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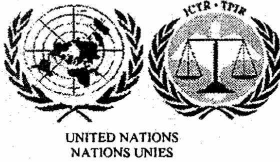
UNITED NATIONS
NATIONS UNIES

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 April 2003

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The PROSECUTOR
v.
Jérôme Clément BICAMUMPAKA
Case No. ICTR-99-50-I

DECISION ON THE DEFENCE MOTION ON A POINT OF LAW
(Rule 73)

The Office of the Prosecutor:
Marks Moore
Ibukunolu Babajide
Elvis Bazawule
George William Mugwanya
Tamara Cummings-John

Counsel for the Defence:
Pierre Gaudreau

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 Motion on a Point of Law (Rule 73 of the Rules of Procedure and Evidence)" filed on 3 July 2002 (the "Motion");

(ii) The "Prosecutor's Response to Defence Motion on a Point of Law (Rule 73 of the Rules of Procedure and Evidence)" filed on 24 October 2002[1];

NOTING that the Defence has not replied to the Prosecutor's response within the prescribed deadlines;

NOTING the "Decision on the Defense's Motion for Provisional Release pursuant to Rule 65 of the Rules" of 25 July 2001 in this case,

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute"), namely Article 1, Article 14 and Article 20 (1) and (3) of the Statute and the Rulès 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.

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence requests that the Chamber, pursuant to Rule 73 of the Rules, determine the lawfulness of Rule 65(B) of the Rules and render a declaratory decision to settle a legal issue, following the jurisprudence of the Tribunal and that of the International Criminal Tribunal for the former Yugoslavia (the "ICTY").[2]

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[1] Response translated into French on 13 February 2003.

[2] With respect to the case *Prosecutor v. Bernard Ntuyahaga*, Declaration on a point of law by Judge Laity Kama, President of the Tribunal, Judge Lennart Aspegren and Judge Navanethem Pillay, 22 April 1999; *Prosecutor v. Théoneste Bagosora*, Decision on the Defence Motion for Pre-Determination of Rules of Evidence, 7 July 1998; *Prosecutor v. Tihomir Blaskic*, Decision rejecting the Defence Motion *in limine* alleging Command Responsibility and for a Bill of Particulars Re Command Responsibility Portions of the Indictment, 4 April 1997; *Prosecutor v. Kvocka et al*, Decision on the Defense Motion regarding Concurrent Procedures before International Criminal Tribunal for the former Yugoslavia and International Court of Justice on the same Questions , 5 December 2000.

2. The Defence requests the Chamber to (1) determine and declare in general that the provisional release regime provided for under Rule 65(B) of the Rules, and particularly the specific requirement of "exceptional circumstances" therein, is *ultra vires* of the Statute [sic]; (2) alternatively, the Defence requests a ruling that the requirement of "exceptional circumstances" in Rule 65(B) of the Rules be declared non peremptory, following the Appeals Chamber Decision of 31 March 2000 in the Barayagwiza Case.[3]

3. The Defence also submits that the said Rule violates the fundamental right of the Accused to be presumed innocent, as provided for under Article 20(3) of the Statute;[4] which presumption, the Defence argues, entails the recognition that imprisonment before trial is the exception rather than the rule.[5]

4. Furthermore, the Defence submits that the requirement of "exceptional circumstances" is too vague and ambiguous, without clear definition; that requiring the Defence to prove "exceptional circumstances" shifts the burden of proof to the Defence contrary to customary international law; that the burden of proof should be borne by the Prosecution, either to prove that it is necessary to detain the Accused or to prove that there are exceptional circumstances warranting the detention of the Accused.

5. The Defence, citing the jurisprudence of the ICTY, argues that since the requirement of "exceptional circumstances" was removed from the corresponding Rule of the ICTY Rules, maintaining the requirement at this Tribunal creates institutional incongruity and inequality between the detainees at this Tribunal and those at the ICTY, in violation of Article 20(1) of the Statute.

