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Mwambi



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: English

TRIAL CHAMBER II

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

Registry: Adama Dieng

Decision of: 21 October 2002

JUDICIAL RECORDS
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The PROSECUTOR
v.
Élie NDAYAMBAJE
Case No. ICTR-98-42-T

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

The Office of the Prosecutor:

Silvana Arbia,
Jonathan Moses,
Adelaide Whest,
Gregory Townsend,
Adesola Adeboyejo,
Manuel Bouwknecht,

Counsel for the Defence:

Pierre Boulé,
Frédéric Palardy,

tdm

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

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

BEING SEISED of:

- (i) The “*Requête en extrême urgence aux fins de remise en liberté provisoire et sous conditions de l’Accusé (Article 65 du Règlement)*”,¹ filed by the Defence on 21 August 2002 (the “Motion”);
- (ii) Annex M and Annex N, filed by the Defence on 2 September 2002;
- (iii) The “*Rectificatif à la requête en extrême urgence aux fins de remise en liberté provisoire et sous conditions de l’accusé*”,² filed by the Defence on 2 September 2002;
- (iv) The “Prosecutor’s Response to Ndayambaje’s Motion for Provisional Release”, filed on 6 September 2002; and
- (v) The “*Réplique à la Réponse du Procureur à la Requête en extrême urgence aux fins de remise en liberté provisoire et sous conditions de l’Accusé (Article 65 du Règlement)*”,³ filed on 14 October 2002.

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

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

ARGUMENTS OF THE PARTIES

The Defence

1. The Defence requests the release of the Accused, arguing *inter alia* that the Chamber should not apply the “exceptional circumstances” clause of Rule 65 (B) of the Tribunal’s Rules governing provisional release because it violates international law and the Statute. The Defence argues that the requirement that an Accused show the existence of “exceptional circumstances” to obtain provisional release violates the Accused’s right to presumption of innocence, pursuant to Article 20 (3) of the Statute and the Accused’s right to be tried without undue delay, pursuant to Article 20 (4) (c) of the Statute.

2. The Defence further submits that Rule 65 (B) violates a “fundamental right” to provisional release of an arrestee or detainee under international law, citing *inter alia*

¹ Motion in Extreme Urgence for the Provisional Release and Bail of the Accused [Unofficial Translation]

² Corrections to the Motion in Extreme Urgence for the Provisional Release and Bail of the Accused [Unofficial Translation]

³ Reply to the Prosecutor’s Response to the Motion in Extreme Urgence for the Provisional Release and Bail of the Accused [Unofficial Translation]

Article 9.3 of the International Covenant of Civil and Political Rights. The Defence notes that the requirement of “exceptional circumstances” as a *sine qua non* condition for 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”) “in order to harmonize its provisions with internationally recognised standards.”⁴

3. In the alternative, the Defence argues that the Accused’s situation satisfies the “exceptional circumstances” requirement of Rule 65 on the following grounds: (a) the Accused has been in detention for more than seven years, one of the longest detentions of an Accused appearing before the ICTR and longer than the detention of any Accused appearing before the ICTY; (b) it is likely to take several years for the Prosecution to complete its case and many months, perhaps years, for the six co-Accused to present their Defence cases; (c) there are inherent problems in the Prosecution’s case, as exemplified by delays due to the unavailability of witnesses and the lack cooperation from the government of Rwanda; and (d) the Accused’s indigence has prevented him from receiving family visits in Arusha.

4. The Defence offers the undertaking by the Accused that he will, *inter alia*, appear for trial and abide by any conditions imposed upon him by the Chamber. The Defence further offers the undertakings of the Accused’s wife and of Professor Stephen Marjisse in which they commit to do everything in their power to ensure that the Accused appears for trial, and in which Professor Marjisse agrees to post a surety in the amount of 5000 Euros.

5. The Defence submits that the Accused does not constitute a danger to any victim, witness or other person, arguing that the Accused has never attempted to contact or intimidate any witness called to testify before the Chamber, and that no witnesses reside in Tanzania, the Netherlands or Belgium, the countries through which the Accused intends to travel or in which he intends to reside. The Defence offers the undertaking of the Accused not to contact any witness, victim or other person in any way associated with the case.

