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UNITED NATIONS

International Criminal Tribunal for the Prosecution of 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 31 December 1994

Case No.ICTR-98-44-I

Date : 18 August 2003

ENGLISH

Original: FRENCH

TRIAL CHAMBER III

Before: Judge Lloyd G. Williams, Q.C., presiding
Judge Andrésia Vaz
Judge Sergey A. Egorov

Registrar: Adama Dieng

Date Filed: 18 August 2003

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THE PROSECUTOR

v.

MATHIEU NGIRUMPATSE *et al.*

DECISION ON THE MOTION BY NGIRUMPATSE'S DEFENCE TO FIND THE ACCUSED'S DETENTION UNLAWFUL OR, IN THE ALTERNATIVE, TO ORDER HIS PROVISIONAL RELEASE

Defence Counsel:
Charles Roach
Frédéric Weyl

Office of the Prosecutor:
Don Webster

Translation certified by LSS, ICTR

THE INTERNATIONAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Judge Andrésia Vaz, designated by Trial Chamber III (the "Trial Chamber") pursuant to the provisions of Rule 73(A) of the Rules of Procedure and Evidence (the "Rules"),

SEIZED by the Defence of Mathieu Ngirumpatse (the Accused) of a Motion: 1. To find that there is no legal basis for detention; 2. Alternatively, to revoke the detention order of 30 June 1998, and Article 2 of the Order of 29 August 1998; 3. Alternatively again, to release the Accused filed on 16 April 2003 (the "Motion"),

CONSIDERING the Prosecutor's response filed on 5 June 2003,

CONSIDERING the Prosecutor's pre-trial brief of 15 March 2002, filed pursuant to Rule 73*bis* of the Rules (the "Pre-trial Brief"),

RULING solely on the basis of the parties' written briefs, pursuant to the provisions of Rule 73(A) of the Rules,

NOW CONSIDERS THE MOTION.

The submissions of the parties

The Defence

1. The Defence submits that the decision of 29 August 1998 ordering the extension of the Accused's detention was nullified by an order of 27 September 1999. The Defence further submits that the Chamber should take action accordingly, in the first place releasing the Accused;

2. In the alternative, the Defence requests the Chamber to review the Accused's situation and release him, there being no valid reason for his continued detention. The Defence submits that the universal principle that freedom is the rule and detention the exception implies that no one can be detained without the possibility of having his detention reviewed at any time to ascertain that it is in conformity with the provisions on which it is based.

3. The Defence argues that in the instant case, the Accused was arrested and held in detention for more than five years on the strength of allegations which were included in the Indictment, but not reiterated in the Pre-trial Brief. The Defence notes that in the Brief, the only charges made against the Accused are that he was appointed President of MRND, made certain utterances in 1993 and chaired meetings in 1992 and 1993, was aware of the delivery and distribution of weapons, and continued his journey on 10 April 1994 after a check at a roadblock. It notes that these allegations-the only remaining ones-are either not criminal in nature or relate to events which occurred prior to 1 January 1994 and are outside the temporal jurisdiction of the Tribunal.

4. The Defence notes that the Prosecution was not in possession of the new evidence referred to in the Pre-trial Brief when the Indictment was filed for confirmation. It notes that the continued detention of the Accused has become arbitrary because the Indictment is now devoid of a legal basis.

5. The Defence adds that none of the reasons cited by the Prosecution in requesting the Accused's initial detention either appears to be or remains relevant, since there are no reasons to fear that the Accused will escape, destroy evidence or cause any other delay than that occasioned by the Prosecution in its diligent conduct of the investigations for the past nine years.

6. In the second alternative, the Defence requests the provisional release of the Accused on the basis of Rule 65 of the Rules. Its argument is that, in view of the general principle referred to above, namely that release is the rule and detention the exceptional, the circumstances requirement of Rule 65 of the Rules is not applicable. It maintains that, in any event, the circumstances justifying its request are indeed exceptional. The Defence cites, in particular, the Prosecution's systematic delay in the preparation of the case, its difficulties in framing charges and the liberties it takes with its obligations. It further cites the fact that the Tribunal is unable to set a date for the opening of the trial, whereas the trials of other accused persons arrested after Mathieu Ngirumpatse have either commenced or are about to commence. The Defence holds this to be discrimination, in view of the right of the accused to be tried without undue delay (Article 20.4(c) of the Statute).

