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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Khalida Rachid Khan, presiding  
Lee Gacuiga Muthoga  
Emile Francis Short

**Registrar:** Mr. Adama Dieng

**Date:** 17 November 2008

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[Signature]

**THE PROSECUTOR**

v.

**Léonidas NSHOGOZA**

**Case No. ICTR-07-91-PT**

**DECISION ON DEFENCE MOTION FOR REVIEW OF PROVISIONAL  
MEASURES, OR ALTERNATIVELY, FOR PROVISIONAL RELEASE**  
*Article 28 of the Statute and Rule 65 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Richard Karegyesa  
Abdoulaye Seye  
Dennis Mabura  
Florida Kabasinga

**For the Accused**

Allison Turner

[Signature]

## INTRODUCTION

1. On 7 January 2008, the Prosecutor issued an indictment, charging the Accused, Léonidas Nshogoza with contempt of the Tribunal and attempt to commit acts punishable as contempt of the Tribunal.<sup>1</sup> On 28 January 2008, a single Judge of the Tribunal issued a decision requesting all states to arrest and transfer the Accused to the Tribunal, and ordering that he be remanded into custody at the United Nations Detention Facility in Arusha upon his transfer from the state in which he is arrested.<sup>2</sup> An order lifting the confidentiality of the warrant for the arrest of the Accused was issued on 4 February 2008.<sup>3</sup>
2. The Accused surrendered himself to the Tribunal on 8 February 2008, and made his initial appearance on 11 February 2008, pleading not guilty to all charges against him.<sup>4</sup>
3. By way of Motion filed on 14 April 2008, the Accused requests that the Chamber "reconsider, review or modify" the Order of 28 January for his detention, or in the alternative, that the Chamber grant him provisional release so that he can go to Canada.<sup>5</sup> In a supplementary submission, the Accused added that he is willing to be released to Kenya, Tanzania or Uganda as well.<sup>6</sup> The request for the provisional release was reiterated in a Defence motion filed on 29 October 2008.<sup>7</sup>
4. The Prosecutor objects to the Motion, submitting that review proceedings are not applicable, that the test for reconsideration is not met, and that provisional release is not advisable.<sup>8</sup>
5. The Prosecutor's case against the Accused is scheduled to commence in February 2009.

<sup>1</sup> *Prosecutor v. Léonidas Nshogoza*, ICTR-07-91-I, "Indictment", 7 January 2008. Mr. Nshogoza is charged with contempt of the Tribunal, punishable under Article 14 of the Statute and Rule 77 (A), (B), and (C) of the Rules of Procedure and Evidence ("Rules").

<sup>2</sup> 28 January Order, pp. 2-3. Article 18 of the Statute requires that the Judge who reviews the indictment is satisfied "that a *prima facie* case has been established by the Prosecutor" before the Judge can confirm the indictment. Once an indictment has been confirmed against an accused, a Judge of the Tribunal can issue a warrant for his or her arrest.<sup>2</sup> In this instance, the Accused was arrested pursuant to the Confirming Judge's Order, as provided for in the Rules.

<sup>3</sup> *Nshogoza*, "Order Lifting the Confidentiality of the Warrant of Arrest and Order for Transfer and Detention Addressed to All States", 4 February 2008. The President of the Tribunal assigned the case to this Trial Chamber on 2 May 2008: *see Nshogoza*, Order Assigning the Case to Trial Chamber III, 2 May 2008.

<sup>4</sup> *Nshogoza*, T. 11 February 2008, p. 7.

<sup>5</sup> *Nshogoza*, "Motion for Review of Provisional Measures and Alternatively for Provisional Release (Rules 39, 40, 40bis, 54 and 65 of ICTR Rules of Procedure and Evidence)", filed 14 April 2008 ("Motion"), p. 2.

<sup>6</sup> *Nshogoza*, "Defence Supplementary Submission to 'Motion for Review of Provisional Measures, and Alternatively, Provisional Release'", filed 20 October 2008, para. 3.

<sup>7</sup> *Nshogoza*, "Defence Motion for Order to the Prosecution to Complete Rule 66 (A) (ii) Disclosure, Request for Time to Investigate Before Trial, and Motion for the Provisional Release of Léonidas Nshogoza," filed 29 October 2008, para. 44.

<sup>8</sup> *Nshogoza*, "Prosecutor's Response to Defence Motion for Review of Provisional Measures and Alternatively for Provisional Release (Rules 39, 40, 40bis, 54 and 65 of ICTR) Dated 14 April 2008", filed 21 April 2008 ("Prosecutor's Response"), paras. 8-13. The Prosecutor makes reference to Rule 120 – Review Proceedings – and concludes that it is not applicable to the present circumstances.