6. Finally, the Defence requests that the Registrar take appropriate measures to summon the host country, the Republic of Tanzania, to be heard by the Chamber, in accordance with Rule 65 (B) of the Rules.

The Prosecution

7. The Prosecution submits that the Motion should be dismissed and argues that the “exceptional circumstances” clause of Rule 65 complies with international law and with the mandate of the Tribunal. The Prosecution further argues that the Defence has the burden of proving that the elements of Rule 65 are satisfied.

⁴ Prosecutor v. Theoneste Bagosora, Case No. ICTR-98-41-T, Decision on the Defence Motion for Release, 12 July 2002, para. 24.

8. The Prosecution submits that the Accused's current situation does not satisfy the "exceptional circumstances" requirement of Rule 65, arguing, *inter alia*, that (a) the length of detention is justified in light of the serious nature of the charges, the complexity of the trial and delays caused by at least one appeal and "duplicated interlocutory motions" filed by the Defence at the pre-trial stage, (b) the lengthy duration of the trial can be explained in part by restrictions placed on the Chamber by Defence Counsel, (c) the Defence argument that the Prosecution's case has inherent problems is unfounded, and (d) the Accused's lack of family visits due to his indigence is both unproven and irrelevant.

9. The Prosecution submits that there is a risk that the Accused will not appear at trial, arguing, *inter alia*, that the Accused fled the scene of the crime in Rwanda and has refused to appear before the Chamber on previous occasions. The Prosecution further submits that the surety offered by Professor Marjisse is inadequate and that the Accused's indigence would likely cause additional delays were the Accused to be provisionally released.

10. The Prosecution argues that, given the serious nature of the charges and the fact that the Accused held a position of power, the Accused's own undertaking does not provide sufficient assurance that he will not attempt to interfere with Prosecution witnesses.

11. Finally, the Prosecution submits that before a request for provisional release can be granted, the Defence must seek an order requesting that the host country be heard before the Chamber. The Prosecution further argues that the Chamber must be convinced that Belgium, the country in which the Accused intends to reside if provisionally released, is willing to receive the Accused as a condition of his bail.

The Defence Reply

12. The Defence contests the Prosecution's allegation that the Defence is responsible for delays in the proceedings, and notes it has never requested an adjournment of trial.

13. The Defence reiterates that the Accused's circumstances, in particular the excessive length of his detention, his lack of access to his family and the slow pace of the proceedings constitute "exceptional circumstances." The Defence notes that the Tribunal has yet to render a decision specifying what constitutes "exceptional circumstances" and that this places an "impossible burden" of proof upon the Defence.

14. The Defence challenges the Prosecution's claim that the Accused's departure from Rwanda in 1994 indicates that the Accused is a flight risk. The Defence notes that the Accused, a Hutu, fled Rwanda with more than one million others who sought refuge outside of the country when the RPF took control.

15. The Defence argues that it is unfair to place the burden on the Defence to prove that the Accused is not a threat to Prosecution witnesses, and notes that the Prosecution has offered no evidence to suggest that the Accused poses any such threat.

16. While reminding that the Accused's indigence has been confirmed by the Registrar, the Defence submits that the cost to the Tribunal of the Accused's travel between Belgium and Tanzania would be substantially less than the current cost of maintaining the Accused in detention.

17. On the issue of the host country requirement under Rule 65, the Defence requests the aid of the Registrar in calling Tanzania and Belgium to be heard.

HAVING DELIBERATED

On the Rule Governing Provisional Release Before the ICTR

18. The Chamber notes Rule 65 of the Rules:

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.

19. As regards the Defence argument that the Chamber should not apply the requirement of "exceptional circumstances" as a condition for provisional release, this Tribunal, including its Appeals Chamber, has consistently recognised that Rule 65 (B) with its "exceptional circumstances" provision is an appropriate rule governing provisional release.⁵ In the instant case, given the gravity of the charges against the Accused, the Chamber maintains that exceptional circumstances have to be proved.

20. Concerning the Defence's argument that the Chamber should apply the Rule as it appears at the ICTY, the Chamber recalls that Article 1 of the Statute establishes the Tribunal as separate and sovereign, with a competence *ratione materiae* and *ratione temporis* distinct from that of the ICTY. The Judges of the Tribunal are bound to apply the ICTR Rules.