7. The Defence intends to provide all the guarantees deemed necessary by the Chamber under Rule 65(C) of the Rules, as long as such guarantees are relevant to the Accused's situation. It notes that the Accused will agree to all controls that may be imposed by the host country, including house arrest, restriction of movement, or the obligation to justify his presence and his activities on a regular basis. The Defence stresses the Accused's desire to reside during his provisional release in France with his wife, or in Italy where his son lives, or even in Canada where he can be accommodated by other members of his family.

8. The Defence has appended solemn declarations to its request. In one of them, the Accused undertakes on his honour to appear at trial if released, to comply strictly with all the various controls and obligations to which he may be subjected by the host country and not to do or embark on anything that would harm the victims, the witnesses or a third party in connection with the crimes committed in Rwanda. In the other two, Joseph Mennella, President of the French association *Convergence et Fraternité* and Alain de Brouwer, honorary head of division at the European Parliament, vouch for the sincerity of the Accused's undertakings.

9. Lastly, the Defence appends to its motion a letter of 14 April 2003 from the Counsel to the Chief of the Defence Counsel Management Section of the Tribunal, in which the Counsel refers to the Accused's hospitalisation and requests information on his health and the care he is receiving.

The Prosecution

10. With regard to the first argument, the Prosecution submits that the decision of 27 September 1999 rendered null and void the order not to disclose the Indictment included in the decision on the confirmation of the Indictment of 29 August 1998, without affecting the other orders, including that on the continued detention of the Accused. The Prosecution adds that the matter has become *res judicata* and refers to the *Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return of Seized Items*, rendered on 10 December by Trial Chamber II of the Tribunal seized of the matter (No. ICTR-97-44-I), and the *Decision (Interlocutory Appeals Filed Against the Decisions of 18 November 1999 and 10 December 1999)* rendered by the Appeals Chamber of the Tribunal on 28 April 2000 (The case of *Mathieu Ngirumpatse v. The Prosecutor,* Case No. ICTR-98-44-A). The Prosecution suggests that the Tribunal should retain the payment of fees associated with the motion.

11. With respect to the second argument, the Prosecution observes that the Pre-trial Brief does not withdraw any of the factual allegations or counts set forth in the Indictment. The Prosecution stresses that questions of merit are premature before trial and that objections to portions of the Pre-trial Brief cannot serve as a basis for challenging the legality of the Accused's detention.

12. Concerning the Defence's allegation that the charges against the Accused derive solely from his status, at the time, as President of MRND, the Prosecution considers that such objections are, of their nature, preliminary motions relating to the Tribunal's jurisdiction or to the form of the indictment. As such, they fall under Rule 72 of the Rules and are, therefore, time-barred. However, the Prosecution adds that it was precisely in his capacity as President of MRND that the Accused allegedly "commanded" the *Interahamwe* militias that slaughtered thousands of unarmed civilians during the Rwandan genocide. The Prosecution stresses that the substantive charges are still included in the Indictment, the supporting materials and the Pre-trial Brief, and are further elaborated in the pre-trial disclosures made by the Prosecution pursuant to Rule 66 of the Rules.

