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UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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ENGLISH
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TRIAL CHAMBER I

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

Registry: Adama Dieng

Decision of: 22 October 2002

THE PROSECUTOR
v.
JEAN MPAMBARA

Case No. ICTR-2001-65-I

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DECISION
(DEFENCE MOTION FOR RELEASE OF THE ACCUSED)

Office of the Prosecutor:
Richard Karegyesa
Andra Mobberley

Counsel for the Defence:
Mario Spandre

Translation certified by LSS, ICTR

CI02-0030 (E)

The International Criminal Tribunal for Rwanda (hereinafter “the Tribunal”)

Sitting as Trial Chamber I composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and Judge Andrézia Vaz, designated pursuant to Rule 73(A) of the Rules of Procedure and Evidence (the “Rules”),

Being seized of:

- (i) The “Defence Motion for Release (Rules 73 and 65 of the Rules)”, filed on 16 July 2002 (the “Motion”);
- (ii) The Prosecutor’s Response, filed on 3 September 2002;
- (iii) The Defence Reply, filed on 3 October 2002.

Noting that Jean Mpambara has been detained by the Tribunal since his transfer to the Tribunal’s seat on 23 June 2001 and that this is the second motion the Defence is filing at the pre-trial stage,

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

Arguments of the parties

1. The Defence submits that several basic rights of the Accused have been violated. It refers, *inter alia*, to Articles 16 and 20 of the Statute, particularly, Articles 20(4)(b), 20(4)(d) and 20(4)(e), as well as Rules 32 and 33 of the Rules, as follows:

- (i) Violation of the right of the Accused to have adequate time and facilities for the preparation of his defence due to delay by the Registry (Lawyers and Detention Facilities Management Section), failure to pay the fees, refund expenses or pay salaries of members of the Defence team (Lead Counsel, his assistant and two investigators).

The Defence contends that:

...according to the internal rules set down by the Registry, claims for refunds and for the payment of fees are supposed to be processed within a month after their submission; ...the original intent of such rules was no doubt to meet the requirement of equality under Article 20(4)(b) of the Statute; ...the said internal rules of the Tribunal are absolutely not (or are no longer) complied with.¹

¹ Motion, p. 6.

It adds to the preceding complaint, the Registry's refusal to bear the cost of DHL or similar services "which are the only means of delivery ensuring the safety and speed that are vital in monitoring and coordinating the Defence team's work."²

(ii) Violation of the right of the Accused to communicate with counsel of his own choosing, due to the Registry's refusal, since January 2002, to allow his investigators access to the Accused, whereas the Counsel was not in a position, financially or in terms of availability, to travel frequently from Belgium to Tanzania.

(iii) Violation of the principle of equality of arms and the right of the Accused to a fair trial;

The Defence alleges that the Prosecution is provided with disproportionate resources, in comparison with the Defence:

... the work of the Office of the Prosecutor is effectively ensured, that its staff is effectively and regularly remunerated; ...expenses such as those for the transmittal of documents are not borne by the staff of the Office of the Prosecutor; [whereas] the Defence, not [being] paid, or [being] obliged to wait for very long periods of time, receiving, for example, the refund in June 2002 of expenses incurred in September 2001.³

The Defence further argues that, the Office of the Prosecutor does not "include a neutral and independent preliminary examining body that investigates the prosecution's evidence and the suspect's defence, as is the case in accusatorial systems of law."⁴ The Defence adds that:

"...the rule obliging the Prosecution to disclose material tending to exculpate the accused to the Defence does not counterbalance the absence of an impartial preliminary examining body that is independent of the parties in the trial, since the Prosecution's primary function is to prosecute persons responsible for crimes committed within the jurisdiction of the Tribunal (Article 15.1 of the Statute)."⁵

2. According to the Defence, these violations constitute exceptional circumstances warranting the provisional release of the Accused, pursuant to Rule 65 of the Rules. The Defence asserts that the Accused will pose no flight risk, for since his arrival in mid-April in Tanzania, where he was arrested in 1999, he was aware that "the Prosecutor was prosecuting the senior officials of the former Rwandan regime, in particular the *Bourgmestres*". The

² Defence Motion, p.3.

³ *Ibid.*, p.4.

