to its demanding standard for provisional release, the Accused should be released because there is a surfeit of facts demonstrating that "exceptional circumstances" exist in the form of abnormal and unreasonable delay. The Defence further contends that although the undue delay by itself would warrant provisional release of the Accused, there are three additional factors in conformity with Rule 65 that militate in favour of provisional release. First, the Accused prays that The Netherlands, which has played host to his wife and children, should be heard on this Motion. Second, the Defence contends that the Trial Chamber should be assured that the Accused would appear for trial. Finally, the Defence avers that there is no danger to victims and witnesses. Both these last conditions, submits the Defence, can be readily ensured in a country like The Netherlands, where the rule of law reigns. All that is necessary to ensure that the conditions for release are met is to hear The Netherlands to determine what type of measures are necessary to restrict the movements of Bagosora once he is there. The Defence adds that the Accused is not opposed to strict judicial control of the conditions of his release. Also in this respect, the Defence notes that the Accused has never attempted to secret himself from the authorities before his arrest or tried to escape since his incarceration.

10. Finally, the Defence declares that permitting the Accused to be provisionally released would give real credence to the presumption of innocence.

B. SUBMISSIONS OF THE PROSECUTOR

11. First, referring to the existing "legal regime" of this Tribunal, the Prosecutor maintains that an accused must be kept in detention pending his trial. This Rule, states the Prosecutor, is justified by the gravity of the nature of the offences with which the accused are charged. The gravity and nature of the offences that fall under this Tribunal's jurisdiction, contends the Prosecutor, justify this general rule. Once incarcerated, however, claims the Prosecutor, an accused may be provisionally released only upon a showing that all the following conditions have been met: (i) exceptional circumstances; (ii) sufficient guarantees that the accused will appear for trial; (iii) if released, the accused will pose no threat to victims, witnesses and other persons; and (iv) hearing of the host country. *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on the Defence Motion for the Provisional Release of the Accused (Trial Chamber II, 21 February 2001). Furthermore, claims the Prosecutor, in accordance with the jurisprudence of the Tribunal, the Chamber need not consider the criteria of Rule 65 requiring the Chamber to determine whether there are sufficient guarantees that the accused will appear for trial and whether to hear the host country if the Defence fails to demonstrate the threshold qualification for relief, the existence of exceptional circumstances. *See Kanyabashi*; *Prosecutor v. Bicamumpaka*, ICTR-99-50-T, Decision on the Defence Motion for Provisional Release Pursuant to Rule 65 of the Rules, 25 July 2001, para. 12.

12. Moreover, the Prosecution submits the Motion should fail because the Defence has not provided sufficient guarantees that Bagosora will appear for trial, if released. In this connection, the Prosecution notes that no guarantees, such as a surety or undertaking by a responsible person or authority has been posted. The Prosecutor also reminds the Chamber that on the day of the commencement of trial, 2 April 2002, the Accused Bagosora refused to appear before the Trial Chamber. The Prosecutor asks therefore, if the Accused refused to

appear for trial while still in detention, how can there be any guarantee that he will appear for trial while out on bail? Furthermore, consideration of the severity of the sentence he may face if convicted, Bagosora's probable financial assets and connections in certain countries where he may seek refuge, all lead to the conclusion that Bagosora presents a clear and present danger of absconding, if released.

13. Similarly, posits the Prosecution, the Defence provides no basis on which the Chamber may reasonably conclude that if released, the Accused would pose no threat or danger to victims, witnesses and other persons. If released, contends the Prosecution, Bagosora could avail himself of his possible connections and influences unfettered. There is therefore, a considerable risk of collusion, subornation of witnesses, and/or pressure being brought to bear on witnesses, if Bagosora were to be released.

14. The Prosecutor notes further that neither the host country, Tanzania, nor The Netherlands, has been heard with respect to the Motion. Because the release of an accused who is charged with grave crimes would entail "extremely serious implications" for the host country, the hearing of the Tanzanian authorities is an indispensable requirement which may not be discharged through the hearing of a third country, in this case The Netherlands, in which the Accused hopes to reside if provisionally released.

15. The Prosecutor then expresses what she believes to be the basis for the Defence conclusion that exceptional circumstances warrant the release of the Accused: (i) duration of his pre-trial detention; (i) that the accused engaged in no conduct causing delays in the proceedings; (iii) failure on the part of the Tribunal to deal with this matter diligently; and (iv) a sentence will not be issued for several years hence.

