

ICTR-99-50-I
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Mugwanya



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

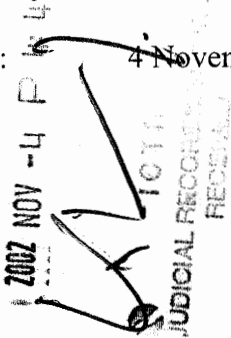
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TRIAL CHAMBER II

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

Registry: Adama Dieng

Date: 4 November 2002



The PROSECUTOR

v.

Casimir BIZIMUNGU et al.

Case No. ICTR-99-50-T

**DECISION ON BIZIMUNGU'S MOTION FOR PROVISIONAL RELEASE
PURSUANT TO RULE 65 OF THE RULES**

Office of the Prosecutor

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

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

BEING SEIZED of:

- (i) The “*Requête en extrême urgence de la défense pour la remise en liberté provisoire*”, filed on 30 April 2002 (the “Motion”);
- (ii) the “Prosecutor’s Response to the Defence Motion for Provisional Release (Bail)”, filed on 2 July 2002 (the “Prosecutor’s Response”);
- (iii) the “Registrar’s Representation pursuant to Rule 33(B) of the Rules of Procedure and Evidence made in Response to the Extremely Urgent Defence Motion for Provisional Release of Dr Casimir Bizimungu”, filed on 19 July 2002 (the “Registrar’s Representation”);
- (iv) the “*Réplique à la ‘Prosecutor’s Response to the Defence Motion for Provisional Release (Bail) (Rule 65 of the Rules of Procedure and Evidence)’ datée du 2 juillet 2002 & et à la ‘Registrar’s Representation pursuant to Rule 33(B) of the Rules of Procedure and Evidence made in Response to the Extremely Urgent Defence Motion for Provisional Release of Dr Casimir Bizimungu’ datée du 19 juillet 2002,*” filed on 25 September 2002 (the “Defence’s Reply”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 6, 65 and 73 of the Rules;

NOW DECIDES the Motion pursuant to Rule 73(A) of the Rules on the basis of the written briefs only as filed by the Parties.

SUBMISSIONS OF THE PARTIES

Defence Submissions

1. As a preliminary matter, the Defence requests that the Motion be decided on the basis of the oral and written submissions of the Parties so that the Defence can exercise its right to call witnesses. The Defence further requests that its application for protective measures for Defence witnesses should be decided before the present Motion because therein it has made a request to protect witnesses who will testify in respect of the Motion.¹

¹ See “Extremely Urgent Defence Motion Seeking Protective Measures for Witnesses Pursuant to Article 21 of the Statute and Rule 75 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda”, filed on 30 April 2002.



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2. The Defence requests the Chamber to grant the provisional release of Dr Casimir Bizimungu (the "Accused") pursuant to Rule 65(B) of the Rules without requiring the Accused to show "exceptional circumstances." The Defence argues that the requirement of "exceptional circumstances" in Rule 65(B) of the Rules violates the guarantees provided to the Accused because it violates the provisions of international legal instruments such as the United Nations Charter, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (the "ICCPR") as well as other provisions such as those from the Constitution of Rwanda and the common law.

3. The Defence argues that since Rule 6 of the Rules provides that amendments to the Rules may be proposed by a Judge, the Prosecutor or the Registrar, then the only way for the Defence to challenge the validity of a Rule is by way of a Motion.

4. The Defence further argues that although the Tribunal has no legal duty to have identical Rules to those of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY,") on 30 November 1999 during its Plenary Session, the ICTY amended Rule 65(B) of its Rules by removing the requirement of "exceptional circumstances." Resultant jurisprudence of the ICTY, found that removal of the requirement made the Rules "[w]holly consistent with the internationally recognized standards regarding the rights of the accused [...] bringing the Rule into conformity with international human rights standards."² The Defence argues that the Tribunal, just like the ICTY, has a duty to conform to international human rights standards.

5. On the basis of the above, the Defence requests that the Chamber should either read Rule 65(B) of the Rules in a manner that does not require the Accused to establish "exceptional circumstances" as a preliminary and mandatory condition of provisional release, or take measures to remove this condition from Rule 65(B) of the Rules.

6. In the alternative, the Defence submits that if the Chamber finds that the Accused must satisfy the "exceptional circumstances" condition, then the Defence essentially argues that the Accused's cooperation with the Tribunal, before and after arrest can constitute "exceptional circumstances" within the meaning of Rule 65(B) of the Rules. The Defence argues that it can reasonably be deduced that the Accused would have given himself up to the authorities if he had the opportunity. The Defence submits that the above points to a strong presumption that the Accused will present himself for trial should he be granted provisional release.

7. In addition, the Defence draws the attention of the Chamber to the fact that, since the Accused's transfer to the UNDF three years and five months ago, no date has been set for his trial. The Defence argues that this amounts to a serious violation of Article 20(4)(c) of the Statute, and as such is an "exceptional circumstance" within the meaning of Rule 65(B) of the Rules.