13. In response to the Defence's third argument, the Prosecution submits that the test of exceptional circumstances is valid, legitimate and in conformity with international law. Citing *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)*, of 8 November 2002 (Trial Chamber II) and *Joseph Kanyabashi v. the Prosecutor* (No. ICTR-96-15-A), *Decision (on application for leave to appeal filed under Rule 65(D) of the Rules of Procedure and Evidence)* of 13 June 2001 (Appeals Chamber), the Prosecution notes that the Chambers of the Tribunal have already dismissed similar objections. In the opinion of the Prosecution, the length of detention does not in itself warrant the provisional release of an accused person. Citing the *Decision on the Defence motion for provisional release of the Accused*, rendered by Trial Chamber II in the case of *The Prosecutor v. Joseph Kanyabashi* (No. ICTR-96-15-T) of 21 February 2001, the Prosecution further considers the length of the Accused's detention,

i.e., five years, as reasonable in the instant case. To support its argument, the Prosecution cites factors such as the complexity of the proceedings, including the investigations; the gravity of the allegations made against the Accused; the number of motions filed by the parties and especially the Defence; the appeals against the Trial Chamber decisions; the complexity brought to the proceedings by the joinder of the trials; and the fact that the Accused's trial is now imminent.

14. Referring to paragraph 32 of the *Mugenzi* Decision cited above, the Prosecution maintains that due consideration must be given not only to the basic rights of the Accused, but also to the fundamental purpose of the Tribunal, 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 31 December 1994" (Preamble to the Statute).

15. The Prosecution further maintains that the fact that some of the accused persons arrested after Mathieu Ngirumpatse proceeded to trial before him is not of itself an exceptional circumstance. In the Prosecution's view, this stems from the nature of the charges brought against the Accused. The Prosecution notes that Mathieu Ngirumpatse was a national figure in Rwanda before and during 1994, and that he is accused of being one of the planners and conspirators of the crimes cited in the Indictment, in a joint (hence more complex) trial with other national figures.

16. The Prosecution adds that the decision to fix the date for the beginning of the trial rests with the Chambers and the Registry, though it does recognize that the conduct of the parties has an impact on the court's schedule. Nonetheless, the Prosecution does not consider failure to set a date for the commencement of the trial as an exceptional circumstance warranting the Accused's provisional release.

17. The Prosecution denies lack of diligence giving rise to delay in the proceedings. It points out that it cannot be faulted, despite the Defence's apparent contention, for not seeking leave to sever from the joined Indictment the accused persons not yet apprehended, adding that, in fact, it intends to request such severance once a date is set for the opening of the trial, as it recently did in the case of Félicien Kabuga.

18. While not seeing it as essential to do so, in that the Defence has not established, in the Prosecution's view, that the Accused's detention was arbitrary or for any other reason no longer justified, the Prosecution notes that the Defence does not offer sufficient guarantees that, should the Accused be provisionally released, he will appear for trial and will not pose a danger to any victim, witness or any person.

Deliberations

Objections to the validity of the Order of 29 August 1998 on the continued detention of the Accused

19. Since 29 August 1998, the legal basis for Mathieu Ngirumpatse's detention has been an order issued by Judge Navanethem Pillay, pursuant to Articles 18.2 and 19.2 of the Statute and Rules 54 and 55 of the Rules. This order was issued subsequent to the confirmation of the Indictment, which took place on the same day. Without providing further details, the Defence refers to an order issued on 27 September 1999, which allegedly rendered null and void that of 29 August 1998 extending the Accused's detention. The Chamber shares the Prosecution's opinion that that the Defence is referring to the Decision to set aside the order on non-disclosure of the Indictment, rendered by Judge Pillay on the date indicated by the Defence, namely, 27 September 1999. The said order did not affect the order for the continued detention of the Accused which, like the non-disclosure order, appears in the decision of 29 August 1998. Since the wording of the decision is unequivocal, the Defence's first argument must be dismissed.

Request for a review of the Accused's situation: the allegations contained in the Pre-trial Brief

20. After reviewing the Accused's situation, the Chamber is not satisfied that the reasons for the decision of 29 August 1998 ordering his continued detention have ceased to exist. The Defence has failed to prove that the allegations contained in the Pre-trial Brief, including those referring to events prior to 1994, do not originate from the Indictment. The fact that the Prosecution's arguments against the Accused have changed since August 1998 could reflect the progress of the investigations; it cannot affect the legal basis for the Accused's detention.