⁵ *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001 ("Kanyabashi Decision"); *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Appeals Chamber, Decision (On Application for Leave to Appeal Filed Under Rule 65 (B) of the Rules of Procedure and Evidence), 13 June 2001 ("Kanyabashi Appeal"); *Prosecutor v. Bicamumpaka*, 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-T, Decision on the Defence Motion for Release, 12 July 2002; *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Decision on the Defence's Motion for the Release or Alternatively Provisional Release of Ferdinand Nahimana, 5 September 2002 ("Nahimana Decision").

As to Exceptional Circumstances Warranting the Provisional Release of the Accused

21. The Chamber notes that the Defence seeks provisional release of the Accused because it argues that the following are "exceptional circumstances" within the meaning of Rule 65(B):

- (a) The fact that the Accused has been in provisional detention for over seven years;
- (b) The high probability that the Accused's trial will last several more years;
- (c) Inherent problems with the Prosecution's case; and
- (d) The Accused's lack of access to his family.

22. Pursuant to Rule 65 and in accordance with its jurisprudence in *Prosecutor v. Kanyabashi*, the Chamber recalls that provisional release of an accused may be ordered only if the Defence satisfies the Trial Chamber of four conditions:

- (1) Exceptional circumstances;
- (2) Provision of sufficient guarantees that the Accused will appear for trial;
- (3) Provision of sufficient guarantees that the Accused, if released, will not pose a danger to any victim, witness or other person; and
- (4) Hearing the host country.⁶

23. With regard to the length of the provisional detention of the Accused, the Chamber notes the Decision in *Barayagwiza* (cited in the *Kanyabashi* Appeal) that a lengthy detention does not constitute in itself good cause for release.⁷ In the present case, having regard to the general complexity of the proceedings and the gravity of the offences with which the Accused is charged, the Chamber concludes that the Accused's detention remains within acceptable limits.

24. While the Chamber remains alive to the need to protect the Accused's right to be tried without undue delay pursuant to Article 20 (4)(c) of the Statute, the Chamber notes that the trial of the Accused, who is jointly tried with five others, began in June 2001, and that the testimony of 14 witnesses has already been heard. Therefore, the provisional release of the Accused in the circumstances of this case would not be justified

25. On the question of a lack of family visits, the Chamber finds that the fact that the Accused is detained in Arusha and therefore at a distance from his family does not contribute to "exceptional circumstances" warranting the Accused's release within the purview of Rule 65 (B) of the Rules.

⁶ *Ibid.* para. 6.

⁷ *Kanyabashi* Appeal, citing *Prosecutor v. Barayagwiza*, Case No. ICTR-97-20-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para.74.

26. The Chamber does not accept the Prosecution submission that the Accused contributed to delays in the proceedings by filing "duplicated interlocutory motions." In accordance with the *Kanyabashi* Decision, the Chamber reminds the Prosecution that filing pre-trial motions and appeals against decisions, pursuant to the Statute and the Rules, is a right afforded to all accused before the ICTR.⁸

27. Finally, the Chamber agrees with the Tribunal's finding in *Prosecutor v. Nahimana* that "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".⁹ After weighing these interests and considering the submissions of both the Defence and Prosecution, the Chamber finds that there are no exceptional circumstances justifying the provisional release of the Accused.

As to the Other Requirements Under Rule 65(B) of the Rules

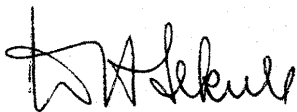
28. In accordance with the ruling of *Prosecutor v. Rutaganda*,¹⁰ if the Trial Chamber is not satisfied of the existence of exceptional circumstances, no provisional release shall be ordered, and it is not necessary to consider the other criteria, pursuant to Rule 65. The Defence having failed to prove the existence of exceptional circumstances, the Trial Chamber will not consider whether the other requirements under Rule 65 of the Rules are met.

FOR ALL THE ABOVE REASONS,


THE TRIAL CHAMBER

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

Arusha, 21 October 2002



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramarosan
Judge



⁸ *Kanyabashi* Decision, para. 10.

⁹ *Nahimana* Decision, para. 10.

¹⁰ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Decision on the Request Filed by the Defence for Provisional Release of Georges Rutaganda, 7 February 1997.