ICTR-99-50-I
11. 11. 2002
(5380 — 5371)

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United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

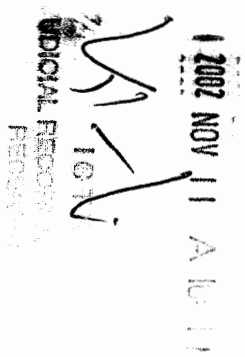
OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 8 November 2002



The PROSECUTOR

v.

Justin MUGENZI et al.

Case No. ICTR-99-50-I

DECISION ON JUSTIN MUGENZI'S MOTION FOR STAY OF PROCEEDINGS OR IN THE ALTERNATIVE PROVISIONAL RELEASE (RULE 65) AND IN ADDITION SEVERANCE (RULE 82(B))

Office of the Prosecutor
Mr. Marks Moore
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

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

BEING SEIZED of:

i. The Defence "Motions for: Stay of proceedings against the defendant Justin Mugenzi on the ground that his right to be tried without undue delay under Article 20(4)(c) has been infringed and that his further prosecution would be an abuse of process. Or, in the alternative; Provisional release of the defendant Justin Mugenzi under Rule 65 of the Rules of Procedure and Evidence. And, in addition to the above; Severance of the trial of the Defendant Justin Mugenzi from the trial of his current co-accused under Rule 82(b) of the Rules of Procedure and Evidence" filed on 2 September 2002 (the "Defence Motions");

ii. The "Prosecutor's Reply to the Defence Motion for Stay of Proceedings or in the Alternative Provisional Release and in Addition Severance Under Rule 82(b)" filed on 16 September 2002 (the "Prosecution Reply");

iii. The "Rejoinder of the Defendant Justin Mugenzi to the Prosecutor's Reply of 16 September 2002" filed on 30 September 2002 (the "Defence Rejoinder");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), particularly:

(i) Article 20(4) of the Statute, which states that:

> 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: [...]
>
> (c) To be tried without undue delay;

(ii) Rules 65 of the Rules, which states that:

> (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.
>
> (C) The Trial Chamber may impose such conditions upon the provisional release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused at trial and the protection of others.

(iii) Rule 82(B) of the Rules on severance of trial, which states that:

The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice

NOW CONSIDERS the matter solely on the basis of the written briefs of the Parties, pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

1. The Defence request an oral hearing so that the issues could be argued fully in court.

2. The Defence request the Chamber to order that the proceedings against the Accused be stayed and that he be released or, in the alternative, that he be provisionally released pending his trial, and, in addition, that the trial of the Accused be severed from the trial of his current co-accused.

3. The Prosecution urges the Chamber to dismiss all three of the Motions.

Request for Stay of Proceedings and Release of the Accused

4. The Defence submits that pursuant to Article 20(4)(c) of the Statute, the Accused has a right to be tried without undue delay, that undue delay has in fact occurred, and that the appropriate remedy, which the Trial Chamber should order, is a stay of proceedings and the release of the Accused.

5. The Defence submits that the right to be tried without undue delay is contained both within the Statute and the International Covenant on Civil and Political Rights (ICCPR)[1]. According to the Defence, the ICCPR is directly applicable by the Tribunal and binding in its effect, and the regional human rights treaties are of persuasive authority. They cite the Tribunal Appeals Chamber Decision in the case of *Barayagwiza*[2] as their authority for this proposition.

6. The Prosecutor concurs with the Defence that, following the *Barayagwiza* Appeals Chamber Decision, the ICCPR is directly applicable by the Tribunal and binding[3]. They do however advance a seemingly contradictory submission later on, in reference to the Defence application for provisional release, that Article 9(3) of the ICCPR is "of persuasive value and [is] of no consequence"[4]. In relation to the dictum of the *Barayagwiza* Decision, the Prosecution argue that the facts in that case are distinguishable and that the *ratio decidendi* is not applicable in the present matter. For the *Barayagwiza* scenario to apply, recalls the Prosecution, "there must be a repeated violation of the fundamental rights of the Accused, the Prosecutor's failure to prosecute must be tantamount to negligence and her conduct must be egregious in addition to the numerous violations". The Defence reply that the circumstances of the case are egregious and that stay of proceedings should be granted.

