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UNITED NATIONS

The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994

Case No.ICTR-95-1-B-I
Date : .....

ENGLISH

Original: FRENCH

TRIAL CHAMBER I

Before: Judge Navanethem Pillay, presiding
Judge Erik Møse
Judge Andrésia Vaz

Registry: Adama Dieng

Date Filed: 01 October 2002

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ICTR
JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR

v.

MIKA MUHIMANA

DECISION

DEFENCE MOTION FOR PROVISIONAL RELEASE OF THE ACCUSED
(Rule 73 and 65 of the Rules of Procedure and Evidence)

Office of the Prosecutor:
Charles Adeogun-Philips
Wallace Kapaya
Boi-Tia Stevens

Counsel for the Defence:
Nyabirungu Mwene Songa
Richard Kazadi Kabimba

CI02-0022 (E)

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

Sitting as Trial Chamber I composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and Judge Andrésia Vaz ("the Chamber");

Noting that:

(i) The Accused has been detained by the Tribunal since 8 November 1999;

(ii) He is charged with conspiracy to commit genocide (Article 2(3)(b) of the Statute of the Tribunal - (the "Statute"), genocide (Article 2(3)(a) of the Statute), crimes against humanity (murder, extermination and other inhumane acts - Articles 3(a), (b) and (i) of the Statute) and violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Article 4(a) of the Statute). These counts relate to the alleged participation of the Accused in a conspiracy to kill all the Tutsis in the Kibuye *Préfecture,* and to attacks launched almost daily against thousands of Tutsis who took refuge in the Bisesero hills between 9 April 1994 and 30 June 1994 or thereabouts;[1]

(iii) By a motion filed on 31 May 2002,[2] the Defence requested Muhimana's provisional release pursuant to Rule 65 of the Rules;

(iv) The week the Motion was filed, the Accused had been in detention for nearly two years and six months;

(v) At the Prosecution's request, the Chamber granted it seven days from the date of receipt of the English translation of the Motion to file its response;

(vi) The English translation of the motion was filed on 3 September 2002;[3]

(vii) The Prosecution filed its Response on 6 September 2002;[4] on 19 September 2002, it made a grammatical correction to paragraph 30 of the Response;[5]

(viii) Considering the period of time that has elapsed between the filing of the Motion and the Chamber's decision, the Chamber will consider the submissions

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[1] *The Prosecutor v. Mika Muhimana,* Case No. ICTR-95-1-I, first amended Indictment, 29 April 1996 (the "Indictment"); counts 1 and 20 to 25 and corresponding paras. of the statement of facts.
[2] *The Prosecutor v. Mika Muhimana*, Case No. ICTR-95-1B-I, "Defence Motion for Provisional Release" ("The Motion").
[3] *Id.*, "Defence Motion for Provisional Release".
[4] *Id.*, Prosecutor's Response to the Defence Motion for Provisional Release ("The Response").
[5] By an Inter-office Memorandum, ref. Mu/02 ICTR-95-1-T, sent to Ms Yan Ling, Chamber Coordinator in the Chamber Support Section.

of the Parties, taking into account the period the Accused has been in detention as of the day the decision is rendered;

Considers the motion on the basis of the briefs filed by the parties, pursuant to Rule 73(A) of the Rules.

Submissions of the Parties

1. The Defence's main arguments are as follows:

(a) That the Accused's obligation under Rule 65(B) of the Rules to prove the existence of exceptional circumstances warranting his provisional release violates both international law and the principle of the presumption of innocence;

Indeed, the said provision makes pre-trial detention the rule rather than the exception, contrary to Article 11 of the Universal Declaration of Human Rights (UDHR) and Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR). This was acknowledged *a posteriori* in an earlier decision of ICTY, in an analysis by some of by some of its judges of the previous wording of Rule 65(B) of ICTY Rules of Procedure and Evidence, after its amendment in November 1999, when, in a plenary session, the judges of the said Tribunal struck out the criterion of exceptional circumstances from the said provision;

(b) That the length of the Accused's detention alone constitutes an exceptional circumstance within the meaning of Rule 65(B) of the Rules, in that it ensues from the violation of the Accused's right to be tried without undue delay and in that it prejudices, for the reasons explained above, the right to be presumed innocent;

The Defence points out, in light of the relevant case law of the European Court of Human Rights (ECHR), that neither the complexity of the proceedings nor the gravity of the charges against the Accused justify such a long detention period as the one he has endured, especially because he has not abused his right to file motions;