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## DISCUSSION

### *Preliminary Matter*

#### *Review*

6. The Defence requests that the Chamber review, reconsider or modify the 28 January Order ("the Impugned Decision"). In the Response to the Motion, the Prosecutor suggests that the Defence may be seeking review under Rule 120 of the Rules, but submits that such review would not be appropriate.

7. The Chamber notes that the Motion does not specifically request review under Rule 120. In any event, Rule 120 is not applicable in the present circumstances.<sup>9</sup>

#### *The Law on Reconsideration*

8. The Chamber has an inherent power to reverse or revise a prior decision where new material circumstances have arisen that did not exist at the time of the original decision, or where the decision was erroneous, and one of the parties suffered some prejudice or injustice as a result.<sup>10</sup> The party seeking reconsideration bears the onus of demonstrating the special circumstances warranting such reconsideration.

#### *Should the Chamber Reconsider the 28 January Order?*

9. The Defence, referring to Rules 39, 40 and 40 *bis*, asserts that the Prosecutor should have brought the Accused in for questioning pursuant to Rule 39 rather than arresting him. The rules the Defence relies upon, however, concern discretionary measures the Prosecutor may utilise during the conduct of an investigation.

<sup>9</sup> Article 25 of the Statute states, "Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement." It is apparent, from the language of Article 25 of the Statute, Rule 120 of the Rules, and a consideration of the treatment of these provisions by the Appeals Chamber, that the Rule provides a mechanism for a convicted person to have his or her case reviewed in light of new facts that were not known at the time of the proceedings. It is not appropriate to use in challenging an *ex parte* order for the arrest and detention of an accused person. See, e.g., *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review, 9 January 2007.

<sup>10</sup> *Bizimungu et al.*, Case No. ICTR-99-50-1, Decision on Defence Motion to Reconsider Order of 2 June Denying Admission of Church and School Records, 23 July 2008, para. 4; *Bizimungu et al.*, Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 26 April 2007, para. 7; *Karamera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions, 8 November 2007, para. 6; *Karamera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karamera et al.*, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005, para. 3; *Karamera et al.*, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8 (citations omitted).



10. In this instance, the Accused was arrested pursuant to the Impugned Decision, following the review and confirmation of the Indictment against him.<sup>11</sup> Article 18 of the Statute requires that the Judge who reviews an indictment is satisfied "that a *prima facie* case has been established by the Prosecutor" before the Judge can confirm the indictment.<sup>12</sup> Once an indictment has been confirmed against an accused person, a Judge of the Tribunal can issue a warrant for the arrest of the accused.<sup>13</sup>

11. The Chamber is satisfied that the Impugned Decision was not erroneous, and that there has been no injustice or harm to the Accused. The Chamber considers that there are no new material circumstances that have arisen, nor is there a new fact that did not exist at the time the Impugned Decision was made.

#### *The Law on Provisional Release*

12. Rule 65 (A) of the Rules provides that a detained accused "may not be provisionally released except upon an order of a Trial Chamber." Rule 65 (B) states:

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.<sup>14</sup>

13. Pursuant to Rule 65 (C), a Chamber may impose such conditions on the provisional release as it deems appropriate.<sup>15</sup>

14. According to the jurisprudence of both *ad hoc* Tribunals, the conditions set out in Rule 65 (B) are the minimum requirements the Accused must meet in order to be granted provisional release, and the Accused bears the burden of demonstrating that, if released, he will reappear for trial, and will not pose a danger to any victim, witness or other person.<sup>16</sup>

15. The Appeals Chamber has held that in assessing whether these minimum conditions have been met, the Chamber must take into account all the relevant factors that a reasonable trier of fact would consider in order to reach a decision.<sup>17</sup> The relevant factors and the weight

<sup>11</sup> 28 January Order; Rule 47 (II) states: "Upon confirmation of any or all counts in the indictment (i) The Judge may issue an arrest warrant, in accordance with Sub-Rule 55 (A), and any orders as provided in Article 19 of the Statute; and (ii) The suspect shall have the status of an accused."

<sup>12</sup> If the Judge is not satisfied that this burden has been met, Article 18 requires that the indictment be dismissed.

<sup>13</sup> Article 19 of the Statute; Rule 47 (II) of the Rules provides that once the indictment is confirmed, "[t]he Judge may issue an arrest warrant, in accordance with Sub-Rule 55 (A), and any orders as provided in Article 19 of the Statute."