The Prosecution Reply

6. The Prosecution argues that the Motion does not fall within the ambit of Rules 72 and 73 of the Rules as it is not "preliminary" in nature and it does not fall within the four categories listed under Rule 73(A). The Prosecution further prays that the Motion be dismissed because it is frivolous and an abuse of process to seek a declaratory ruling on the legality of the requirement of "exceptional circumstances" in Rule 65(B) of the Rules. The Prosecution relies on an abundance of jurisprudence from the Trial Chambers and the Appeals Chamber of the Tribunal, which have consistently upheld the application of the exceptional circumstances criterion.

7. The Prosecution urges the Chamber to decline the Defence's prayer to declare *ultra vires* the requirement of "exceptional circumstances" in Rule 65(B), because, submits the Prosecution, the said requirement is consistent with the Statute and that the *ultra vires* rule is a prerogative writ issued to strike out administrative actions taken by an

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[3] *Jean Bosco Barayagwiza v. The Prosecutor*, Appeals Chamber, Decision on the Prosecutor's Request for Review or Reconsideration, 31 March 2000, para. 63-70.

[4] The Defence refers to the Universal Declaration on Human Rights, Article 11(1); the International Convention on Civil and Political Rights, Article 14(2); the European Convention on Human Rights, Article 3 and the Inter-American Convention on Human Rights, Article (5).

[5] The Defence cites the International on Civil and Political Rights, Article 9(3); the European Convention on Human Rights, Article 5(3); Inter-American Commission on Human Rights, Article 7(5).

administrative body. The Prosecution concludes that the Motion is thus procedurally irregular and therefore the Defence should make its request to the Plenary, which is the body responsible for the adoption and amendment of the Rules.

8. The Prosecution agrees with the Defence that the Tribunal provides for review of Decisions; however it contends that such applications must fall within the prescription of the Rules as affirmed in the *Barayagwiza* Decision on Review and Reconsideration.[6] On this basis, the Prosecution argues that the Motion is a disguised, irregular appeal or review of the Chamber's Decision on Provisional Release of 25 July 2001. Moreover, the Prosecution submits that the Defence is seeking, by the Motion, an amendment of Rule 65(B) of the Rules and thereby foregoing the amendment procedure laid out under Rule 6 of the Rules; that the Defence may seek an amendment of Rule 65(B) of the Rules by petitioning the President or through a Motion to the Plenary. Finally, the Prosecution argues that the Tribunal is distinct from the ICTY, by virtue of Article 15(3) of the Statute.

9. The Prosecution submits that, contrary to the Defence's argument, pre-trial detention is the rule and provisional release is the exception. Pursuant to Rule 47(B) of the Rules, once it satisfies the Tribunal through a *prima facie* showing that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, an Indictment against a suspect is confirmed. Once such an Indictment is confirmed against an Accused, pursuant to Rule 64 of the Rules, an Accused is lawfully detained and to be provisionally released, he must satisfy the requirements of Rule 65(B) of the Rules. Finally, the Prosecution argues that the question of the shift in the burden of proof does not arise and the interpretation of the Rules must be within the unique framework of the Tribunal.[7]

HAVING DELIBERATED

10. As a preliminary matter, the Chamber notes that contrary to the submissions of the Prosecution, Rule 73(A) does not contain an exhaustive list of issues that may be raised, unlike Rule 72(B). The expression "Subject to Rule 72" in Rule 73(A) does not set up the same prerequisites as Rule 72, which relates to preliminary motions, whilst Rule 73 covers all other kinds of motions, at the pre-trial and the trial stages.

11. Similarly, the Chamber is not persuaded by the Prosecution's submission that the issue of *ultra vires* may only be raised in the context of judicial review of administrative actions. It may also arise in a number of other instances, including in considerations of the relationship between a regulation and its enabling statute; as well as in the context of exercise of power by any organ or functionary invested with certain powers to exercise.[8]

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[6] *Jean Bosco Barayagwiza v. The Prosecutor*, Appeals Chamber, Decision on the Prosecutor's Request for Review or Reconsideration, 31 March 2000, p. 14, para. 38.

