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UNITED NATIONS  
NATIONS UNIES

**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  
Aydin Sefa Akay

**Registrar:** Mr. Adama Dieng

**Date:** 12 February 2009

JUDICIAL RECORDS ARCHIVES  
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**THE PROSECUTOR**

v.

**Léonidas NSHOGOZA**

**Case No. ICTR-2007-91-T**

**DECISION ON MOTION FOR RECONSIDERATION OF THE TRIAL CHAMBER'S  
DECISION ON PROVISIONAL RELEASE**

*Rule 65 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Paul Ng'aura  
Abdoulaye Seye  
Dennis Mabura  
Marie Ka

**For the Accused:**

Allison Turner

## INTRODUCTION

1. On 14 April 2008, the Accused, Léonidas Nshogoza, requested that the Chamber grant him provisional release to the State of Canada.<sup>1</sup> In a supplementary submission, the Accused indicated that he was also willing to be released to the Republics of Kenya, Tanzania or Uganda.<sup>2</sup>
2. On 17 November 2008, the Chamber issued an Interim Order seeking submissions from the appropriate authorities of the State of Canada, and the Republics of Kenya, Tanzania, and Uganda, on the issue of their respective willingness to accept the Accused into their jurisdiction pending trial, as well as any conditions which they might attach to receiving the Accused into their jurisdiction.<sup>3</sup>
3. The Government of Canada and the Republic of Tanzania provided submissions to the Chamber on 11 December 2008.<sup>4</sup> The Government of Canada submitted that it “does not have any legislation, policies, procedures or resources that would allow [it] to make any sort of guarantee” that the Accused would appear for trial.<sup>5</sup> The Republic of Tanzania indicated that it would not be in a position to “host” the Accused as requested.<sup>6</sup> The Republics of Uganda and Kenya made no submissions on the matter.
4. On 17 December 2008, the Trial Chamber issued a decision denying the Defence request for provisional release (“Impugned Decision”).<sup>7</sup> The Chamber found that the Accused had not discharged the burden of demonstrating that the minimum conditions of Rule 65 (B) of the Rules of Procedure and Evidence (“Rules”) were met.
5. On 3 February 2009, the Defence filed a Motion requesting the Chamber to reconsider the Impugned Decision.<sup>8</sup>

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<sup>1</sup> *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-PT, 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 (“Original Motion”), p. 2.

<sup>2</sup> *Nshogoza*, Defence Supplementary Submission to ‘Motion for Review of Provisional Measures, and Alternatively, Provisional Release’, filed 20 October 2008, para. 3. The request for the provisional release was reiterated in a Defence motion filed on 29 October 2008. See *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>3</sup> *Nshogoza*, Order Lifting the Confidentiality of the Warrant of Arrest and Order for Transfer and Detention Address to All States, 4 February 2008.

<sup>4</sup> *Nshogoza*, Submission of the Government of Canada on the Issue of Accepting Leonidas Nshogoza into Our Jurisdiction Pending Trial, filed 11 December 2008 (“Canada Submission”); and Letter from The United Republic of Tanzania, dated 11 December 2008 (“Tanzanian Letter”).

<sup>5</sup> Canada Submission, p. 5.

<sup>6</sup> Tanzanian Letter.

<sup>7</sup> *Nshogoza*, Decision on Defence Motion for Provisional Release, 17 December 2008.

<sup>8</sup> *Nshogoza*, Motion for Reconsideration of the Trial Chamber’s ‘Decision on Defence Motion for Provisional Release’, of 17 December 2008 (“Motion”).