16. Addressing the issue of length of Bagosora's pre-trial detention, the Prosecutor first states that the length of his detention has not been six years as contended by the Defence, rather it has been five years and four months. This figure is based upon the Tribunal's Decision on Joinder, which held that the period he spent before transfer to the seat of the Tribunal is not to be imputed to the Tribunal. *See Prosecutor v. Bagosora*, ICTR-96-7, Decision on the Prosecutor's Motion for Joinder, at para. 97, 152, 153 (29 June 2000). Notwithstanding, the Prosecutor contends that the period of the Accused's pre-trial detention is not unreasonable because human rights law does not posit a "maximum length of pre-trial detention" and "the reasonableness of detention may not be assessed in the abstract." *See P. van Dijk et al*, Theory and Practice of the European Convention on Human Rights, Kluwer Law International 1998, 3rd ed., 379. Rather, says the Prosecutor, assessment of reasonableness of detention entails the consideration, on a case-by-case basis, of the following two factors: (i) complexity of the case and (ii) conduct of the parties.

17. The Prosecutor challenges the Defence contention that none of the delays in the proceedings in this case may be attributed to Bagosora, although conceding that Bagosora has filed a comparatively limited number of motions. However, claims the Prosecutor, his case has been joined for trial purposes with that of Kabiligi, Ntabakuze and Nsengiyumva. Here the Prosecutor reiterates the finding in the Joinder Decision stating that delays "will be minor as compared with the time saved as a whole." Joinder Decision at para. 154. The Chamber was confident that "any delay that the joinder of the case may occasion will not violate human rights standards."

18. As a practical matter, once the case of Bagosora was joined with the others, the actions of his co-accused will affect the rights of all the co-accused, ensuring the procedural principle of *beneficisum cohaesionis*. In this connection the Prosecutor observes that since July 1998 the four Accused in this case have lodged at least thirty-five applications. The four Accused in this joint trial also filed ten appeals of interlocutory decisions. Notably, all four Accused, Bagosora included, on 2 April 2002, the day the trial was to commence, filed a joint Appeal of the Chamber's Decision refusing to reconsider its decisions of 29 November and 5 December 2002 harmonizing protective measures for the Prosecutor's witnesses. The Accused also requested that the trial be adjourned *sine die* until the resolution of the Appeal. Also significant is the fact that Bagosora has availed himself of the benefits of the Joinder Decision by insisting to be heard in respect of matters which concerned only his co-accused. *See* Transcript of Hearing 15 November 2001, pp. 12-16. Therefore, Bagosora should not be allowed to enjoy the benefits of joinder without also being required to endure its inconveniences as well.

19. The Prosecutor refutes the Defence accusation that this case has not been handled in an expeditious manner. The Prosecutor stresses the complexity of this case against Bagosora and his co-accused, which involves bringing to justice persons who are alleged to have been the masterminds of the Rwandan genocide. This case, states the Prosecutor, has been proceeding "with continuous activity". Citing to Chamber's finding in the Joinder Decision at para 151. As to the Defence contention that Bagosora will not be sentenced for several years, the Prosecutor submits that this fact does not render unreasonable his continued pre-trial detention. The factors involved in the pronouncement of judgement are beyond the control of the Prosecution, but rather with the Trial Chamber, which must control the scheduling of the proceedings and its deliberations before delivering a judgement.

20. The Prosecutor finally submits that the Chamber should interpret the "exceptional circumstances in the context prevalent at the Tribunal as recently pronounced by the Appeals Chamber in *Prosecutor v. Blagojevic, Obrenovic and Jokic*, IT-02-53-A65, Appeals Chamber, Decision on Application for Leave to Appeal at p. 11. (18 April 2002) In *Blagojevic* the Appeals Chamber held that when applicable, it would uphold human rights principles. However, the Appeals Chamber recognised it was an international judicial body with a mandate to prosecute persons responsible for serious violations of international humanitarian law rather than a human rights body responsible for upholding general human rights.

II.

DELIBERATIONS

21. At the outset, the Chamber notes that although the Defence has styled the Motion as one pursuant to Rule 65 challenging the length of his "pre-trial" detention, strictly speaking, the current posture of the case may not be characterised as "pre-trial" because the trial in this matter commenced on 2 April 2002. Also, the Chamber observes parenthetically that the tone of the Defence Motion is regrettable. Although zealous advocacy is encouraged, Counsel should nevertheless maintain a respectful and decorous tone in its submissions.