(c) That the Accused solemnly undertakes to appear for trial, if released, and that he provides certain guarantees, such as, to stay with his family in Cotonou city, Benin, to surrender his passport to the relevant authorities and to report to the authorities designated by the Tribunal and also to abide by any other conditions imposed by the Tribunal;

(d) That the Accused does not pose a danger to any victim, witness or any other person, as borne out by his exemplary conduct as detainee, and as certified in a statement by the Commanding Officer of the United Nations Detention Facility (Annex II to the Motion);

(e) That it is the responsibility of the Tribunal to request to hear the host country which will receive the Accused should he be provisionally released;

In this connection, the Defence refers to the peculiar situation of the Rwandan accused: "... To day they are in detention ... yesterday they were refugees scattered all around the world; ... unwelcome in their native country as per the wish and policies of the current regime", pointing out that "States are both hostile and reluctant to receive them", whereas "the Accused, being refugees, constitute a vulnerable group, and hence, deserve greater protection under the law" (Motion, p. 9, paras. 38 and 41);

(f) That once the unlawfulness of the Accused's detention is established, the Tribunal should grant the Accused adequate compensation, in accordance with prevailing international law (the Defence cites Article 9(5) of the Statute of the ICCPR, Article 5 of the European Convention on Human Rights (ECHR), Article 85 of the Rome Statute establishing the International Criminal Court and some national court practices (it cites some decisions of the Belgium Court of Cassation);

2. For its part, the Prosecution submits:

(i) That it agrees with the Defence that under international standards, pre-trial detention, in general, is viewed as the exception rather than the rule;

(ii) That, however, the above principle is not covered by Rule 65 because of the extreme gravity of the offences over which the Tribunal has jurisdiction and the unique circumstances under which the Tribunal operates (citing a decision rendered by an ICTY Trial Chamber on 25 September 1996 in the *Delalic* case);

3. In addition, the Prosecution mainly submits that in the instant case:

(i) The length of the Accused's detention does not constitute an exceptional circumstance warranting his provisional release in light of the applicable criteria in the prevailing international law, whose assessment is a discretionary matter for the court and which will ultimately depend on the circumstances of each case (citing the Decision of the European Court of Human Rights in *Wemhoff v. Federal Republic of Germany,* 27 June 1968, Series A, No. 7, p. 24, para. 10; p. 26, para. 17);

(ii) In view of the foregoing, both ECHR and the European Commission for Human Rights held in several cases that the complexity of the cases considered, including related investigations in some instances, the gravity of the offences charged and/or the severity of the corresponding penalty, warranted provisional

detention of between 18 months to 5 years (citing several cases relating to such charges as fraud or crimes against humanity);[6]

(iii) In the case of *Bagosora et al.*, Trial Chamber III of the Tribunal held that the length of the current and future pre-trial detention of the Accused, who had at the time been detained by the Tribunal for six years, "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 life, may be a flight risk or may pose a threat to witnesses or to the community if he were to be released;"[7]

(iv) The confirming Judge of Mika Muhimana's Indictment established that there was *prima facie* evidence to show that Muhimana may have committed the offences with which he was charged which were of exceptional gravity;

(v) The Prosecution did show diligence in preparing the case file, particularly by bringing, in March 2000, a motion for severance of the Indictment in respect of the Accused, so as to expedite the commencement of his trial, which motion was denied by the Chamber and to which the Accused's Defence itself was opposed, although four of his co-accused were at large at the time, with three of them still at large up to this day;[8]

(vi) The Defence has not furnished sufficient guarantees that the Accused will appear for trial if released, and that he will not pose a danger to any victims, witnesses or other persons;

(vii) Benin, the host country, has not been heard.

DELIBERATION

4. The Chamber reiterates that the provisions of the Rules, particularly those of Rule 65, are binding.

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[6] Citing: *Ventura v. Italy,* App. No. 7438/76, Comm. Report 15.12.80; *Ferrari-Bravo v. Italy*, App. No. 9627/81, Comm. Report 14.3.84; *Bonnechaux v. Switzerland,* App. No. 8224/78, Comm. Report 5.12.79; *Di Stefano v. United Kingdom,* App. No. 12391/86, Comm. Report 13.4.89; *X v. Germany,* App. No. 6946/75, Comm. Report 6.7.76; *W v Switzerland*, 26 January 1993, Series A, No. 254, P. 15 para. 30; *Van Der Tang v Spain,* 13 July 1995, Series A. No. 321, P. 321, P. 18 & 21; *Neumeister v Austria,* 27 June 1968, series A, No. 8, p. 42, para. 21.