## DISCUSSION

### *Law on Reconsideration*

6. Though reconsideration is not expressly provided for in the Statute or the Rules, the Trial 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 or an abuse of discretion and has caused prejudice or injustice to a party.<sup>9</sup> Further, it is for the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.<sup>10</sup>

### *Whether the Impugned Decision Warrants Reconsideration*

#### (i) *New Material Circumstances*

7. The Defence submits that new material circumstances have arisen which did not exist at the time of the Impugned Decision and which warrant reconsideration. According to the Defence, the new material circumstances are: (i) the Accused's willingness for his provisional release to be conditional upon his release to a UN ICTR safe house in Arusha, until such time as the judgment in this case is rendered;<sup>11</sup> (ii) proof that the Accused was lawfully in Tanzania at the time when he presented himself to the Tribunal;<sup>12</sup> and (iii) the Accused's signed declaration that he will appear at the Tribunal upon being requested to do so.<sup>13</sup>

8. With regard to the Accused's willingness to be released to a UN ICTR safe house, the Chamber considers that this is a new and different request, which was not relevant to the Impugned Decision on the original Defence request for release to the State of Canada, or the Republics of Tanzania, Kenya and Uganda. It is, therefore, not a new material circumstance warranting reconsideration of the Impugned Decision.

9. The Defence asserts that as the Accused entered Tanzania legally on 15 January 2008, the Government of Tanzania has been "willingly hosting" him since that date. The Chamber, however, considers that the Accused's lawful presence in the Republic of Tanzania is irrelevant to the criteria under Rule 65 (B). The Chamber recalls that Rule 65 (B) provides that:

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<sup>9</sup> *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, 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; *Prosecutor v. 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; *Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera et al.*, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005, para. 3; *Karemera 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 (note also the authorities cited in footnotes contained within that paragraph).

<sup>10</sup> See *Prosecutor v. Nzirorera et al.*, Case No. ICTR-98-44-T, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago, 10 October 2003, para. 6.

<sup>11</sup> Motion, para. 4.

<sup>12</sup> Motion, Annexure A.

<sup>13</sup> Motion, Annexure 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.”

10. The Republic of Tanzania has already clearly indicated that it is not willing to receive the Accused if provisionally released.<sup>14</sup> Given that the issue of whether the Accused entered Tanzania lawfully is not material to the criteria under Rule 65 (B), the Chamber considers that proof to this effect is not a new material circumstance warranting reconsideration.

11. With regard to the Accused's signed declaration that he will appear at the Tribunal upon being requested to do so, the Chamber notes that such a declaration was before the Chamber at the time of the Impugned Decision.<sup>15</sup> Accordingly, it is not a new material circumstance warranting reconsideration.

12. In addition, under the heading of “new material circumstances” in the Motion, the Defence submits that it is not required to satisfy the Trial Chamber that “compelling reasons” exist to justify his release.<sup>16</sup> This submission, however, is not a new material circumstance. Furthermore, the Chamber notes that the Impugned Decision did not find that the Defence must demonstrate “compelling reasons” to justify provisional release. Rather, the Impugned Decision stated:

“In cases where Trial Chambers have decided to provisionally release accused persons, there has usually been some compelling circumstance, often family or health related, as well as undertakings from state authorities to monitor the accused and to take measures to ensure that he would return for trial.”<sup>17</sup>

13. Accordingly, the Chamber finds that the Defence has not demonstrated any new material circumstances warranting reconsideration of the Impugned Decision.

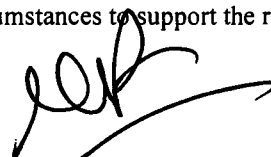
14. In the Motion, the Defence further reiterates that no suggestion has ever been made in this case that the Accused would pose a danger to any person should he be provisionally released. The Impugned Decision did not address whether the Accused would pose a danger to any victim, witness or other person, since the Defence had not met the other requirements, which are cumulative, under Rule 65 (B). In view of the Chamber's finding above, that there are no new material circumstances warranting reconsideration of the Impugned Decision,

<sup>14</sup> See *supra* para. 3.

<sup>15</sup> *Nshogoza*, Defence Reply to Prosecutor's Response to Defence Motion for Review or Provisional Release, 28 April 2008, attached Declaration of Mr. Léonidas Nshogoza in Support of Motion for Review of Provisional Measures and Alternatively for Provisional Release.

<sup>16</sup> Motion, para. 16.