² *Prosecutor v. Blagoje Simic et al.*, "Decision on Simo Zaric's Application for Provisional Release", pp. 7-8, and "Decision on Miroslav Tadic's Application for Provisional Release", p 8, 4 April 2000 (Case No IT-95-59)



8. Regarding other conditions under Rule 65(B) of the Rules, the Defence essentially submits that, if released on bail, the Accused will not be a threat to witnesses.

9. On the requirement of hearing the host country, the Defence submits that applications to possible host countries have been made, but those countries appear reluctant to grant the application. Notwithstanding, the Defence argues that as these countries have an obligation to co-operate with the Tribunal, but not with the Accused, the responsibility for finding a host country should fall to the Registry and/or the Office of the Prosecutor.

Prosecutor's Response

10. The Prosecution argues that under Rule 65(B) of the Rules the Accused must name a host country before a Motion such as the present can be entertained. The Prosecution notes that the Defence has not demonstrated to the Chamber its attempt to secure a host country rendering the application for provisional release premature.

11. Regarding the Motion for Witness Protection, the Prosecution argues that any request for protection of witnesses to be called in respect of the instant Motion should have been filed with the instant Motion so as to ensure judicial economy.

12. In response to the Defence arguments relating to the requirement of "exceptional circumstances", the Prosecution asserts that Rule 65(B) of the Rules is legitimate and consistent with international law. The Prosecution recalls that the "Decision on the Defence Motion for the Provisional Release of the Accused" of 21 February 2001 in the case of *The Prosecutor v. Joseph Kanyabashi*, (the "Kanyabashi Decision") established that there was no inconsistency between Rule 65(B) of the Rules and international law.

13. Moreover, in response to the Defence citation of the ICTY Rules, the Prosecution notes that the ICTY and the Tribunal are two independent and distinct institutions, and this Tribunal is therefore justified in having different Rules from those of the ICTY. The Prosecution maintains that the Defence simply has to satisfy all the requirements of Rule 65(B) of the Rules.

14. In response to the Defence's alternative argument that the Accused has shown "exceptional circumstances," the Prosecution argues that the Defence has not brought sufficient evidence to suggest that the Accused has shown exemplary behavior and has no intention to evade justice. Moreover, the Prosecution submits that given the grave charges facing the Accused, along with the complexity in conducting the relevant investigations, the Accused has not been detained for an unreasonable period of time. In conclusion, the Prosecution submits that the Defence has not shown the existence of "exceptional circumstances" that would justify provisional release.

15. The Prosecution therefore requests that this Motion be denied.



Registrar's Submissions

16. The Registrar notes that it is a neutral organ within the Tribunal, and therefore cannot be called upon to argue for or against a particular Motion. However, the Registrar also notes that he has a responsibility to ensure that the Accused, if granted provisional release, will present himself for trial, will not interfere with witnesses, or in any way interfere with the administration of justice.³

17. The Registrar, pursuant to Rule 33(B) of the Rules submits that the Defence is misguided in arguing that the Registry has the responsibility of securing a host country for the Accused. The Registrar informs the Chamber that if the Registry were to assume that responsibility, it would be acting *ultra vires*. In support of this contention, the Registrar notes the "Declaration on a Point of Law" of 22 April 1999 in the case of the *Prosecutor v. Ntuyahaga*. In the said Declaration, at para 17(i), after the Registrar had issued a "safe conduct" document in order to assist Mr Ntuyahaga because the Registry could not find a country willing to accept him, Trial Chamber I declared, on a point of law, that the Registrar acted, "*ultra vires* in issuing a "safe conduct" document."

18. On that basis, the Registrar informs the Chamber that the Defence has the duty to provide it with the name of a host country, which undertakes to *inter alia*, transport and accompany the Accused to and from the Tribunal.

Defence Reply

19. In its Reply, the Defence outlines the various steps taken to secure a host country for the Accused, if release is granted. The Defence submits that there is a strong possibility that a host country will be found so it requests the Chamber to postpone the deliberation of the Motion until 12 October 2002.

20. The Defence argues that the detention of the Accused should not be justified simply because of the complexity and seriousness of the crimes. The Defence demonstrates this by giving examples of the Nuremberg and Tokyo trials. At Nuremberg, an indictment was preferred against an Accused on 18 November 1945 whereas the trial was held on 20 November 1945 and a Decision was rendered on 1 October 1946. Similarly for Tokyo, a 55-counts indictment was preferred against an Accused on 29 April 1946, and a Decision was rendered on 24 November 1948.

21. The Defence persists with its request for an oral hearing to clear the ambiguities found in the written submissions of the Parties as well as to offer an opportunity for witnesses to testify on the Accused's character as outlined in his Affidavit.

22. Finally, the Defence, while emphasizing its reasons for the request for the removal of the requirement of "exceptional circumstances," prays that the Chamber stay its Decision until an amendment to Rule 65(B) of the Rules can be made at the next Plenary Meeting of the Tribunal.

