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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

**TRIAL CHAMBER II**

Case No. ICTR-2001-77-I

ENGLISH  
Original: FRENCH

Before: Judge Arlette Ramaroson, presiding  
Judge William H. Sekule  
Judge Solomy B. Bossa

Registrar: Adama Dieng

Decision rendered on: 13 October 2006

JUDICIAL RECORDS/ARCHIVES  
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**THE PROSECUTOR**

v.

**JOSEPH NZABIRINDA**

**DECISION ON THE DEFENCE MOTION FOR THE SETTING OF A DATE FOR  
THE COMMENCEMENT OF TRIAL AND PROVISIONAL RELEASE**

Office of the Prosecutor

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CII06-0075 (E)

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Translation certified by LSS, ICTR

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

**SITTING** as Trial Chamber II, composed of Judge Arlette Ramaroson, presiding, Judge William H. Sekule, and Judge Solomy B. Bossa (the “Chamber”);

**BEING SEIZED** of the “Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release”, pursuant to Rule 73 of the Rules of Procedure and Evidence, filed on 11 September 2006 (the “Motion”);

**CONSIDERING** the “Prosecutor’s Response to Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release”, filed on 15 September 2006 and the “Defence Reply to the Prosecutor’s Response to Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release”, filed on 18 September 2006;

**CONSIDERING** the “Reply to the Prosecutor’s Response to Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release”, pursuant to Rule 73 of the Rules of Procedure and Evidence, and the annexes filed on 9 October 2006;

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

**NOW DECIDES** as follows, based solely on the written Briefs of the parties, pursuant to Rule 73.

**SUBMISSIONS BY THE PARTIES**

*The Defence*

1. The Defence submits that since the initial appearance of the Accused on 27 March 2002, the Chamber has not convened a status conference or set a date for the commencement of trial. The Defence contends that it is ready to go to trial and requests a date for a pre-trial conference and a date for trial.<sup>1</sup> In the alternative, the Chamber should set a date for a status conference.

2. In the event that the Tribunal is unable to set a date for trial, the Defence requests the provisional release of the Accused pursuant to Rule 65(A).<sup>2</sup>

3. The Defence further submits that pending the commencement of trial, the Accused may, upon his provisional release, reside in Belgium where he already enjoys refugee status, since he has an alien registration certificate in Belgium and his family resides there. The Defence defers to the Tribunal to work out the modalities for his provisional release with Belgium, his potential host country.

<sup>1</sup> The Defence cites Articles 19(1), 19(3) and 20(4) of the Statute and Rule 62(A) of the Rules and other international instruments on the right of an accused to be tried without undue delay.

<sup>2</sup> The Defence also relies on certain international instruments and ICTY case law: *Baskić [sic]*, *Đjukić* and *Simić*.

4. The Defence further argues that it is in the interest of justice to uphold the principle of freedom, which is the rule in criminal law, rather than the principle of pre-trial detention, which should be the exception. It also contends that the Accused has been in detention for almost five years, in breach of all international instruments guaranteeing the right to a fair trial.

**The Prosecutor's Response**

5. The Prosecutor raises no objection to the setting of a date for the commencement of trial, recalling that such matters fall within the jurisdiction of the Tribunal's Administration.

6. However, the Prosecution objects to the Motion for provisional release, arguing that the Accused has not demonstrated that if released, he will appear for trial and will not pose a danger to any victim, witness or other person, pursuant to Rule 65(B). Nor has it been demonstrated that the Belgian authorities have agreed to host the Accused in their country.

**The Defence's Reply**

7. With regard to the Motion for the setting of a date for the commencement of trial, the Defence submits that even if the decision to set a date for trial is not within the Judges' jurisdiction, they should, in any case, uphold the right of the Accused to a fair trial and ensure that the Accused is brought to trial without undue delay.

8. With regard to the Motion for provisional release pending the commencement of trial, the Defence argues that the Accused will make a formal oral and written undertaking to appear for trial and to not pose a danger to any victims or witnesses; that the Accused has never refused to cooperate with the Prosecution; that the Prosecution has never demonstrated that the Accused poses a potential danger to victims and witnesses if released.

**DELIBERATION**

**Request for setting a date for the commencement of trial, a pre-trial conference or a status conference**

9. The Chamber recalls the Tribunal's case law on the setting of a date for the commencement of trial, as expounded in *Rukundo* and echoed in *Nsengimana*:

As regards the issue of setting of a date for the commencement of trial, the Chamber notes that such would come under the authority of the Tribunal's Administration and would be determined by its judicial calendar. In setting its priorities on the judicial calendar, the Tribunal would take into account, *inter alia*, the gravity of the charges, the right of every accused person to a fair trial without undue delay and the Tribunal's facilities.<sup>3</sup>

10. The Chamber notes that it is difficult to set a date for the commencement of trial or for a pre-trial conference because of the institutional constraints of the Tribunal.

<sup>3</sup> *Rukundo*, 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, ICTR-01-70-PT, 1 June 2005, para. 14; *Nsengimana*, 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, ICTR 01-69-I, 11 July 2005, paras. 14-15.

Nevertheless, the Chamber acknowledges the need for the Accused to be tried without undue delay.

11. Thus, the Chamber orders that a status conference be convened immediately between the parties pursuant to Rule 65*bis* so as to expedite the commencement of trial and, accordingly, directs the Registrar to contact the parties.

#### **Provisional release of the Accused**

12. The Chamber is aware of the length of the Accused's pre-trial detention but notes that it is not disproportionate in relation to the gravity of the crimes with which he is charged.<sup>4</sup>

13. The Chamber takes note of Rule 65(B) laying down the conditions for provisional release and specifying that provisional release may be ordered by a 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". The Chamber also notes that these conditions are cumulative.<sup>5</sup>

14. The Chamber recalls that "it is not a prerequisite to obtaining provisional release to provide guarantees from the state to which the accused seeks to be released, or from anyone else, that he will appear for trial".<sup>6</sup> However, the Chamber finds that neither Tanzania, the host country, nor Belgium, the country to which the Accused seeks to be released, have been consulted on this issue, taking into account the arguments advanced in support of this Motion. But the Chamber notes that "the observance of such conditions as are necessary to ensure the presence of the accused at trial" necessarily implies that the Governments of both States have been consulted. As noted by the Appeals Chamber, "it is advisable for an applicant for provisional release to provide such a guarantee from a governmental body as the International Tribunal does not have the power to execute an arrest warrant in the event that the accused does not appear for trial". Considering the gravity of the charges against the Accused and the evidence adduced by the Defence, the Chamber is not persuaded that the Accused will appear for trial if released. Accordingly, the Chamber denies the Motion for provisional release.

**FOR THESE REASONS,**

**THE TRIBUNAL**

**GRANTS** the Motion partly;

**DIRECTS** the Registrar to consult the parties as soon as possible with a view to setting a date for a status conference;

<sup>4</sup> *Nsengimana*, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber's Decision on Provisional Release, ICTR-01-69-AR 65 Appeals Chamber, 23 August 2005.

<sup>5</sup> *Delalić and Others*, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić (TC), IT-96-21, 25 September 1996, para. 1.

<sup>6</sup> *Nsengimana*, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber's Decision on Provisional Release, (AC), ICTR-01-69-AR65, 23 August 2005.

**DENIES** the Motion for provisional release.

Arusha, 13 October 2006

[Signed]

[Signed]

[Signed]

Arlette Ramaroson  
Presiding Judge

William H. Sekule  
Judge

Solomy B. Bossa  
Judge



[Seal of the Tribunal]

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