⁴ Defence Motion, p.5.

⁵ Defence Motion, p. 6.

Defence concludes that "such being the case, the Accused could well have expected to be prosecuted; ...[he] never sought to flee and must therefore be released."⁶

3. In substance, the Prosecutor's response is as follows:

(i) None of the arguments advanced by the Defence, as set forth in paragraph 1 *supra*, constitute exceptional circumstances within the meaning of Rule 65 of the Rules;

(ii) Responsibility rested with the Registry to reply to allegations of delay in the payment of the Defence team's fees and expenses. In any case, the Defence has not established that the alleged delay in the payment of fees and expenses had prejudiced the preparation of its defence and hindered progress in investigations and, even if that were the case, an administrative remedy requiring the Registry to refund Defence expenses would have been sufficient to cure any prejudice;

(iii) If the Defence were to offer proof of the alleged delay in the payment of fees and expenses blamed on the Registry, the likely judicial remedy would, at the very most, at the end of the proceedings, be monetary damages in the case of the Accused being found not guilty, or a reduction of sentence in the case of the Accused being found guilty (the Prosecution cites the "Decision (Prosecutor's request for review or reconsideration)" rendered by the Appeals Chamber in *The Prosecutor v. Jean-Bosco Barayagwiza* (Case No. ICTR-97-19-AR72) on 31 March 2000);

(iv) The ban preventing investigators from having access to the Accused in detention is consistent with Rule 65 of the *Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or otherwise Detained on the Authority of the Tribunal* ("UNDF Rules").⁷ There is no provision which allows Defence investigators or assistants access to detainees. The Prosecution understands that the competent authorities had, nevertheless, up to a certain time, allowed persons other than their Counsel to have access to accused persons in the United Nations Detention Facility. This practice extended a privilege to such other persons. It was not a right. Whatever the case, this is a matter for the Lawyers

⁶ Defence Motion, p.10.

⁷ Rule 65 of UNDF Rules provides that: "Each detainee shall be entitled to communicate fully and without restraint with his Defence Counsel, with the assistance of an interpreter where necessary. Unless such Counsel and interpreter have been provided by the Tribunal on the basis of the indigence of the detainee, all such communications shall be at the expense of the detainee. All such correspondence and communications shall be privileged. All visits shall be made by prior arrangement with the Commanding Officer as to the time and duration of the visit and shall be subject to the same security controls as are imposed under Rule 61. The Commanding Officer shall not refuse a request for such a visit without reasonable grounds. Interviews with legal Counsel and interpreters shall be conducted in the sight but not within the hearing, either direct or indirect, of the staff of the Detention Unit.

and Detention Facilities Management Section on which it should first be heard. The Prosecutor is, as a matter of principle, opposed to allowing Defence investigators any access to the accused in detention, unless the Defence provides justification for such a privilege, in which case a full investigation into the antecedents of the investigators will be requested.

(v) Jean Mpambara was charged with genocide, a *jus cogens* crime in customary international law distinguished by its gravity. The confirming Judge acknowledged that there was *prima facie* evidence upon which to indict the Accused after considering the statements of 28 relevant witnesses. Therefore, he is lawfully detained by the Tribunal. Should he be found guilty, he will be convicted and possibly sentenced to life imprisonment. The Defence had not shown that the Accused, if released, would appear for his trial. Finally, since the Accused was arrested in June 2001, the issue of his extended provisional detention does not arise.

4. In its reply, the Defence rebuts the Prosecution arguments that there are no exceptional circumstances justifying the provisional release of the Accused. It reiterates its arguments set out in its initial motion, submitting that it is no longer possible for the Defence to defend the Accused under the conditions imposed on it. It contends that, the Lead Counsel and his Assistant have not been remunerated for any of their services. In the opinion of the Defence, that constitutes an exceptional circumstance due to circumstances beyond its control. Furthermore, the Defence is of the view that the Prosecution's arguments as to the gravity of the charges laid against the Accused are immaterial to the issue raised, namely the right to defend himself and to have adequate time and facilities to that effect. Lastly, the Defence posits that the Trial Chamber may order the competent services of the Tribunal to conduct investigations in order to verify the relevance of its allegations.

