



ICTR-00-56-I
11-11-2003
(2303 — 2299)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER II

ORG: ENG

Before: Arlette Ramaroson, President
William H. Sekule
Asoka de Zoysa Gunawardana

Registrar: Mr. Adama Dieng

Date: 11 November 2003

The PROSECUTOR

v.

Augustin NDINDILYIMANA et. al.

Case No. ICTR-2000-56-I

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**DECISION ON AUGUSTIN NDINDILYIMANA'S EMERGENCY MOTION
FOR TEMPORARY PROVISIONAL RELEASE.**

Office of the Prosecutor

Ciré Ali Bâ
Alphonse Van

Counsel for the Defence

Christopher Black for Ndindilyimana

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

SITTING as Trial Chamber II composed of Judges Arlette Ramarosan Presiding, William H. Sekule and Winston C. Matanzima Maqutu ("The Chamber");

BEING SEIZED of "Augustin Ndindiliyimana 's Emergency Motion for an Order that the Applicant be Granted Temporary Provisional Release," filed on 14 October 2003 (the "Motion");

HAVING RECEIVED AND CONSIDERED the "*Réponse du Procureur à la requête en extreme urgence déposée par le conseil de l'accusé Augustin Ndindiliyimana en vue de solliciter de la Chambre de Première Instance II la mise en liberté provisoire et "temporaire" de son client, pour des raisons humanitaires,*" filed on 16 October 2003 (the "Prosecutor response") **AND** the "Registrar's Submission under Rule 33(B) of the Rules on the Defence Counsel's Emergency Motion for an Order that the Applicant be Granted Temporary Provisional Release of Augustin Ndindiliyimana," filed on 17 October 2003 (the "Registrar's submission"); **AND** "Reply to Response of Registrar and Prosecutor to Emergency Motion for Temporary Provisional release," filed on 23 October 2003 (the "Defence Reply"); **AND** "*Réplique du Procureur à la réponse du conseil de Augustin Ndindiliyimana datée du 21 octobre 2003 faisant suite aux observations présentées par le Greffe et le bureau du Procureur sur la demande de mise en liberté provisoire formulée pour le compte de l'accusé* » filed on 3 November 2003.

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of the Procedure and Evidence (the "Rules"), in particular Rules 33(b), 65 and 72 of the Rules;

NOW DECIDES the Motion solely on the basis of the written briefs filed by the parties pursuant to Rule 73(a) of the Rules.

SUBMISSIONS OF THE PARTIES:

Defence submissions:

1. The Defence requests pursuant to Rule 65 for the provisional release of the Accused Augustin Ndindiliyimana (the "Accused") in order for him to be at his son's side in hospital in Belgium due to the grave illness his son is suffering until the crisis is passed or in the event of his son's death, to attend the funeral. Alternatively, the Defence requests the Chamber to order the transfer in custody of the Accused to Belgium for the afore-mentioned purpose.
2. For its request, the Defence relies on the jurisprudence of the International Criminal Tribunal for Yugoslavia (the "ICTY") case of *Fustar* where the Trial Chamber granted the provisional release of an Accused on humanitarian grounds where the Accused attended his father's funeral.¹
3. The Defence annexes at Annex A, a report by Professor Ch. Vermynen which explains the critical medical condition of the Accused's son. In addition the Defence has annexed at Annex B,

¹ *Prosecutor v. Fustar*, IT-02-65-PT Decision on Defendant Dustan Fustar's Emergency Motion Seeking a Temporary Provisional Release to attend the 40-day Memorial of his Father's Death issued on 11 July 2003

a Letter from Mr. Black to Madame Onkelinx, the Vice-Prime Minister and the Minister for Justice, urging the Minister to inform the Tribunal that Belgium will temporarily receive the Accused as the host country for the limited duration specified by the Chamber.

Prosecution's response

4. In its Response, the Prosecution objects to the Motion.
5. The Prosecution argues that the situation in the case of *Fustar* as relied upon by the Defence differs from that of Ndindiliyimana because *Fustar* voluntarily surrendered to the judicial authorities whereas the Accused was arrested in Belgium following a warrant for his arrest.
6. The Prosecution further points out that the letter produced in Annex B addressed to the Belgian authorities has no Response indicating whether or not Mr. Black's request on behalf of the accused is granted.
7. The Prosecution argues that granting the temporary release of the Accused would put in jeopardy seven protected Prosecution witnesses who are currently residing in Belgium.
8. The Prosecution urges the Chamber to deny the Defence request particularly as the Accused is charged with grave crimes and that the Rwandan community in Belgium including victim's relatives will be put in danger if the Accused is temporarily released in Belgium.
9. The Prosecution thus prays that the Chamber rules the Motion ill-founded because the Defence has not satisfied the conditions laid out at Rule 65 (B) and (C) that would enable the Chamber to grant the provisional release of the Accused.

Registrar's submissions

10. In its submissions under Rule 33(B) the Registrar notes that there has never been a case where an Accused person was granted provisional release pursuant to Rule 65 by the Tribunal. The Registrar lays out the legal requirements for provisional release and further examines the facts regarding the legal requirements. The Registrar concludes that, "Defence Counsel's submission does not meet the criteria put in place for the grant of provisional release of an accused person,"² namely that the Host Country [in this case, Belgium] is willing to receive the Accused and is committed to meet the conditions laid out by the Chamber.
11. Nonetheless, the Registrar undertakes to assist and consult with the Ministry of Justice of the named Host Country and the United Republic of Tanzania for the practical arrangements for the provisional release and movements of the Accused consequent upon the Chamber's order.

²See para. 9 of the Registrar's Submissions

Defence's Reply

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12. The Defence accepts the Prosecution and Registrar's submissions that the host country Belgium has to agree to the terms set out in the Registrar's Submissions.

13. However, the Defence denies that the Accused, if released, will tamper with witnesses and that the Prosecution is only speculating when it submits that the Accused will do so. The Defence argues that in any case, if Belgium, as the host country accepts that the Accused be provisionally released in its custody, it will ensure that no such action by the Accused is possible.

14. The Defence argues that the Accused, when he was arrested, could not turn himself in because he was indicted on the day of his arrest. It submits that the Accused never contested his extradition and that his whereabouts in Belgium were always known.

15. The Defence submits that the instant Motion was made before the requisite agreement from the Belgian authorities was obtained and thus it requests the Chamber to delay its Decision on this matter until the Belgian authorities respond to the Defence request for Belgium to host the Accused.

Prosecution's Response

16. The Prosecution submits that according to legal principle, a petition that fails to meet the preconditions of legislated procedure will be inadmissible. It points out the Rules do not envision delays in rendering a Decisions. In any case the request made by Counsel for the Accused for his transfer to Belgium fails to comply with the requirements enunciated in the Registrar's submissions.

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17. The Chamber recalls the provisions of Rule 65(a) and (b) of the Rules, under which, "[o]nce detained, an accused may not be provisionally released except upon an order of a Trial Chamber [and such provisional release may be ordered by a Trial Chamber] 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."

18. After having reviewed the Motion, the Chamber finds that it does not fulfill the conditions set under Rule 65 for it to grant the provisional release of the Accused, for example that of hearing the host country. Accordingly, the Chamber denies the Defence request in its entirety.

FOR THE ABOVE REASONS, THE TRIBUNAL

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DENIES the Defence request in its entirety..

Arusha, 11 November 2003

Arlette Ramaroson
Presiding Judge

William H. Sekule
Judge

Asoka de Zoysa Gunawardana
Judge