<sup>14</sup> With respect to the assessment of danger to victims, there must be a concrete danger identified. See *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Decision on Motion on Behalf of Lahi Brahimaj for Provisional Release, 14 December 2007.

<sup>15</sup> Such conditions include the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused at trial, and the protection of others. See Rule 65 (C).

<sup>16</sup> *Prosecutor v. Baton Haxhiu*, Case No. IT-04-84-R77.5, Decision on Provisional Release of Baton Haxhiu, 23 May 2008 ("Haxhiu Decision"), para. 7 (citations omitted); *Prosecutor v. Hormisdas Nsegimana*, Case No. ICTR-01-69-AR65, Decision on the Application by Hormisdas Nsegimana for Leave to Appeal the Trial Chamber's Decision on Provisional Release, 23 August 2005, p. 3.

<sup>17</sup> *Prosecutor v. Prlic et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlic, Stojic, Praljak, Petkovic, and Coric, 11 March

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to be attached to these factors are to be decided on a case by case basis, in light of the particular circumstances of the individual accused. The Chamber should assess the circumstances as they exist at the time when it makes its decision, and to the extent that they can be foreseen, the circumstances at the time the accused is expected to return to the Tribunal.<sup>18</sup>

16. While it is not a prerequisite to provide guarantees from the State to which an accused seeks to be released that he will appear for trial, Rule 65 (B) requires the Chamber to be satisfied that the accused will appear for trial. Often, a guarantee from the appropriate governmental body is imposed as a condition under Rule 65 (C).<sup>19</sup> In certain instances, if an accused does not provide guarantees from the relevant authorities to support his release, the Chamber can, nonetheless, dispose of the motion without hearing from these countries. Indeed, the Appeals Chamber has held that where a Trial Chamber was not satisfied that the accused would return for trial, and where neither the host country, nor the country to which the accused sought to be released, was his home country, it was not necessary to hear from those countries before disposing of the motion.<sup>20</sup>

17. Since the requirements of Rule 65 (B) are cumulative, if an accused person does not meet any one of the requirements, the release shall not be granted.<sup>21</sup> Moreover, the Chamber retains the discretion to deny provisional release even if it is satisfied that the minimum requirements of Rule 65 (B) have been met.<sup>22</sup>

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2008, para. 7; *Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, Decision on the Accused Prlic's Motion for Provisional Release, 17 July 2008, para. 5 (citing *Prosecutor v. Mico Stanisic* Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mico Stanisic's Provisional Release, 17 October 2005; *Prosecutor v. Jovica Stanisic and Franko Simatovic*, Case No. IT-03-69-AR65.A, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008; *The Prosecutor v. Prlic et al.*, Case No. IT-04-74-AR65.7, Decision on 'Prosecution's Appeal from D cision relative   la Demande de mise en libert  provisoire de l'Accus  Petkovic dated 1 March 2008', 21 April 2008); *Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, Decision on the Accused Prljak's Motion for Provisional Release, 17 July 2008, para. 6 (citations omitted). Trial Chambers have considered, among others, factors such as the length of detention, the stage of the trial, factors motivating the release such as an illness in the family of the accused, the guarantees from the relevant state authorities that the accused will be monitored and will return for trial, and the Prosecutor's view on the release.

<sup>18</sup> *Prosecutor v. Prlic et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlic, Stojic, Prljak, Petkovic, and Coric, 11 March 2008, para. 7.

<sup>19</sup> *Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-AR65, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber's Decision on Provisional Release (AC), 23 August 2005, p. 3.

<sup>20</sup> *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, 11 July 2005. In this case, the Chamber denied a request for provisional release without hearing from the host country nor from any of the countries to which the accused person sought to be released. Rather than guarantees from the relevant state authorities, the accused in that case provided assurances from religious organizations that were ready to receive him. On appeal, the Appeal Chamber concluded that the Trial Chamber had not been satisfied that the appellant would return for trial, and that given the particular circumstances of the case, considering that neither the host country nor the country to which the appellant sought to be released was the home country of the appellant, it was not necessary to hear from those countries in order to dispose of the motion.

<sup>21</sup> *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, 11 July 2005, para. 17 (citing *Prosecutor v. Delalic et al.*, Case No. IT-96-21, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalic (TC), 25 September 1996, para. 1).

<sup>22</sup> *Haxiu* Decision, para. 7.