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[1] They add that it is also contained in various other regional human rights instruments such as the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights.
[2] *Barayagwiza v. Prosecutor*, Appeals Chamber Decision of 3 November 1999, at par. 40
[3] At para. 5 of the Prosecution Reply
[4] At para. 55 of the Prosecution Reply

7. The Defence quote jurisprudence from the European Court of Human Rights (ECHR) to the effect that the reasonableness of the length of detention must be assessed in each case in each instance according to the particular circumstances. They cite various decisions where the length of detention had been found to be unreasonable, the length of detention in these cases varying from two years to more than four years. They submit that, according to jurisprudence of the ECHR, the threshold of what can be considered reasonable detention is lower where detention is pre-trial. The Defence submit that their client has been in pre-trial detention for a period of three and a half years to date, and that in comparison with the standards laid down by the ECHR and the ICCPR, this represents an inordinate delay. This, in the submissions of the Defence, raises a presumption that the rights of the Accused have been breached and it now falls on the Prosecution to explain this delay.

8. The Defence admit that this case is one of a very serious and complex nature, but that it is not the complexity of the case that has caused delay. Neither is it the case that the Accused has been responsible for the delay in trial. The Defence claim that the cause of the delay is the lack of Tribunal resources to hear the case in a timely manner, and that this is no good reason to justify the breach of the Accused's right to trial without undue delay. The Defence add, "It is the United Nations' obligation to ensure that their *ad hoc* tribunals are organised in such a way that they can meet their requirements under international law".

9. The Prosecution disagree with the Defence argument that delay in trial has been caused by a backlog of cases at the Tribunal. They quote a passage from the transcripts from 12 March 2001 in this case to the effect that the Chamber scheduled a further status conference in order to determine an actual date for trial.

10. The Prosecution concede that the jurisprudence of the ECHR is of persuasive authority but not directly applicable in the present case. Furthermore, they are aware that relevant human rights law does not imply a maximum length of pre-trial detention in the abstract. Citing a decision of the ECHR in support of this argument[5], they concur with the Defence that what constitutes undue delay has to be decided on a case-by-case basis. They raise the issue of the seriousness of the crimes charged against the Accused, and counter the authorities cited by the Defence in support of length of reasonable detention, claiming that none of the authorities cited dealt with the grave nature of the crimes charged against the Accused at the Tribunal.

11. The Prosecution contend that, in general, Defence add to the delay in moving to trial through the filing of pre-trial Motions and Appeals against interlocutory Decisions. Such conduct, whilst it may be necessary and well founded, adds to the delays in bringing the Accused to trial, and the reasonableness of the duration of pre-trial detention needs to be assessed with this in mind. The Prosecution submit that they have acted with due diligence in prosecuting the case against the Accused.

12. The Defence argue that the Accused does not have to show that delay has caused "such prejudice to him that a fair trial is no longer possible" such as would be the traditional requirement in Common law jurisprudence. The reason for this is that the Common law concept of a fair trial includes the right to trial without undue delay. In contrast to the Common law

[5] *Eckle v. Germany* (1983), 5 E.H.R.R. 1

approach, the case law of the ECHR "makes it clear that the right to a hearing within a reasonable time is independent of the right to a fair hearing, and that there is no need to show specific prejudice, other than the prejudice caused by unreasonable elapse of time". The Prosecution disagree and submit that, pursuant to Rules 5(A) and 5(B) of the Rules, the Defence have failed to show that material prejudice has been caused to the Accused.

13. The Defence submit that as a violation of the Accused's right to trial without undue delay has been shown, the proper remedy is a stay in proceedings and release of the Accused. The Defence quote the *Barayagwiza* Decision[6] to support this contention. They submit that in the *Barayagwiza* Decision a stay was granted because the Prosecution failed to prosecute with due diligence causing a delay of just under two years.

14. The Prosecution reply that the Defence seeks a disproportionate remedy, and that the Prosecution desires a fair trial. This, they submit, is in the interests of all parties and the advancement of international criminal law as a whole. The lawful period of pre-trial detention should be decided on a case-by-case basis. In this case detention is lawful, and that the Defence Motion should be denied.