[7] Citing in the case of *The Prosecutor v. Théonaste Bagosora*, No. ICTR-98-41-T, the *Decision on the Defence Motion for Release* of 12 July 2002, para. 27 (unofficial translation).

[8] See the First Amended Indictment dated 29 April 1996. Mika Muhimana is jointly charged with Clément Kayishema, Obed Ruzindana, Ignace Bagilishema, Vincent Rutaganira, Charles Sikubwabo, Aloys Ndimbati and Ryandikayo. The trial of the first three Accused has taken place (the first two were convicted while the third one was acquitted); the fourth Accused is currently being detained by the Tribunal and is awaiting trial; the last three are still at large.

5. In response to the Defence submissions summarised in paragraph 1(a) above, the Chamber notes that it had found that this Tribunal, including its Appeals Chambers, have consistently recognised that Rule 65(B), with its "exceptional circumstances" provision, was an appropriate rule governing provisional release.[9] Moreover, the Chamber further pointed out in that instance that, while the "exceptional circumstances" clause has been removed from the corresponding Rule of ICTY, its application continues to be the exception rather than the rule.[10] Citing a number of ICTY decisions on the subject, the Chamber concluded that "Thus ICTY has generally denied provisional release, unless the accused demonstrated exceptional circumstances or similarly strong grounds for release".[11]

6. In view of the Prosecution's submissions, as summed up in paragraph 3(iv) above, the Chamber also reiterates that the Accused is presumed innocent, pursuant to Article 20(3) of the Statute.

7. The Chamber recognises, as moreover established by ICTY case law and endorsed by this Tribunal, that "[T]he 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."[12]

8. In view of the Prosecution's arguments, as summarised in paragraphs 3(i) and 3(ii) above, the Chamber is not satisfied by the arguments advanced by the Defence in paragraph 1(b) above to show that the length of the Accused's detention to date is an exceptional circumstance. Consequently, the issue of compensation for unlawful detention, as set out in paragraph 1(f) above, does not arise.

9. Moreover, and irrespective of the above considerations, the Chamber notes that Mika Muhimana is charged with very serious crimes, as listed above in point (ii), paragraph 3 of the preamble. It notes that if he were to be found guilty, he could be sentenced to a maximum penalty of life imprisonment. In view of the foregoing, the Defence's submissions and the relatively insufficient guarantees it provides, as summarised in points 1(c), 1(d) and 1(e) above, fail to satisfy the Chamber that the Accused, who did not surrender voluntarily to the Tribunal, will under no circumstances, abscond or pose a danger to witnesses or other persons, if released.

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[9] *The Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-99-52-T, Decision on the Defence Motion for the Release or Alternatively Provisional Release of Ferdinand Nahimana, 13 June 2001, [*sic*], § 10. In the same paragraph, there is a footnote, No. 3, citing several supporting decisions by the Tribunal's Chambers.

[10] *Id.* Para. 11 (citing a Decision rendered by ICTY in *The Prosecutor v. Krajisnik and Plavsic,* No.IT-00-39 and 40, 8 October 2001).

[11] *Id.* Para. 11.

[12] ICTY, Trial Chamber II, *The Prosecutor v. Simo Drljaca and Milan Kovacevic*, Case No. IT-97-24, "Decision on the Defence Motion for Provisional Release," 20 January 1998, § 22. The same reasoning was followed by the Tribunal's Trial Chamber II in paragraph 9 of the "Decision on the Defence Motion for the Provisional Release of the Accused" dated 21 February 2001, and rendered in the case of *The Prosecutor v. Joseph Kanyabashi* (Case No. ICTR-96-15-T).

10. The mere fact that the Accused left Rwanda after the 1994 events and that he feels unwelcome in many countries, including his native country, cannot justify his being relieved of the burden of providing the Chamber with some *prima facie* evidence to show that if he were released, there is a likelihood that the authorities of the host country concerned would welcome him into their country and monitor his movements in one way or another to ensure that he remains within the territory.

11. It is apparent, therefore, that the Defence motion has failed to satisfy the requirements provided for in Rule 65 of the Rules of Procedure and Evidence and, accordingly, must be dismissed.

For the foregoing reasons,

The Tribunal

Dismisses the motion.

Arusha, 1 October 2002

(Signed)

Judge Navanethem Pillay, presiding

Erik Møse
Judge

Andrésia Vaz
Judge
