



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

## TRIAL CHAMBER II

### Before:

Judge	William	H.	Sekule,	Presiding
Judge		Arlette		Ramaroson
Judge Solomy Balungi Bossa				

**Registrar:** Mr. Adama Dieng

**Date:** 11 July 2005

**The PROSECUTOR**

**v.**

**Hormisdas NSENGIMANA**

*Case No. ICTR-01-69-I*

### DECISION ON NSENGIMANA'S MOTION FOR THE SETTING OF A DATE FOR A PRE-TRIAL CONFERENCE, A DATE FOR THE COMMENCEMENT OF TRIAL, AND FOR PROVISIONAL RELEASE

#### Office of the Prosecutor

Mr. William Egbe, Senior Trial  
Mr. Ignacio Tredici, Assistant Trial  
*Ms. Amina Ibrahim, Case Manager*

#### Defence Counsel

Mr. Emmanuel Altit, Lead Counsel  
Attorney  
Attorney

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

**SITTING** as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson, and Judge Solomy Balungi Bossa (the "Chamber");

**BEING SEISED** of Nsengimana's "Motion for the Setting of a Date for a Pre-Trial Conference, of a Date for the Commencement of Trial, and for Provisional Release",<sup>[1]</sup> filed on 20 May 2005 (the "Motion");

**CONSIDERING** the "Prosecutor's Response to Defence Motion for the Setting of a Date for a Pre-Trial Conference- a Date for the Commencement of Trial and a Request for Provisional Release", filed on 27 June 2005 (the "Prosecution's Response");

**CONSIDERING** the “Reply to the Prosecutor’s Response to the Motion for the Setting of a Date for a Pre-Trial Conference, for the Commencement of Trial, and for Provisional Release”,<sup>[2]</sup> filed on 1 July 2005 (the “Defence Reply”);

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), notably Rule 65 and 73 *bis*;

**NOW DECIDES** the Motion pursuant to Rule 73 (A), on the basis of the written submissions of the Parties.

### ***The Defence***

1. The Defence moves the Chamber to set dates for a pre-trial conference and for the commencement of trial, as well as for provisional release. In support of its motion, the Defence submits that if a pre-trial conference could be held in September 2005, it would inform the Defence about the Prosecution’s intentions of amending the Indictment. The Defence argues that this information is crucial for its timely preparation.
2. As to the setting of a date for the commencement of trial, the Defence submits that the instant case is relatively simple. It involves only one accused, who is not accused of being one of the masterminds of the genocide. In addition, the Indictment contains relatively few counts, and both the Prosecution and the Defence intend to call less than twenty factual witnesses respectively, and probably no expert witnesses. The Defence points out that the Defence Counsel Management Section (“DCDMS”) will not provide it with the funds necessary to complete its investigations, unless a date for the commencement of trial is set. The Defence requests that a date be fixed in the second half of 2006 for the commencement of trial.
3. In support of its request for provisional release, the Defence submits that the Accused has been detained for over three years. This lengthy detention contravenes the Statute and international human rights law, both of which guarantee the right to an expeditious trial. Further, the Defence argues that the Accused meets all conditions for provisional release as developed in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (the “ICTY”). It alleges that the Accused, Father Hormisdas Nsengimana, gave himself up to the Cameroonian authorities in Yaoundé as soon as he was aware of the Tribunal’s arrest warrant. Besides, the Defence submits that there is no risk that the Accused would be a danger to any witness or other person, if he was provisionally released. Finally, the Defence argues that the necessary guarantees have been given, since the *Congrégation Saint Jean*, which is located in France, has expressed its willingness to accommodate the Accused during the period of his provisional release and to comply with the Tribunal’s orders.

### ***The Prosecution***

4. The Prosecution does not oppose the request for the setting of a date for the commencement of trial, submitting that this is the Tribunal’s prerogative.
5. The Prosecution objects, however, to the request for provisional release and submits that the Defence has failed to demonstrate that, if released, the Accused will appear for trial and will not pose a danger to any victim, witness or other person. Furthermore, the Prosecution submits that the *Congrégation Saint Jean* has no immigration powers and can therefore not guarantee the stay of the Accused in French territory for any duration.

### ***The Defence Reply***

6. The Defence submits that the letter from the *Prieur Général de la Congrégation Saint-Jean* annexed to the Motion was not intended to show that the *Congrégation* has any immigration powers, but only expresses its readiness to cooperate with the appropriate authorities of the country concerned, namely France, should the Chamber deem it necessary to contact them in order to decide on the provisional release of the Accused.

7. The Defence asserts that it is impossible for the Accused to provide an absolute guarantee of his presence at the beginning of trial and points out that in any event, the Chamber may issue a warrant of arrest to secure his transfer to the Seat of the Tribunal, in accordance with Rule 65 (H).

8. The Defence further argues that it is incumbent upon the Prosecution to prove that if released, the Accused will pose a danger to any given person, and that it is not the Accused's role to ask the host country if it wishes to be heard.