Alternative Request for Provisional Release and Severance of Trial

Provisional Release

15. In the alternative, the Defence request that should a stay of proceedings and release not be granted, the Accused be provisionally released pending his trial before the Tribunal, pursuant to Rule 65(B) of the Rules.

16. Turning to the alleged inconsistency between the Rules and the ICCPR, the Defence take issue with Rule 65(B) of the Rules which states that provisional release will only be granted in "exceptional circumstances". They submit that this Rule is in direct conflict with the provisions of the ICCPR. Article 9(3) of the ICCPR states that "It shall not be the general rule that persons awaiting trial shall be detained in custody".

17. The Defence argue that the ICCPR trumps the provisions of the Rules, which they argue can be changed by this Chamber in deciding this Motion, because Article 14 of the Statute does not lay down a formal procedure for changing the Rules. They submit that the Judges of this Chamber should change the Rules of the Tribunal so that, in their opinion, they cease to be in conflict with the "internationally recognised standards" of the ICCPR. In the alternative, they argue that the Judges of the Tribunal should "read in" and give effect to the Rules in a manner that is compatible to the ICCPR whenever it is possible to do so, and that it is necessary to do so in this case. The Prosecution reply that Defence proposal that the Chamber make a rule change is illegitimate.

18. The Defence request that should the Chamber agree with their proposal, they should delete or ignore the "exceptional circumstances" provision of Rule 65(B).

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[6] *Barayagwiza v. The Prosecutor*, Appeals Chamber Decision of 3 November 1999, at par. 106

19. Alternatively, should the Chamber decide not to adopt the above approach, the Defence contends that "exceptional circumstances" can indeed be made out in this case. The exceptional circumstance of this case is the unacceptable length of detention without trial, as outlined in the request for stay of proceedings made out above.

20. The Defence submit that the correct interpretation of the words "host country" within Rule 65(B) must be the country in which it is intended that the applicant for provisional release will reside if provisional release in granted, in this case Belgium. Any other interpretation would be illogical, although the Defence admit to have taken "in an excess of caution" the added measure of writing to the authorities of the United Republic of Tanzania to solicit their opinion on the provisional release of the Accused.

21. The Defence submit that the Accused, should he be provisionally released, poses no danger to victims, witness or other persons, and had no wish to become a fugitive from justice.

Severance of Trial

22. The Defence argue that, in order to prove their contentions of fact[7], the Defence will have to go into matters that will address and criticise two of his co-accused's roles in positions of power within the MRND. This, they argue, will create a conflict of interests between the co-accused. They submit that this line of defence may cause Mugenzi's co-accused to react by attempting to discredit him. The Defence argue that this would serious prejudice to his case, satisfying the requirements of Rule 82(B) of the Rules for severance of trial.

23. The Defence further submit that one of the tests, which the Trial Chamber must apply in deciding this application, is whether the factual allegations against the co-accused are similar. The Defence submit that out of the 67 witness statements which have been disclosed, only 20 of these contain allegations against the Accused, and that out of those only three "containing allegations of fact said to be probative of the Accused's guilt" also contain allegations against his co-accused, and that even in these, the alleged link between the co-accused and the Accused is tenuous.

24. The Defence submit that the only rationale for linking the trial of the Accused with his current co-accused is that they were all Ministers in the government at the relevant time. However, in their submission, of the 20 Ministers appointed on 9 April 1994, the Prosecution do not suggest any rationale for a joinder of these four in particular.

25. In the submission of the Defence, prejudice to the Accused will be caused by his length of time in detention due to the increased length of the trial. Also, there will be no overall saving of time by having witnesses give evidence just once because they contend that the witnesses will mostly testify on separate allegations relating to separate accused. The accumulation of evidence is irrelevant to each defendant untouched by it and will have a prejudicial effect in distracting the Chamber's attention. Finally, and in "the interests of justice" (Rule 82(B)), the Defence asks the Chamber to consider whether joint trial would aid judicial economy given that counsel for co-accused may be sitting mute through testimonies that do not affect their client.