[7] The Prosecution cites *Prosecutor v. Dusko Tadic*, Case No. IT-94-I-T, Decision on the Prosecutor's Motion requesting protective Measures for Victims and Witnesses, 10 August 1995, para. 27.

[8] See Declaration on a point of law by Judge Laity Kama, President of the Tribunal, Judge Lennart Aspegren and Judge Navanethem Pillay, 22 April 1999, with respect to the case of *Prosecutor v. Bernard Ntuyahaga*.

12. The Chamber notes that the Motion challenges the legality of Rule 65(B), especially in its requirement that the onus is on the Defence to show the "exceptional circumstances" to warrant provisional release.

13. The Chamber recalls in this regard that the jurisprudence of this Tribunal, at both the trial and appellate levels, has consistently recognized that this provision of Rule 65(B) is appropriate to regulate provisional release.[9] In *Sagahutu v. Prosecutor*, the Appeals Chamber ruled that "in absence of exceptional circumstances, provisional release may not be granted".[10] Consequently, this Tribunal, both at the first instance and the appeal levels, has effectively in the past rejected the submission that the 'exceptional circumstances' element in Rule 65(B) is not imperative.

14. With respect to the Defence argument that to permit a provisional release, as Rule 65(B) does, subject to the onus on the defendant to establish exceptional circumstances, is "fundamentally" contradictory of "the spirit of the Statute and the international customary law", the Chamber recalls the abundance of the Tribunal's jurisprudence denying such argument. [11] Again, the Appeals Chamber's Decision in *Bizimungu v. Prosecutor* considered that the Applicant had failed to demonstrate how it was that the Trial Chamber may have erred by, among other things, denying the Applicant's attempt to challenge Rule 65(B) as illegal, unfair and unreasonable.[12]

15. With regard to the Defence's argument that the expression "exceptional circumstances" is too vague, adding to the unfairness of the Accused having to bear an unspecific burden of proof, the Chamber reiterates that the expression "exceptional circumstances" was elaborated upon by the jurisprudence of the Tribunal and the ICTY, [13]

[9] *Prosecutor v. Kanyabashi*, Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001; *Prosecutor v. Bicamumpaka*, Decision on the Defence's Motion for Provisional Release Pursuant to Rule 65 of the Rules, 25 July 2001; *Prosecutor v. Bagosora et al.*, Decision on the Defence Motion for Release, 12 July 2002; *Prosecutor v. Bizimungu*, Decision on Bizimungu's Motion for Provisional Release Pursuant to Rule 65 of the Rules, 4 November 2002. As for the Appeals Chamber, see *Kanyabashi v. Prosecutor*, Decision (On Application for Leave to Appeal Filed Under Rule 65(D) of the Rules of Procedure and Evidence), 13 June 2001,

[10] *Sagahutu v. Prosecutor*, Decision on Leave to Appeal Against the Refusal to Grant Provisional Release, 26 March 2003.

[11] *Prosecutor v. Nahimana*, Decision on the Defence's Motion for the release or alternatively Provisional release of Ferdinand Nahimana, 5 September 2002, paras 2, 9 and 10 ; *Prosecutor v. Muhimana*, Décision (Requête de la Défense aux fins de la mise en liberté provisoire de l'accusé) 1 octobre 2002.

[12] *Bizimungu v. the Prosecutor*, Decision on the Application to Appeal Against the Provisional Release Decision of Trial Chamber II of 4 November 2002, 13 December 2002.

