

ICTR-99-52-T
05-09-2002
(29515-29511)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

Before: Judge Navanethem Pillay, presiding
Judge Erik Møse
Judge Asoka de Zoysa Gunawardana

Decision of: 5 September 2002

JUDICIAL
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THE PROSECUTOR
v.
FERDINAND NAHIMANA

Case No. ICTR-99-52-T

**DECISION ON THE DEFENCE'S MOTION FOR THE RELEASE OR
ALTERNATIVELY PROVISIONAL RELEASE OF FERDINAND NAHIMANA**

Rule 65 of the Rules of Procedure and Evidence

For the Prosecutor:

Mr Stephen Rapp
Mr William Egbe
Ms Simone Monasebian
Ms Charity Kagwi
Mr William Mubiru

For the Defence:

Mr. Jean-Marie Biju-Duval
Ms. Diana Ellis QC

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

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse, and Judge Asoka de Zoysa Gunawardana (“the Chamber”);

CONSIDERING the Defence’s “Requête aux fins de mise en liberté”, filed on 12 July 2002 (“the motion”);

CONSIDERING the Prosecutor’s “Brief in Response to Defense Motion for Provisional Release of Ferdinand Nahimana”, filed on 5 August 2002;

CONSIDERING the Defence’s “Memcire de la defense en replique au memoire en response du Procureur en date du 5 aout 2002”, filed on 21 August 2002;

CONSIDERING the Prosecutor’s memorandum on the “Nahimana Defence supplemental submission in support of Provisional Release”, filed on 26 August 2002;

HEREBY decides the motion.

SUBMISSIONS OF THE PARTIES

1. The Defence requested the release of the Accused, arguing *inter alia* that the alleged lengthy detention of the Accused violates Article 20 of the Statute of the International Criminal Tribunal for Rwanda and the Accused’s right to liberty and the presumption of innocence as recognized under international law. The Defence further argued that the Accused has suffered unreasonable detention since there is no public interest in the detention of the Accused on any of the following grounds: (i) the complexity of the case, (ii) the behaviour of the accused, (iii) the interests of preserving proof and witnesses testimony, and (iv) the risk of flight.
2. In the alternative, the Defence argued that the “exceptional circumstances” clause of Rule 65(B) of the Tribunal’s Rules of Procedure and Evidence governing provisional release violates international law and Article 20(3) of the Tribunal’s Statute. The Defence additionally argued that the length of the detention of the Accused in any event satisfies the exceptional circumstances test of Rule 65(B) and that the remaining tests of that provision are satisfied.
3. The Defence therefore requested an order releasing the Accused and other consequential orders.
4. Counsel for the Prosecutor submitted that the motion should be dismissed. The continued detention of the Accused is justified, according to the Prosecutor, in view of the reasonable suspicion that the Accused was involved in the serious criminal acts for which he is charged. The Prosecutor further argued that the Accused and his Counsel were partially responsible for the length of the Accused’s detention.

5. The Prosecutor further submitted that the tests of Rule 65(B) have not been satisfied by the Defence, since there are no exceptional circumstances and there are no sufficient guarantees that the Accused will appear at trial and will not pose a danger to victims, witnesses, or other persons.

DELIBERATIONS OF THE CHAMBER

Violation of Rights of the Accused

6. The Chamber notes that on 19 September 2000, as part of an earlier motion dealing with due process matters, Counsel for the Defence submitted that the Accused's rights as protected by Article 20 of the Statute had been violated, alleging *inter alia* delays in the proceedings and the lengthy detention of the Accused.¹ On 26 September 2000, the Chamber dismissed the Defence's motion.²

7. On October 2000 the Accused's trial commenced and has progressed since then at a steady pace. The Defence case is due to begin in the latter half of September 2002. In the Chamber's opinion, the Defence has failed to demonstrate any new circumstances that would lead the Chamber to review its decision of 26 September 2000.

Request for Provisional Release

8. Rule 65(B) of the Rules states: "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."

9. The Defence submitted that requiring the Accused to prove "exceptional circumstances" violates international law.

10. However, this Tribunal, including its Appeals Chamber, have consistently recognized that Rule 65(B) with its "exceptional circumstances" provision is an appropriate rule governing provisional release.³ A decision to provisionally release an accused charged with serious violations of international law, including genocide, must weigh the request of the accused against community interests and the need to complete trial proceedings in an orderly manner. Given the gravity of the charges against the Accused, requiring proof of exceptional circumstances for provisional release is appropriate. The Chamber also notes that the Accused did not voluntarily surrender to the Tribunal.

¹ Transcripts of 16 September 2000 pp. 6-13.

² Transcripts of 26 September 2000 pp. 32-36.

³ Decisions of this Tribunal include: Prosecutor v. Kanyabashi, Case no. ICTR-96-15, *Decision on the Defence Motion for the Provisional Release of the Accused*, 21 February 2001; Prosecutor v. Bicomumpaka, Case no. ICTR-99-50, *Decision on the Defence's Motion for Provisional Release Pursuant to Rule 65 of the Rules*, 25 July 2001; Prosecutor v. Bagosora et al., Case no. ICTR-98-41, *Decision on the Defence Motion for Release*, 12 July 2002. As for the Appeals Chamber, see Kanyabashi v. The Prosecutor, Case No. ICTR-96-15, *Decision (On Application for Leave to Appeal Filed Under Rule 65(D) of the Rules of Procedure and Evidence)*, 13 June 2001.