[7] The Defence set out certain contentions of fact in paragraphs 92-114

26. The Defence accept that, on a *prima facie* reading of the Rules, this application for severance is out of time. They claim however that the jurisprudence of the tribunal, in particular a Decision rendered in the *Kamuhanda* trial, allows the Defence to file for a separate trial at any time in order to avoid a conflict of interest that might cause serious prejudice to an accused or to protect the interests of justice. Thus, they claim that the Chamber can and should consider the Defence's application for severance of trial.

27. The Prosecution submit that the Defence Motion is out of time in terms of Rule 72(A), and thus inadmissible.

28. The Prosecution submit that although the Defence claim that there would be a conflict of interest in the event of a joint trial, they have failed to show in sufficient detail how this would occur. In the opinion of the Prosecution, the assertion by the Defence that co-accused were in a different political party is insufficient.

29. According to the Prosecution, the fact that the accused persons in this case were government ministers is sufficient nexus for them to be tried together. The Defence reply that there is contrary authority on this point, and it is for the Trial Chamber to determine.

30. The Prosecution add that Rule 82(A) is sufficient guarantee that the Accused in this case will be tried in no less a manner than if he were to be tried alone, and that this guarantee negates the Defendant's claim of prejudice.

DELIBERATIONS

The Defence Request for an Oral Hearing

31. The Defence request an oral hearing so that the Parties could argue this matter before the Chamber in court. After having considered the written briefs of the Parties, the Chamber is satisfied that it can adequately determine the matter on the basis these submissions. Accordingly, the matter will be dealt with solely on the basis of the written briefs of the Parties, pursuant to Rule 73(A) of the Rules, and as indicated in the Memorandum of 4 September 2002[8].

Request for Stay of Proceedings and Release of the Accused

32. The Defence have based their Motion on Article 20(4)(c) of the Statute. In terms of the Statute the Chamber is enjoined to try the Accused without undue delay. However, the protection of that right must be reconciled with the fundamental purpose of the Tribunal, and should be interpreted and applied within the sphere of the Tribunal's sole purpose, which is "prosecuting 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

[8] With extensions as granted by the Chamber upon subsequent application by the Prosecutor, and as agreed at the Status Conference.

31 December 1994."[9]. This entails balancing the rights of the accused with the ends of justice. The Chamber recalls Article 144-1 of the French Code of Criminal Procedure[10], which states that:

> *La détention provisoire ne peut excéder une durée raisonnable, au regard de la gravité des faits reprochés à la personne mise en examen et de la complexité des investigations nécessaires à la manifestation de la vérité.*[11]

The Accused's right to be tried without undue delay should be balanced with the need to ascertain the truth about the serious crimes with which the Accused is charged.

33. Even having regard to the jurisprudence from national or regional jurisdictions the Chamber recalls its Decision in the case of *Kanyabashi*[12] where it said:

> The Chamber notes that the issue of reasonable length of proceeding has been addressed by the U.N. Human Rights Committee, the European Court of Human Rights and the Inter-American Commission on Human Rights. "The reasonableness of the period cannot be translated into a fixed number of days, months or years, since it is dependent on other elements which the judge must consider." *Firmenich v. Argentina*, the Inter-American Commission on Human Rights Resolution No. 17/89, (13 April 1989). In the opinion of the European Court of Human Rights, "the reasonableness of the length of proceedings coming within the scope of Article 6(1) must be assessed in each case according to the particular circumstances. The Court has to have regard, inter alia, to the complexity of the factual or legal issues raised by the case, to the conduct of the applicants and the competent authorities and to what was at stake for the former, in addition to complying with the "reasonable time" requirement. [four factors]" *Zimmerman and Steiner*, 13 July 1983, Series A, No. 66, at para. 24.

The Chamber consequently finds that undue delay depends on circumstances. Furthermore, as Nowak has stated, the Strasbourg organs have deemed trials that lasted longer than 10 years to be compatible with Article 6(1) of the ECHR, on the other hand holding that undue delay has occurred in others which lasted less than one year[13].

34. In light of the above, the Chamber finds that the Defence application for Stay of Proceedings and Release of the Accused has not been made out.

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[9] Article 1 of the Statute

[10] *Code de procédure pénale*, updated as of October 2002

[11] Provisional Detention must not exceed a reasonable time, having regard to the gravity of the charges against the detainee and an examination and the complexity of the investigations necessary for the discovery of the truth (Unofficial Translation).