9. The Defence submits that if the Accused were to be asked for a bail bond, the amount should not be considerable, since he is destitute.

10. According to the Defence, the Accused solemnly declares that he will not interfere with any victim, witness or accused persons involved in other trials before the Tribunal, that he will be present at the Tribunal on the day his trial commences, and that he will comply with orders issued by the Chamber.

11. The Defence points out that the Tribunal is bound by International Human Rights Law according to which provisional release is the rule, and detention before trial, the exception.

## **DELIBERATIONS**

### **• *On the setting of dates for a pre-trial conference and for the commencement of trial***

12. The Chamber notes the Defence submission that a date for a pre-trial conference in September 2005 would inform it about the Prosecution's intentions to amend the indictment. The Chamber recalls that pursuant to Rule 50, the Prosecution may at any time from the initial appearance file a motion requesting the Chamber's leave to amend the indictment. The Chamber is therefore of the view that a pre-trial conference would not affect the Prosecution's discretion to request leave to amend the indictment either before or after a date for the pre-trial conference has been set. The Chamber is satisfied, having regard to Rule 73 *bis*, that it is inappropriate at this stage to set a date for a pre-trial conference.

13. As regards the setting of a date for the commencement of trial in the second half of 2006, the Chamber notes the Defence submission that, according to DCDMS, it will not be provided with the necessary funds if a trial date is not set. The Chamber further takes note of the Defence's concern to complete its investigations as soon as possible.

14. On this issue, the Chamber recalls the relevant jurisprudence as enunciated in the *Rukundo* Decision:

[A]s regards the question of the determination of a date for the commencement of the trial, the Chamber reiterates that it is a matter for the general administration of the Tribunal and its judicial calendar. The Tribunal evaluates priorities taking into account notably the gravity of the crimes charged, the rights of all accused to have a fair trial within a reasonable time and the availability of Tribunal facilities in setting the judicial calendar.<sup>[3]</sup>

15. The Chamber concurs with this jurisprudence and finds that at this stage of proceedings, and having regard to the judicial calendar, it is not yet in a position to set a date for the commencement of trial.

- ***On the request for provisional release***

16. The Chamber recalls the provision of Rule 65 (B), which reads:

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.

17. The Chamber recalls that the provisions in Rule 65 (B) are cumulative, and not disjunctive.<sup>[4]</sup> The Chamber shall consider the first of the requirements under Rule 65(B) to see if it has been met, i.e., whether the host country and the country to which the accused seeks to be released have submitted on the question of the provisional release of the Accused.

18. The Defence submits on this requirement that the Accused, if released, would be transferred to France or to Austria. The Chamber notes that the Defence relies upon a letter dated 18 May 2005 annexed to the Motion. The letter is from Brother *Jean-Pierre- Marie Guérin-Boutaud, Prieur Général de la Congrégation Saint-Jean*, in which he expresses the *Congrégation*'s willingness to accommodate and to provide for the Accused during the period of his provisional release. In the Chamber's view, neither of the two suggested institutions, which house the *Congrégation* - the *Marchegg* Convent in Austria or the *Saint-Jodard* Noviciate in France (*Loire*) – may be considered as representative of the Austrian or French authorities regarding the transfer of the Accused to Austria and France. With regard to submissions by the host country, namely Tanzania, the Chamber notes the absence of any such submissions. In the absence of appropriate submissions from Austria and France and no submissions from Tanzania, the Chamber finds that the Defence has failed to fulfil the first requirement that would allow it to order the provisional release of the Accused.

19. Since the Defence has failed to fulfil the first of the cumulative requirements under rule 65(B), the Chamber does not find it necessary to consider the other requirements. Accordingly, the Chamber dismisses the Defence request for the provisional release of the Accused.

**FOR THE ABOVE REASONS,**

**THE TRIAL CHAMBER**

**DENIES** the Motion in its entirety.

Arusha, 11 July 2005

William H. Sekule

Presiding Judge

Arlette Ramarason

Judge

Solomy Balungi Bossa

Judge

[Seal of the Tribunal]

<sup>[1]</sup> The Motion was originally filed in French as “*Requête en fixation d’une date de la conférence préalable au procès, d’une date de début de procès et demande de liberté provisoire- Article 73 Bis du Règlement de Procédure et de Preuve*”.

<sup>[2]</sup> The Reply was originally filed in French as “*Mémoire en réplique à la réponse du Procureur suite au dépôt de la requête en fixation d’une date de la conférence préalable au procès, d’une date de début de procès, et demande de libération provisoire*”.

<sup>[3]</sup> *Prosecutor v. Emmanuel Rukundo*, ICTR-01-70-PT, Decision on the Motion of the Defence for Setting of a Date for the Commencement of Trial or Alternatively, the Transfer of the Case to a National Jurisdiction (TC), 1 June 2005, para. 14

<sup>[4]</sup> *Prosecutor v. Zejnil Delalić et al.*, IT-96-21, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić (TC), 25 September 1996, para. 1.