[13] See for exemple: *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, "Serious illness"; ICTY, *Prosecutor v. Drljaca and Kovacevic*, Decision on the Defence Request for Provisional Release pertaining to the Accused Milan Kovacevic, 20 January 1998, par. 22 and *Prosecutor v. Kanyabash,* Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001, para. 9, and *Prosecutor v. Mugenzi*, 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)),8 November 2002, para.36, "Length of Detention"; *Prosecutor v. Ndayambaje*, Decision on the Defence Motion for the Provisional Release of the

as recalled in the Decision on Provisional Release of 25 July 2001 in the present case. Moreover, in *Sagahutu v. Prosecutor*, the Appeals Chamber stated that "the word "exceptional" provides a sufficiently clear meaning as to have no need of any further definition".[14]

16. With respect to the different rules applied by the Tribunal and the ICTY, the Chamber recalls that the Tribunal has ruled in *Prosecutor v. Kanyabashi* that "Article 1 of the Statute clearly establishes the Tribunal as a separate and sovereign body, with a competence *ratione materiae* and *ratione temporis* distinct from that of the ICTY".[15] The Appeals Chamber added in *Sagahutu v. Prosecutor* that "by applying its Rules equally to all parties, [the International Tribunal] guards against any discrimination vis-à-vis the accused".[16] Also, in *Prosecutor v. Nahimana* the Tribunal held that, even if the "exceptional circumstances" wording was removed from the corresponding rule of the ICTY on provisional release, "provisional release continues to be the exception and not the rule".[17]

17. With respect to amending Rule 65, the Chamber recalls that it is not in a position to amend the Rules of Procedure and Evidence. That too has been settled in *Prosecutor v. Kanyabashi*.[18] Also recently, in its decision in *Bizimungu v. Prosecutor*, the Appeals Chamber considered that the Applicant had failed to demonstrate how the Trial Chamber may have erred in "refusing to entertain the Applicant's request to amend Rule 65(B) from the Bench by disregarding the "exceptional circumstances" requirement of the Rule [...]".[19]

18. It seems that contrary to what Defence argues, the Canadian case of *R.v. Pearson*[20] does not support the Defence argument on the issue of onus in applications for pre-trial release.

19. Accordingly, the Trial Chamber finds that the issues raised by the Defence have been decided upon by this Tribunal, and this motion merely revisits points of law already settled. The Chamber also finds some merit in the Prosecution's submission that this Motion is a disguised attempt to appeal or at least revisit the "Decision on the Defence's

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Accused, 21 October 2002, para. 25, "Lack of family visit"; ICTY, *Prosecutor v. Brdanin et al*, Decision on Motion by Radoslav Brdanin for Provisional Release, 28 March 2001, par.17 "Voluntary surrender".

[14] *Sagahutu v. Prosecutor*, Decision on Leave to Appeal Against the Refusal to Grant Provisional Release, 26 March 2003.

[15] *Prosecutor v. Kanyabashi*, Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001, para. 4.

[16] *Sagahutu v. Prosecutor*, Decision on Leave to Appeal Against the Refusal to Grant Provisional Release, 26 March 2003.

[17] *Prosecutor v. Krajisnik and Plavsic*, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 October 2001, para. 12. cited in *Prosecutor v. Nahimana*, Decision on the Defence's Motion for the Release or Alternatively Provisional release of Ferdinand Nahimana, 5 September 2002.

[18] *Prosecutor v. Kanyabashi*, Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001, para. 5.

[19] *Bizimungu v. the Prosecutor*, Decision on the Application to Appeal Against the Provisional Release Decision of Trial Chamber II of 4 November 2002, 13 December 2002.

[20] [1992] 3.S.C.R.665.

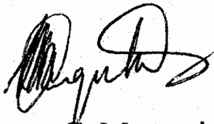
Motion for Provisional Release pursuant to Rule 65 of the Rules" specifically rendered in this case by this Trial Chamber on 25 July 2001.

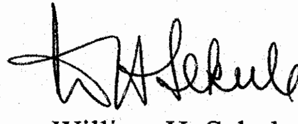
FOR ALL THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES the Defence Motion in all respect.

WARNS Counsel for the Defence against the filing of frivolous motions which are contrary to the interests of justice pursuant to Rule 46 of the Rules as it could attract sanctions such as the non-payment in whole or in part of fees associated with the Motion and/or costs thereof pursuant to Rule 73 (E) of the Rules.

Arusha, 8 April 2003





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

(Seal of the Tribunal)