[12] Prosecutor v. Joseph Kanyabashi, *Decision on the Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings*, 23 May 2000

[13] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel (1994) at p.257

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Provisional Release

Preliminary deliberation on the Requirement of "exceptional circumstances" within Rule 65(B) of the Rules

35. Regarding the Defence argument that "exceptional circumstances" in Rule 65(B) are in contravention of Article 9(3) of the ICCPR, the Chamber notes that conditions surrounding the detention of accused before the Tribunal are different from those surrounding detention of accused in domestic jurisdictions. The detention of an accused at the UNDF is to ensure his presence at trial, however, as the Rules state, provisional release may be granted where the Chamber is satisfied that there are exceptional circumstances where it would be proper to do so. The Chamber therefore finds that it must apply Rule 65(B) as it stands, and the Defence must make out a case for the Accused to be provisionally released by showing the existence of exceptional circumstances.

The Accused's case for provisional release

36. In order to be granted provisional release pursuant to Rule 65 of the Rules, the Defence must satisfy the Chamber of the following requirements contained in Rule 65(B) of the Rules:

(i) The existence of exceptional circumstances;

(ii) After hearing the host country, that the accused will appear for trial, and, if released, will not pose a danger to any victim, witness or other person.

The Defence assert that exceptional circumstances justifying the provisional release of the Accused exist because of the undue delay, which they claim, has occurred in the trial of the Accused. However, in this regard, the Chamber recalls an Appeals Chamber Decision in *Kanyabashi*[14], where it was held that lengthy pre-trial detention does not constitute *per se* good cause for release. The Chamber can only assess whether delay is *undue* by having regard to other factors in addition to the length of detention, such as the seriousness of the charges facing the Accused and the general complexity of the trial. In this instance, the Chamber is not persuaded that the Defence has made out a case of undue delay.

37. The Defence have made no submission regarding the host country but since they have failed to make out the existence of exceptional circumstances, the Chamber need not consider the Defence submissions relating to the other requirements of Rule 65(B)[15].

[14] *Prosecutor v. Kanyabashi*, Decision (On Application for Leave to Appeal Filed under Rule 65(D) of the Rules of Procedure and Evidence), Appeals Chamber, 13 June 2001

[15] *Prosecutor v. Rutaganda*, Decision on the Request Filed by the Defence for Provisional Release of Georges Rutaganda, 7 February 1997

Severance of Trial

40. The Chamber recalls its Decision in the case of *Kamuhanda*[16] where it ruled that "The Defence may move for a separate trial pursuant to Rule 82(B) at any time if it is necessary to avoid a conflict of interest that might cause serious prejudice to an accused or to protect the interests of justice". The Chamber adheres to this position and considers the Defence Motion.

41. In relation to the rationale for linking the Accused with others for joint trial, the Chamber reminds the Parties that a Motion under Rule 82(B) is not a review of the reasons for joinder of trial in the first instance, but a Motion for severance of trial, which must be dealt with pursuant to the requirements of that Rule.

42. The Defence alleges that because the Accused intends to present evidence that criticises the MRND, his co-accused, allegedly influential members of that party, might be affected by this criticism and respond to the Accused in like manner. The Defence argues that this will cause serious prejudice to the Accused. The Chamber is not persuaded by this argument, and finds that this does not necessitate a separate trial.

43. Alternatively, the Defence requests the Chamber to consider severance of trial to protect the interests of justice, having regard to judicial economy. The Chamber is not persuaded by the Defence argument that the possible savings in court time they put forward at this stage are persuasive enough for the Chamber to find it "in the interests of justice" to sever the trial of the Accused from his co-accused. The Chamber will, however, remain alive to the matter.

44. Finally, the Chamber reminds the Parties that pursuant to Rule 82(A), each Accused shall be accorded the same rights as if he were being tried separately.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Defence Motions in their entirety.

Arusha, 8 November 2002

Winston C. Matanzima Maqutu
Presiding Judge

William H. Sekule
Judge

Arlette Ramaroson
Judge

[Seal of the Tribunal]

[16] *Prosecutor v. Kamuhanda*, Decision on the Defence Motions for Severance and a Separate Trial Filed by the Accused, 7 November 2000