<sup>17</sup> *Prosecutor v. Milorad Krnojelac*, (AC) Decision on Application for Provisional Release, 12 December 2002; *Prosecutor v. Baton Haxhiu*, Case No. IT-04-84-R77.5, Decision on Provisional Release of Baton Haxhiu, 23 May 2008 paras 8, 11; *Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, Decision on the Accused Prlic's Motion for Provisional Release, 17 July 2008, paras. 9, 16, 17, 26, 27; *Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, Decision on the Accused Praljak's Motion for Provisional Release, 17 July 2008, paras. 17, 19, 29. (In the recent *Prlic* decisions, the close of the Prosecution's case required the Chamber to engage in a detailed evaluation of the Accused's risk of flight, and to consider if there were sufficiently compelling reasons to grant the provisional release. Though the burden on the Accused is not the same in this case, the general trend of the cases granting provisional release has been to require some demonstration of personal circumstances to support the request.);



there is no need to address the Defence's repeated arguments that the Accused would not pose any danger if provisionally released.

(ii) *Whether the Impugned Decision was Erroneous and Caused Prejudice and Injustice to the Accused*

15. The Defence further submits that the Impugned Decision was erroneous in its reliance on a Decision on Provisional Release in *The Prosecutor v. Baton Haxiu*.<sup>18</sup> The Defence submits that the *Haxiu* Decision is distinguishable on the grounds that the accused in that case sought release into a third state where he had family and assets. The Defence points out that the accused in the *Haxiu* case was not seeking conditional release into a Tribunal safe house, and the *Haxiu* Decision is, therefore, not an authority which would prevent the granting of provisional release in this case.<sup>19</sup>

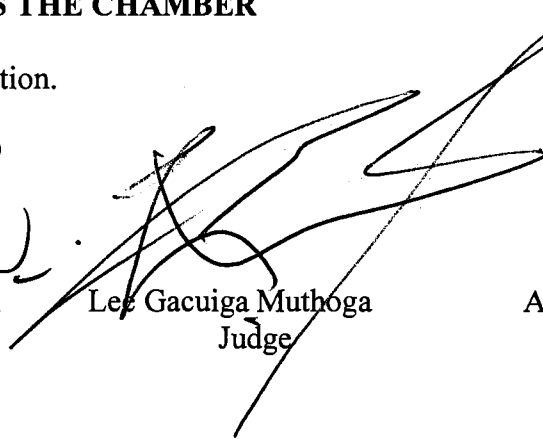
16. The Chamber considers that the Defence submission is without merit. The Chamber recalls that the Impugned Decision was made pursuant to the Accused's request for provisional release to a third state,<sup>20</sup> as in the *Haxiu* Decision, and not to a safe house. Therefore, the Impugned Decision was not erroneous in considering the *Haxiu* Decision. The Impugned Decision referred to the *Haxiu* Decision for the purposes of determining that it is advisable for the Accused to provide guarantees from the relevant government authorities of the state to which he wishes to be released, in order to satisfy the criteria under Rule 65 (B).<sup>21</sup> Accordingly, the Chamber finds that the Impugned Decision was not erroneous.

**FOR THESE REASONS THE CHAMBER**


**DENIES** the Defence Motion.

Arusha, 12 February 2009

  
Khalida Rachid Khan  
Presiding Judge



Lee Gacuiga Muthoga  
Judge

  
Aydin Sefa Akay  
Judge

[Seal of the Tribunal]



<sup>18</sup> *Prosecutor v. Baton Haxiu*, Case No. IT-04-84-R77.5, Decision on Provisional Release of Baton Haxiu, 23 May 2008, para. 7 ("*Haxiu* Decision"). See Impugned Decision, footnotes 11-13, and Motion para. 19.

<sup>19</sup> Motion, para. 21.

<sup>20</sup> The Accused sought to be released to the Republic of Tanzania, the State of Canada, the Republic of Kenya or the Republic of Uganda. See *supra*, para. 1.

<sup>21</sup> See Impugned Decision, paras. 13-15.