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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

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ICTR-98-44-AR65
07th April 2009

~~(2710/H - 2704/H)~~

(2719/H - 2713)

IN THE APPEALS CHAMBER

Before:

Judge Liu Daqun, Presiding
Judge Mohamed Shahabuddeen
Judge Fausto Pocar
Judge Theodor Meron
Judge Carmel Agius

ICTR Appeals Chamber
Date: 07th April 2009
Action: *A. Judgment*
Copied To: *Convened Judges SLOS, LOU, ABU, PATSE, CMB, UG, K.S.*

Registrar:

Mr. Adama Dieng

Decision of:

7 April 2009

ÉDOUARD KAREMERA
MATTHIEU NGIRUMPATSE
JOSEPH NZIRORERA

v.

THE PROSECUTOR

Case No. ICTR-98-44-AR65

JUDICIAL RECORDS/ARCHIVES

2009 APR - 8 1 A 9:29

DECISION ON MATTHIEU NGIRUMPATSE'S APPEAL AGAINST
TRIAL CHAMBER'S DECISION DENYING PROVISIONAL RELEASE

Office of the Prosecutor:

Mr. Don Webster
Mr. Iain Morley
Mr. Saidou N'Dow
Ms. Gerda Visser
Ms. Sunkarie Ballah-Conteh
Mr. Takeh Sendze

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *KIFFE KUMELIO A. AFANDE*
SIGNATURE: *[Signature]* DATE: *07 April 2009*

Counsel for the Defense:

Ms. Dior Diagne Mbaye and Mr. Félix Sow for Mr. Édouard Karemera
Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Matthieu Ngirumpatse
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for Mr. Joseph Nzirorera

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of "Ngirumpatse's Appeal from the Decision on Various Motions on Matthieu Ngirumpatse's Health Rendered on 6 February 2009" filed on 13 February 2009 ("Appeal") by Matthieu Ngirumpatse ("Ngirumpatse").

A. Background

2. On 6 February 2009, Trial Chamber III of the Tribunal ("Trial Chamber") issued its "Decision on the Various Motions Relating to Matthieu Ngirumpatse's Health" ("Impugned Decision"). In the Impugned Decision, the Trial Chamber rejected Ngirumpatse's request for provisional release for a period of no less than six months so that he could receive medical treatment at a specialized hospital in one of several primarily European States listed in a confidential annex to his Motion.¹ Specifically, the Trial Chamber reasoned that Ngirumpatse had not furnished any "guarantees" from any of his proposed States or shown that he made an attempt to contact their relevant governmental authorities to this end.² Furthermore, according to the Impugned Decision, he had not demonstrated that he would receive better medical treatment in Europe or anywhere else.³

3. Ngirumpatse appealed this decision on 13 February 2009. In its Response of 18 February 2009, the Prosecution opposed the Appeal on procedural grounds because Ngirumpatse had not sought certification to appeal pursuant to Rule 73 of the Tribunal's Rules of Procedure and Evidence ("Rules").⁴ On 20 February 2009, Ngirumpatse replied that he had brought his Appeal in accordance with Rule 65 of the Rules, which provides an appeal as of right from decisions

¹ Impugned Decision, paras. 14-23, p. 10, ruling on *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Requête de M. Ngirumpatse aux fins de mise en liberté provisoire pour motif médical, et de transfert en urgence dans l'attente qu'il soit statué sur les conditions matérielles susceptibles d'assortir sa mise en liberté*, 3 November 2008 ("Motion").

² Impugned Decision, paras. 21, 23.

³ Impugned Decision, paras. 22, 23. The Appeals Chamber notes that Ngirumpatse has been receiving medical treatment in Nairobi, Kenya, since 8 October 2008: Appeal, para. 4.