³ See the Kanyabashi Decision at para 6-7.



HAVING DELIBERATED

Regarding the Request for an Oral Hearing of the Motion

23. As a preliminary matter, the Chamber notes the Defence's ongoing request to make oral submissions in order to *inter alia* clear ambiguities in the written submissions of the Parties and in order to hear witnesses testifying on the character of the Accused. The Chamber recalls the Registry's Memorandum following instructions by the Chamber, dated 22 May 2002 to the effect that this Motion would be decided on the basis of written briefs only.⁴ After having considered the written submissions of the Parties, the Chamber is satisfied that it can make a determination of the said submissions. Accordingly, the Chamber denies the Defence request for an oral hearing and will decide the Motion solely on the basis of the written submissions of the Parties, pursuant to Rule 73(A) of the Rules.

The Rule Governing Provisional Release Before the Tribunal

24. Rule 65(B) of the Rules provides that "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."

25. The Chamber notes that the Defence requests the Chamber not to apply the requirement of "exceptional circumstances" as a condition for provisional release. The Defence requests that the Tribunal amends its Rule 65(B) of the Rules just as it has been the case at the ICTY.

26. The principle object of the Tribunal, as laid out under Article 1 of the Statute, is to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States between 1 January and 31 December 1994.

27. It is the Chamber's view that, the Tribunal has its own applicable Rules and since no amendment has been made to Rule 65(B) of the Rules, the Judges of the Tribunal are bound to apply this Rule as it stands.

Exceptional Circumstances Warranting the Provisional Release of the Accused

28. The jurisprudence of the Tribunal has been that a showing of "exceptional circumstances" is a threshold requirement before the Chamber considers granting provisional release.⁵ In the instant case, the Defence argues that the following

⁴ ICTR/JUD-11-6-2-02-75

⁵ See the Kanyabashi Decision at para 6-7; and para. 22 of the "Decision on the Defence Motion for Release," of 12 July 2002 in *the Prosecutor v. Bagosora et. al.*



“exceptional circumstances” warrant the provisional release of the Accused; 1) the fact that the Accused has cooperated with the Tribunal, before and after his arrest; and 2) the fact that the Accused has been in provisional detention for more than three years.

29. The Chamber notes that the Defence essentially submits that the Accused has cooperated with the Tribunal and that, if he had known that there was an Indictment against him, he would have surrendered to the Tribunal.

30. The Chamber takes note of the jurisprudence of the ICTY in the case of *Prosecutor v. Brdanin and Talic* in which, Trial Chamber II observed that considerable weight is given to the accused’s voluntary surrender when determining that the accused will appear at his trial. The Chamber notes however that, in the circumstances of this case there is no evidence that the Accused could have surrendered himself. The Chamber, on that basis therefore, cannot make a determination on whether or not this *per se* would have amounted to “exceptional circumstances.”

31. The Chamber notes the Defence’s further argument that it constitutes an “exceptional circumstance” that the Accused right to a trial without undue delay, guaranteed under Article 20(4)(c) of the Statute has been infringed upon as he has been in detention for over three years. The Chamber notes that in the case of *Prosecutor v. Kanyabashi*, it held that a lengthy detention does not constitute *per se* good cause that would warrant provisional release.⁶

32. In the instant case, having regard to the general complexity of the case and the gravity of the offences with which the Accused is charged, the Chamber concludes that the Accused’s detention remains within reasonable limits.

33. The Chamber, agreeing with the Tribunal’s “Decision on the Defence’s Motion for the Release or Alternatively Provisional Release of Ferdinand Nahimana,” of 5 September 2002 in *Prosecutor v. Nahimana* which found at para 10 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.” In the instant case, 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

34. In accordance with the ruling in the “Decision on the Request Filed by the Defence for Provisional Release of Georges Rutaganda,” of 7 February 1997, in *Prosecutor v. Rutaganda*, if the Trial Chamber is not satisfied of the existence of “exceptional circumstances,” no provisional release shall be ordered, and it is not

⁶ See the Appeals Chamber “Decision (On Application for Leave to Appeal Filed under Rule 65(D) of the Rules of Procedure and Evidence)” of 13 June 2001

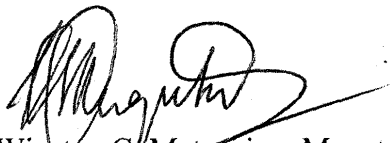


necessary to consider the other criteria pursuant to Rule 65(B) of the Rules. The Defence having failed to prove the existence of “exceptional circumstances,” the Trial Chamber will not consider whether the other requirements under Rule 65(B) of the Rules are met.

FOR THE ABOVE REASONS, THE TRIBUNAL

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


Arusha, 4 November 2002



Winston C. Matafzima Maqutu
Presiding Judge



William H. Sekule
Judge



Arlette Ramaroson
Judge

[Seal of the Tribunal]