Deliberations

5. The Trial Chamber notes that issues concerning the payment of the Defence team's fees, refund of expenses and the defrayal of the cost of sending and delivering documents through DHL are administrative. The party raising such issues must exhaust all existing administrative mechanisms before referring to the Trial Chamber if there is a subsisting issue which, in its view, violates the rights of the Accused. The Defence, in this case, does not appear to have exhausted all the avenues for remedy available at the Registry. Indeed, it only mentions that it made formal contacts, with the Lawyers and Detention Facilities Management Section of the Registry that, in its view, were fruitless. It does not state that it drew the Registrar's attention to the issue. The Trial Chamber further recalls that pursuant to Rules 19 and 33(A) of the Rules, the Registrar is responsible for the administration and servicing of the Tribunal, under the authority and control of the President. The Trial Chamber cannot intervene at this stage. This argument must therefore be dismissed.

6. A similar line of reasoning applies to the alleged violation of the right of the Accused to communicate with Counsel of his own choosing as a result of the Registry's refusal to allow investigators to have access to the Accused. The Trial Chamber recalls

that the administrative procedure for lodging complaints relating to detention conditions is governed specifically by Rules 82 to 86 of UNDF Rules. These rules include, *inter alia*, the lodging of a complaint to the Commanding Officer of the Detention Facility or his representative and if the complaint is rejected, the detainee may make a written complaint to the Registrar, who shall forward it to the President. The documents in the case-file do not indicate that the Defence has exhausted the administrative procedures provided for in these rules. Accordingly, this argument must fail.

7. With respect to the arguments concerning the alleged violation of principle of equality of arms and the right of the Accused to a fair trial, the Trial Chamber notes *seriatim*:

(i) The alleged disproportionate facilities accorded to the staff of the Office of the Prosecutor in view of the belated payment of fees and refund of expenses, which applies only to assigned Defence Counsel,

The Trial Chamber notes that under Article 10 of the Statute, the Tribunal consists of three organs: the Chambers, the Prosecutor and a Registry. It is up to the Registry, pursuant to Rule 33(A) of the Rules and under the authority of the President of the Tribunal, to determine the procedures for the payment of fees and defrayal cost and expenses incurred by Counsel for indigent accused persons in the preparation of their defence, in accordance with Article 20(4)(d) of the Statute.⁸ This argument therefore lacks merit.

(ii) The alleged lack of independence by the Prosecutor,

The Trial Chamber notes that Article 15(2) of the Statute provides that the Prosecutor shall act independently as a separate organ of the Tribunal. Even though the Prosecution, in this Tribunal, appears to function differently from the prosecuting bodies in the Civil Law inquisitorial systems, that is not sufficient to call into question the Tribunal's independence or impartiality; except it were to be considered, as the Defence seems to do, that the prosecuting bodies of the Common Law accusatorial systems from which the Statute partly draws inspiration in this regard,⁹ fail as such to ensure the independence and impartiality of prosecutions in these systems. Such an argument is unfounded.

(iii) Lastly, with regard to this very argument, the Defence does not demonstrate that the Prosecutor has not, in the instant case, complied with its obligation to disclose to the Defence, as soon as practicable, the existence of evidence known to the Prosecutor, which in any way tends to suggest the innocence or mitigate the guilt of the

⁸ Article 20(4)(d) of the Statute: "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality,...to have legal assistance assigned to him or her [...] and without payment by him or her in any such case if he or she does not have sufficient means to pay for it".

⁹ Cf. *L'Accusation*, yril Laucci, in: *Droit international pénal*, under the direction of H. Ascensio, E. Decaux and A. Pellet, Cedin Paris-X, ed. A. Pedone, 2000, p.757.

Accused or may affect the credibility of Prosecution evidence, pursuant to Rule 68. This argument appears, therefore, to be unfounded.

8. Since the Defence has not proved the existence of exceptional circumstances warranting the provisional release of the Accused, pursuant to Rule 65 of the Rules, the Trial Chamber finds that the motion is not justified.

For the foregoing reasons,

The Trial Chamber

Dismisses the motion.

Arusha, 22 October 2002

(Signed)

Judge Navanethem Pillay,
Presiding Judge

Erik Møse
Judge

Andrésia Vaz
Judge