⁴ Prosecutor's Response to: *Requête en Appel de M. Ngirumpatse contre la "Décision sur les diverses requêtes relatives à l'état de santé de Mathieu Ngirumpatse" rendu[e] le 6 février 2009*, 18 February 2009 ("Response"), paras. 2, 3.

pertaining to provisional release.⁵ Later that day, the Prosecution withdrew its Response without taking a position on the merits of the Appeal.⁶

B. Standard of Review

4. A decision on provisional release by a Trial Chamber under Rule 65 of the Rules is discretionary.⁷ Accordingly, the relevant inquiry is whether the Trial Chamber correctly exercised its discretion in reaching that decision, not whether the Appeals Chamber agrees with it.⁸ In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber committed a "discernible error".⁹ The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹⁰

C. Submissions

5. In his Appeal, Ngirumpatse requests the Appeals Chamber to (i) reverse the Impugned Decision; (ii) order that the States to which he seeks to be released be consulted; (iii) request, if necessary, their cooperation in hosting him on their territory; and (iv) order his provisional release.¹¹

6. Ngirumpatse submits that the Trial Chamber erred in rejecting his application for provisional release on the sole basis that he failed to produce a proof of an agreement from a host State or a proof of contacts being initiated in that regard.¹² He argues that, by focusing on the issue of a State's guarantee, the Trial Chamber implicitly acknowledged that his situation justifies

⁵ *Réplique de M. Ngirumpatse sur son appel contre la "Décision sur les diverses requêtes relatives à l'état de santé de Mathieu Ngirumpatse rendu[e] le 6 février 2009"*, 20 February 2009, p. 2.

⁶ Withdrawal of Prosecutor's Response to: *Requête en Appel de M. Ngirumpatse contre la "Décision sur les diverses requêtes relatives à l'état de santé de Mathieu Ngirumpatse" rendu[e] le 6 février 2009*, 20 February 2009, para. 2.

⁷ See, e.g., *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Provisional Release, 16 December 2008 ("Prlić 16 December 2008 Decision"), para. 4; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.7, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on Popović's Motion for Provisional Release, 1 July 2008 ("Popović Decision"), para. 5; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006 ("Milutinović Decision"), para. 3; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006 ("Haradinaj Decision"), para. 21.

⁸ *Ibid.*

⁹ See, e.g., Prlić 16 December 2008 Decision, para. 5; Popović Decision, para. 6; Milutinović Decision, para. 3; Haradinaj Decision, para. 22.

¹⁰ *Ibid.*

¹¹ Appeal, p. 12.

¹² Appeal, paras. 26, 30, 33, 39, 57.

provisional release.¹³ In his view, the Trial Chamber's analysis also suggests that it does not entertain any doubt as to his appearance at trial nor that, if released, he would not pose a danger to any victim, witness or other person.¹⁴ With respect to the host State's agreement, Ngirumpatse contends that Rule 65 of the Rules does not impose such a requirement as a condition for admissibility or a prerequisite to obtaining provisional release.¹⁵ In addition, Ngirumpatse argues that the Trial Chamber misinterpreted Rule 65 as requiring guarantees without having previously specified that they would be required or indicated what they should consist of.¹⁶

7. Ngirumpatse also submits that the Trial Chamber erred in considering that it was not within its remit to engage in consultation with States in the search for a host State for an accused applying for provisional release.¹⁷ He argues that the obligation to give the host State and the State to which the accused seeks to be released the opportunity to be heard is placed upon the Chamber, not the accused.¹⁸ In this respect, Ngirumpatse emphasizes that his Defence is not in a position to contribute fully to the process of consultation with the States concerned¹⁹ and that the Registry declined to assist him absent a prior decision from the Trial Chamber granting him provisional release.²⁰ According to him, the Trial Chamber had the authority under Article 28 of the Statute of the Tribunal to request submissions from the States to which he seeks to be released on their willingness to admit him into their jurisdiction and to request their cooperation in admitting him.²¹ He contends that the Trial Chamber not only failed to exercise its prerogatives, but also did not consider his submissions on the matter, thereby failing to provide a reasoned opinion.²²

8. Ngirumpatse further submits that the Trial Chamber did not take into account all the relevant factors in reaching its decision.²³ He points out that his application was filed on medical and humanitarian grounds and to ensure a proper administration of justice, which the Trial Chamber failed to take into account.²⁴ He also claims that the Trial Chamber did not consider the time he has already spent in detention.²⁵

¹³ Appeal, paras. 29-34, 42, 45.

¹⁴ Appeal, paras. 35-40, 45.