11. The Chamber is aware that the "exceptional circumstances" clause has been removed from the corresponding Rule of the International Criminal Tribunal for the former Yugoslavia (ICTY). However, at the ICTY, "provisional release continues to be the exception and not the rule".⁴ Thus the ICTY has generally denied provisional release,⁵ unless the accused demonstrated exceptional circumstances or similarly strong grounds for release.⁶

Whether the Defence has shown "exceptional circumstances"

12. The Chamber dealt with the Defence's submissions as to undue delay in the proceedings in its decision of 26 September 2000.

13. The Chamber again finds that the Defence has failed to show any irregularity over the length of the current proceedings given the complexity of the case. In addition, in view of the seriousness of the charges against the Accused, the Chamber finds that there is nothing irregular about his continued detention.

14. The Chamber notes that this is not a case of an accused awaiting trial, when a motion for provisional release may be properly received. In the present case the trial of the Accused has reached an advanced stage, with only the Defence case remaining to be heard, to be followed by the Judges' deliberations and judgement. There is no reason to believe that the remainder of the trial will not proceed as scheduled. The Accused's

⁴ Prosecutor v. Krajisnik and Plavsic, Case No. IT-00-39&40, *Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release*, 8 October 2001, para. 12.

⁵ See, for example, Le Procureur c. Kvočka et al., Case no. IT-98-30/1, *Décision relative à la demande aux fins de la mise en liberté provisoire de Milojica Kos*, 29 January 1999; Prosecutor v. Simic et al., Case no. IT-95-8/1, *Decision on Motion for Provisional Release of Simo Zaric*, 15 February 1999; Le Procureur c. Kupreskic et al., Case no. IT-95-15, *Décision relative à requête aux fins de mise en liberté provisoire déposée par Vladimir Santic*, 14 September 1999; Le Procureur c. Kunarac et Kovac, Case no. IT-96-32/2, *Nouvelle décision relative à la demande de mise en liberté provisoire de Dragoljub Kunarac*, 17 November 1999; Le Procureur c. Zoran Kupreskic et al., Case no. IT-95-15, *Décision relative à la demande de mise en liberté provisoire des accusés Zoran Kupreskic et Mirjan Kupreskic en date du 15 décembre 1999*, 20 December 1999; Le Procureur c. Kupreskic et al., IT-95-15, *Décision relative à la demande de mise en liberté provisoire de l'accusé Vladimir Santic en date du 15 décembre 1999*, 20 December 1999; Le Procureur c. Brdjanin et al., Case no. IT-99-36, *Décision relative à la requête de Radoslave Brdanin aux fins de mise en liberté provisoire*, 25 July 2000; Le Procureur c. Milosevic, Case no. IT-02-54, *Décision relative à la demande de mise en liberté provisoire de l'accusé*, 6 March 2002.

⁶ Prosecutor v. Enver Hadzihasanovic, et al., Case No. IT-01-47, *Decision Granting Provisional Release to Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura*, 19 December 2001 (noting seventeen guarantees were offered by each accused, seven of which were offered by the Government of Bosnia and Herzegovina which assured "reasonabl[e] safeguard[s]"); Le Procureur c. Ademi, Case no. IT-01-46, *Ordonnance relative à la requête aux fins de mise en liberté provisoire*, 20 February 2002 (noting the assurances of the government of Croatia); Prosecutor v. Simic et al., Case no. IT-95-9, *Decision on Milan Simic's Application for Provisional Release*, 29 May 2000 (considering the physical condition of the accused); Prosecutor v. Simic et al., Case no. IT-95-9, *Order on Request for Provisional Release by Simo Zaric*, 29 February 2000; Prosecutor v. Simic et al., Case no. IT-95-9, *Decision on Miroslav Tadic's Application for Provisional Release*, 4 April 2000; Prosecutor v. Kupreskic et al., IT-95-16, *Decision on the Motion of Defence Counsel for Drago Josipovic (Request for permission to attend funeral)*, 6 May 1999; Prosecutor v. Blagoje Simic and Others, Case No. IT-95-9, *Decision on Miroslav Tadic's Application for Provisional Release*, 4 April 2000; Prosecutor v. Blagoje Simic and Others, Case No. IT-95-9-PT, *Decision on Simo Zaric's Application for Provisional Release*, 4 April 2000 (noting the expected delay in setting a trial date).

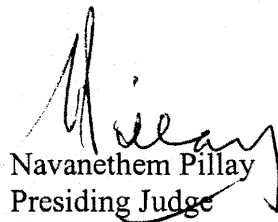
continued custody would facilitate the uninterrupted progress of the trial, whereas provisional release at this stage would only risk delay.

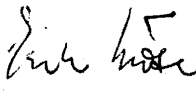
15. Because the Chamber finds that there are no exceptional circumstances justifying the provisional release of the Accused, it need not consider the remaining conditions set out in Rule 65(B).


FOR THE ABOVE REASONS, THE CHAMBER:

DENIES the motion.

Arusha, 5 September 2002


Navanethem Pillay
Presiding Judge


Erik Møse
Judge


Asoka de Zoysa Gunawardana
Judge

(Seal of the Tribunal)