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*Should the Chamber Provisionally Release the Accused?*

18. The Defence submits that the Accused should be released immediately because he does not pose a flight risk, he is not a danger or threat to society, and he has not been charged with any of the crimes enumerated in the Statute, but with contempt of the Tribunal, which is instead provided for in the Rules.<sup>23</sup>

19. The Accused has expressed his willingness to be provisionally released to Canada, Kenya, Tanzania, or Uganda.<sup>24</sup> The documentation provided to support the request for provisional release includes a letter from the Accused, and a copy of email correspondence from his friend in Canada, who indicates that he is ready to receive the Accused.<sup>25</sup> The Accused has not provided any submissions from the States into which he seeks to be released.

20. The Prosecutor objects to the request for provisional release, asserting that the Accused has shown a pattern of disregard for the Tribunal's orders, that there is no proof of a fixed place of abode in any jurisdiction, and that the Accused may have breached the conditions of his provisional release from detention for criminal charges by Rwandan courts.<sup>26</sup> In response to the 29 October Motion reiterating the request for provisional release, the Prosecutor adds that the Chamber should dismiss the Motion based on the lack of any undertakings from the countries to which the Accused seeks to be released.<sup>27</sup>

21. The Chamber notes that, generally speaking, a request for provisional release by an accused person which is unsubstantiated by supporting documentation from the proposed host State may be denied from the outset. However, the Accused has been in custody since February 2008, and has not been charged with a serious violation of international humanitarian law but rather with contempt of the Tribunal, which carries a maximum sentence of 5 years or a fine of \$USD 10,000, or both.<sup>28</sup> Considering these factors, and noting the general principle of customary international law that persons awaiting trial should only be detained in pre-trial custody in limited circumstances,<sup>29</sup> the Chamber is of the view that it should invite submissions from the States concerned.

<sup>23</sup> Motion, paras. 16-27.

<sup>24</sup> Nshogoza, Defence Supplementary Submission.

<sup>25</sup> Motion, Annex C; Nshogoza, "Strictly Confidential (Under Seal) and Ex Parte Supplementary Submission to 'Motion for Review of Provisional Measures, or Alternatively, for Provisional Release' filed 14 April 2008" ("Supplementary Submission"), 2 September 2008. In this Supplementary Submission, the Defence submits that the Accused has a friend willing to receive him in Canada, a jurisdiction into which he wishes to be released.

<sup>26</sup> Prosecutor's Response, paras. 14-18.

<sup>27</sup> Nshogoza, "Prosecutor's Response to 'Defence Motion for Order to the Prosecution to Complete Rule 66 (A) (ii) Disclosure, Request for Time to Investigate Before Trial, and Motion for the Provisional Release of Léonidas Nshogoza'", filed 3 November 2008, at para. 12.

<sup>28</sup> Rule 77 (G).

<sup>29</sup> For example, Article 9 (3) of the *International Covenant on Civil and Political Rights* provides, in relevant part: "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage in the proceedings, and, should occasion arise, for execution of the judgement."



22. In this regard, the Chamber recalls its power under Article 28 of the Statute to request assistance from States.<sup>30</sup> In these exceptional circumstances, and in light of the considerations outlined above, the Chamber considers that submissions from the States into which the Accused seeks to be released would assist the Chamber in determining his request for provisional release.

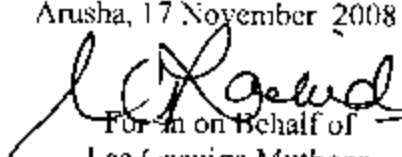


**FOR THESE REASONS** the Chamber,

**DENIES** the Defence request for reconsideration of the Impugned Decision; and

**RESPECTFULLY REQUESTS**, pursuant to Article 28 of the Statute, submissions from the appropriate authorities of the State of Canada, the Republic of Kenya, the Republic of Tanzania and the Republic of Uganda on the issue of their respective willingness to accept the Accused, Léonidas Nshogoza, into their jurisdiction pending trial, as well as any conditions which they might attach to receiving the Accused into their jurisdiction, no later than 12 December 2008; and

**HEREBY DIRECTS** the Registrar to communicate this Decision to the relevant State authorities forthwith, as well as to facilitate the provision of the submissions by those State authorities to the Chamber.

Arusha, 17 November 2008

 For and on Behalf of Lee Ocuiga Muthoga Judge	 Khalida Rashed Khan Presiding Judge	 For and on Behalf of Emile Francis Short Judge
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<sup>30</sup> ICTR Statute, Article 28(1) requires States to cooperate with the Tribunal "in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law." Article 28 (2) further requires States to cooperate with any request for assistance without undue delay.