¹⁵ Appeal, paras. 42, 43, 52, 63-65. *See also ibid.*, para. 66.

¹⁶ Appeal, paras. 59-61, 67, 68.

¹⁷ Appeal, paras. 47, 48.

¹⁸ Appeal, paras. 47-51.

¹⁹ Ngirumpatse is seeking leave in specific countries listed in order of preference in Annex A of his Motion.

²⁰ Appeal, paras. 45, 50.

²¹ Appeal, paras. 53, 54. Ngirumpatse points out that such an approach was followed in the *Nshogoza* case: Appeal, para. 56, referring to *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Review of Provisional Measures, or Alternatively for Provisional Release, 17 November 2008.

²² Appeal, paras. 28, 57. *See also ibid.*, para. 83.

²³ Appeal, paras. 27, 70.

²⁴ Appeal, paras. 74, 75.

²⁵ Appeal, paras. 76-78.

9. Finally, Ngirumpatse points out that, in similar situations, accused persons before the International Tribunal for the Former Yugoslavia ("ICTY") have been released on a provisional basis.²⁶ Arguing that he would certainly be provisionally released if he were under the jurisdiction of the ICTY or a national court, Ngirumpatse submits that there should be no discriminatory application of human rights standards.²⁷

D. Discussion

10. Under Rule 65(B) of the Rules, a Trial Chamber may order provisional release only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness or other person; and after giving the host country and the country to which the accused seeks to be released the opportunity to be heard.

11. In the Impugned Decision, the Trial Chamber found that the requirements under Rule 65 of the Rules were not satisfied and accordingly denied Ngirumpatse's application for provisional release.²⁸ The Trial Chamber reached its conclusion primarily relying on the fact that Ngirumpatse failed to provide guarantees from any of the States into which he sought to be released or documentation showing that he had contacted the concerned States.²⁹ It explained that, as the guarantor of public safety and order on its territory, the host State was the only entity able to provide the Tribunal with guarantees that the accused will not flee and that, if he does, he will be arrested.³⁰ The Trial Chamber then held that it was not within its remit to engage in consultations with States in the search for a host State for an accused applying for provisional release.³¹

12. The Appeals Chamber understands from the Impugned Decision that, in the absence of a State's guarantees, the Trial Chamber considered that it could not be satisfied that, if released, Ngirumpatse would appear for trial. The Appeals Chamber considers that, in concluding that it was not satisfied that Ngirumpatse would not flee if released on this sole basis, the Trial Chamber regarded the production of guarantees as a prerequisite to obtaining provisional release. The Appeals Chamber finds that the Trial Chamber erred in the exercise of its discretion in doing so.

²⁶ Appeal, para. 80. Ngirumpatse specifically refers to the provisional release of Jovica Stanišić, an accused before the ICTY: *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69.

²⁷ Appeal, paras. 81-82.

²⁸ Impugned Decision, para. 23.

²⁹ *Ibid.*, para. 21.

³⁰ *Ibid.*, para. 21.

³¹ *Ibid.*, para. 21.

13. The Appeals Chamber has repeatedly held that Rule 65 of the Rules places no obligation upon an accused applying for provisional release to provide guarantees from a State as a prerequisite to obtaining provisional release.³² Whilst a State's guarantees may carry considerable weight in support of an application for provisional release, a Trial Chamber is under the obligation to consider all relevant factors which a reasonable Trial Chamber would be expected to take into account before deciding whether the requirements of Rule 65(B) of the Rules have been met.³³ It must also provide a reasoned opinion indicating its view on those relevant factors.³⁴ In the present case, the Trial Chamber should have primarily considered whether, even in the absence of a State's guarantees, Ngirumpatse's personal circumstances could satisfy the Trial Chamber that he would appear for trial if released. Although it is within a Trial Chamber's discretion to impose the condition of production of guarantees from the potential host State to ensure the presence of the accused at trial pursuant to Rule 65(C) of the Rules,³⁵ it should not be the threshold consideration. This becomes most relevant where a Trial Chamber has concerns about the applicant's personal guarantees and considers that assurances from the host State would alter the balance in favour of provisional release.