21. The Defence adds that the allegations contained in the Pre-trial Brief relate to a period that is outside the Tribunal's temporal jurisdiction. Inasmuch as the allegations are based on the Indictment, the objection is out of time because of its preliminary nature, pursuant to Rule 72 of the Rules.

22. In any event, the Chamber notes that Mathieu Ngirumpatse is accused of being one of the main instigators and planners of the massacres committed in Rwanda in 1994, and this, according to the Prosecution, was also obvious from certain acts committed before 1994. It is against these allegations, and not only those relating to his former status as President of MRND, that the Accused will have the opportunity to defend himself during the trial, as well as against the Prosecution's interpretation of his acts and the allegations relating directly to the period of the Tribunal's temporal jurisdiction. Furthermore, it has been established that, on certain conditions,[1] allegations relating to a period that falls outside the Tribunal's temporal jurisdiction can serve to demonstrate participation in a conspiracy to commit the offences set forth in the Statute, which occurred on Rwandan territory in 1994. Consequently, the second argument must be dismissed.

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[1] See in particular, The Appeals Chamber, *Hassan Ngeze and Ferdinand Nahimana v. the Prosecutor*, Case Nos. ICTR-97-27-AR72 and ICTR-96-11-AR72, Decision on Interlocutory Appeals, 5 September 2000. Trial Chamber II, *The Prosecutor v. Juvénal Kajelijeli,* Case No. ICTR-98-44A-T, *Decision on the Defence Motion Objecting to the Jurisdiction of the Tribunal,* 13 March 2001; Trial Chamber III, *The Prosecutor v. Anatole Nsengiyumva,* Case No. ICTR-96-34-I, *Decision on the Defence Motions Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment*, 13 April 2000.

Request for a review of the Accused's situation: objection to the unreasonableness of the length of his detention and guarantees offered

23. Rule 65(B) was amended during the last plenary session of the Tribunal, held on 26 and 27 May 2003. It now reads as follows:

> **Rule 65: Provisional release**
>
> (...)
>
> (B) Provisional release may be ordered by a Trial Chamber only after giving the host country and the country to which the accused seeks to be released the opportunity to be heard, 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.

24. Under the new Rule 65(B), the Defence is therefore no longer required to show the existence of exceptional circumstances justifying a request for provisional release. Pursuant to Rule 6(C) of the Rules, this amendment enters into force immediately, since it does not operate to the prejudice of the Accused; rather, it works to the benefit of the accused detainees. It is therefore unnecessary to consider the objections of the Defence to the obligation to show the existence of exceptional circumstances warranting provisional release.

25. The Chamber does not find the Accused's detention longer than is reasonable, given the complexity of the case, the requirements of the investigation, the number of motions filed by the parties and the nature of the charges brought against the Accused. The Chamber notes in particular that, as pointed out by the Prosecution, Mathieu Ngirumpatse is accused of being one of the instigators and planners of crimes that fall under the jurisdiction of the Tribunal, including genocide.

26. Furthermore, the Defence does not provide any *prima facie* evidence that the French, Italian or Canadian authorities would be willing to allow him into their territory if he is provisionally released. Neither does it provide information to show that the said authorities would agree to take measures designed to ensure that the Accused will remain on their territory while awaiting trial, and that he will appear for trial when required to do so.

27. In view of the foregoing, the solemn undertakings given by the Accused and Mr. De Brouwer and Mr. Mennella do not of themselves satisfy the Chamber that Mathieu Ngirumpatse's provisional release would not pose any danger to the victims, witnesses or any other person, and that, if provisionally released, he would appear for trial when required to do so.

Inegality between the accused persons in detention in terms of the commencement of their trials

28. The Defence stresses that the trials of some accused persons arrested after Mathieu Ngirumpatse started before his, but does not specify the accused persons in question. The Chamber is of the view that this fact, for which there may be various reasons, does not, of itself, amount to discrimination in terms of the Accused's right to be tried without undue delay.

FOR THESE REASONS

THE CHAMBER

DENIES the motion.

Arusha, 18 August 2003

[Signed]
Andrésia Vaz
Judge

[Seal of the Tribunal]

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