22. The Chamber will now address whether the Defence has made out the elements establishing "exceptional circumstances" entitling the Accused to be provisionally released. Under Rule 65, a showing of exceptional circumstances is the *sine qua non* condition for

provisional release. *Prosecutor v. Kanyabashi*, ICTR–96-15-T at para. 6; Prosecutor *v. Rutaganda*, ICTR-96-3-T, Decision on the Defence on the Request Filed by the Defence for Provisional Release of Georges Rutaganda (25 February 1997). Although the length of an accused's detention is not, by itself, a determining factor, it may nevertheless be one factor to be assessed in consideration of the Defence's showing of "exceptional circumstances", the threshold showing that triggers the Chamber's consideration of the remaining three cumulative factors that must be weighed pursuant to Rule 65 (B) to justifying provisional release. *See Prosecutor v. Delalic*, (IT-96-21-T), Decision on Motion for Provisional Release Filed by the Accused Zejjnil Delalic (25 September 1996); Prosecutor *v. Kanyabashi*, ICTR-96-15-T Appeals Chamber Decision at para _ and; *Prosecutor v. Drljaca Kovacevic*, IT-97-24 (ICTY), Decision on the Defence Request for Provisional Release (20 January 1998), at para. 22.

23. Pursuant to Rules 64 and 65(A) and (B) an accused, after his transfer to the Tribunal, shall be detained. He may be provisionally released only upon an order of the Tribunal after establishing exceptional circumstances. The Rules do not define the exceptional circumstances, which may justify provisional release. However, a review of the jurisprudence of ICTY reveals that release was granted primarily for humanitarian reasons. *See Prosecutor v. Simic,* IT-95-9-P, Decision on the Provisional Release of the Accused (26 March 1998). This Tribunal has never provisionally released any of the accused.

24. The Chamber notes that ICTY indeed has amended its Rule 65 regarding provisional release in order to harmonize its provisions with internationally recognized standards. However, the Chamber is bound to apply the Rules of this Tribunal, including the provisions of Rule 65.

25. On the question of the perceived causes for the delays observed in this trial proceedings, the Defence neglects that some of the delays in setting a date for trial of this matter are owing to congestion in the Tribunal's calendar caused by limited human and physical resources of the Tribunal. With a growing number of accused in custody and only three Trial Chambers in place, some measure of delay in trials is inevitable. The Trial Chamber is currently actively engaged in the trial of two other matters, namely *Prosecutor v. Semanza*, ICTR-97-20-T, and *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T. In addition, the Chamber diligently works on the motions, initial appearances, confirmation hearings, and other applications and issues arising in an additional twenty cases.

26. Moreover, the Chamber notes that the situation that exists in national jurisdictions cannot be equated with those extant at this Tribunal. The resources in the national jurisdictions may be allocated by governments to meet existing circumstances. At this Tribunal, only the United Nations may make the necessary changes or provide the additional judicial resources to assist in expediting the trials and thereby shorten the pre-trial detention of the accused.

27. The Chamber notes that in certain circumstances, six years of pre-trial detention may be a factor in the consideration of exceptional circumstances warranting the release of an accused. However, the length of current or potential future detention of the Accused cannot be considered material in these circumstances because it does not mitigate in any way that the Accused, who is charged with the grave offences coming under the subject matter jurisdiction of this Tribunal, which offences carry maximum term of imprisonment of is life, may be a flight risk or may pose a threat to witnesses or to the community if he were to be released.

Detention under Rule 65 is intended to ensure the safety of the community and the integrity to the trial process. The Chamber observes that the Accused even while in custody found the opportunity to intentionally absent himself from the trial proceedings of 2 April 2002.

CONCLUSION

28. The Chamber finds that the Defence has failed to produce facts exhibiting exceptional circumstances. The Chamber does not agree that delays of the trial for more than five years in itself, without more, constitutes an instance of exceptional circumstances that would warrant the release of the Accused.

29. Nevertheless, the Chamber has considered the other arguments advanced by the Defence and finds them to be without merit.

For the foregoing reasons, the Tribunal:

DENIES the Motion in its entirety.

Arusha 12 July 2002

Lloyd G. Williams, Q.C., Presiding Judge	Pavel Dolenc Judge	Andresia Vaz Judge

[Seal of the Tribunal]