14. In addition, the Appeals Chamber emphasizes that the humanitarian and medical grounds advanced by Ngirumpatse in support of his application³⁶ were relevant factors in deciding whether

³² *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008 ("Stanišić Decision"), para. 48; *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, 23 August 2005 ("Nsengimana Decision"), p. 3; *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-01-70-AR65D)2, *Décision relative à la Demande d'autorisation d'interjeter appel (Mise en liberté provisoire)*, 28 April 2004, p. 3; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005 ("Tolimir Decision"), para. 9; *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-AR65.1, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, 2 December 2004 ("Čermak Decision"), para. 30. See also *Prosecutor v. Astrid Haračija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, Decision on Motion on Bajrush Morina for Provisional Release, 9 February 2009, para. 6; *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002 ("Blagojević Decision"), para. 7.

³³ See, e.g., *Prlić* 16 December 2008 Decision, para. 7; *Popović* Decision, paras. 8, 24; *Stanišić* Decision, para. 35; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution's Urgent Appeal Against "Décision relative à la demande de mise en liberté provisoire de l'accusé Pušić" Issued on 14 April 2008, 23 April 2008 ("Prlić 23 April 2008 Decision"), para. 7; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR65.1, Decision on Ante Gotovina's Appeal Against Denial of Provisional Release, 17 January 2008, para. 8; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 27 July 2007 ("Bošković Decision"), para. 6; *Prosecutor v. Ramuš Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006, para. 10.

³⁴ *Ibid.*

³⁵ *Stanišić* Decision, para. 48; *Nsengimana* Decision, p. 3; *Tolimir* Decision, para. 9; *Čermak* Decision, para. 30. See also *Blagojević* Decision, para. 8 and *Impugned* Decision, para. 15.

³⁶ See Motion, paras. 7, 18-21.

he will return for trial.³⁷ As such, they deserved consideration in the assessment of whether Ngirumpatse is a flight risk. In limiting itself to concluding that Ngirumpatse would not receive a better medical treatment in Europe or anywhere else without considering the humanitarian and medical grounds put forward by Ngirumpatse,³⁸ the Trial Chamber erred in the exercise of its discretion.

15. The Appeals Chamber therefore finds that the Trial Chamber erred in failing to take into account all the factors which were relevant to its taking a fully informed and reasoned decision as to whether, pursuant to Rule 65 of the Rules, Ngirumpatse will appear for trial if provisionally released and, more generally, as to whether or not he should be granted provisional release. In these circumstances, the Appeals Chamber considers that Ngirumpatse's remaining arguments need not be addressed in the present appeal.

16. As a result, the Appeals Chamber considers it necessary to remand the matter to the Trial Chamber so that it can apply the correct legal standards and exercise its discretion accordingly. In this respect, the Appeals Chamber emphasizes that, since a Trial Chamber is required to assess the relevant factors as they exist at the time when it reaches its decision on provisional release,³⁹ it would be appropriate for the Trial Chamber to authorize the parties, if they so wish, to file additional submissions on the matter.

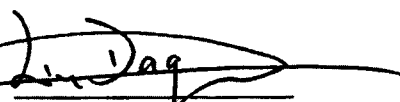
E. Disposition

17. For the foregoing reasons, the Appeal Chamber **QUASHES** the Impugned Decision and **REMANDS** the matter to the Trial Chamber for reconsideration.

Done this seventh day of April 2009,
at The Hague, The Netherlands.



[Seal of the Tribunal]


Judge Liu Daqun
Presiding

³⁷ Cf. *Popović* Decision, para. 18; *Prlić* 23 April 2008 Decision, para. 14; *Boškoski* Decision, para. 14. If the requirements of Rule 65(B) are met, the existence of humanitarian reasons can also be a salient and relevant factor in assessing whether to exercise discretion to grant provisional release: see *Prlić* 23 April 2008 Decision, para. 14.

³⁸ Impugned Decision, para. 22, referring to the testimony of the Tribunal's Chief Medical Officer.

³⁹ See, e.g., *Prlić* 16 December 2008 Decision, para. 7; *Stanišić* Decision, para. 35; *Popović* Decision, para. 8.