



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
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 17 December 2008

THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-PT

DECISION ON DEFENCE MOTION FOR PROVISIONAL RELEASE

Office of the Prosecutor:

Richard Karegyesa
Abdoulaye Seye
Dennis Mabura
Florida Kabisanga

For the Accused:

Allison Turner

INTRODUCTION

1. By way of Motion filed on 14 April 2008, the Accused, Léonidas Nshogoza, requests that the Chamber grant him provisional release so that he can go to Canada.¹ In a supplementary submission, the Accused adds that he is also willing to be released to Kenya, Tanzania or Uganda.² The request for the provisional release was reiterated in a Defence motion filed on 29 October 2008.³
2. The Prosecutor objects to the Motion, submitting that provisional release is not advisable.⁴
3. On 17 November 2008, the Chamber issued an Interim Order seeking 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 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 2008.⁵
4. The Government of Canada and the Republic of Tanzania provided submissions to the Chamber on 11 and 12 December 2008, respectively.⁶
5. The Republic of Uganda and the Republic of Kenya made no submissions on the matter.

DISCUSSION

Should the Chamber Provisionally Release the Accused?

6. In its submissions, the Government of Canada explained the procedure that foreign nationals must follow in order to obtain a temporary resident visa for entry into Canada.⁷ In addition, the Government of Canada submits 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.⁸

¹ *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.

² *Nshogoza*, “Defence Supplementary Submission to ‘Motion for Review of Provisional Measures, and Alternatively, Provisional Release’,” filed 20 October 2008, para. 3.

³ *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.

⁴ *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.

⁵ *Nshogoza*, “Order Lifting the Confidentiality of the Warrant of Arrest and Order for Transfer and Detention Addressed to All States”, 4 February 2008.

⁶ *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”),

⁷ Canada Submission, pp.2-4.

⁸ *Ibid.*, p.5

7. The Republic of Tanzania advises that it is unable to host the Accused as requested.⁹
8. The Chamber recalls that in order to grant a provisional release, the Chamber must be satisfied that an accused, if released, will appear for trial.
9. Rule 65 (A) of the Rules provides that a detained accused person “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.¹⁰

10. 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.¹¹

11. 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.¹²

12. In this regard, the Chamber notes that in a contempt case before the International Criminal Tribunal for the former Yugoslavia, an accused who, like Mr Nshogoza, surrendered voluntarily, was provisionally released. The Chamber notes that the voluntary surrender of the Accused may be seen as an indication that he would not try to evade justice if provisionally released.¹³

⁹ The United Republic of Tanzania, Ministry of Foreign Affairs and International Co-operation, Letter dated 11 December 2008.

¹⁰ 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.

¹¹ *Prosecutor v. Baton Haxhiu*, Case No. IT-04-84-R77.5, Decision on Provisional Release of Baton Haxhiu, 23 May 2008, 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.

¹² *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 Prljak’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.);

¹³ *Prosecutor v. Baton Haxhiu*, Case No. IT-04-84-R77.5, Decision on Provisional Release of Baton Haxhiu, 23 May 2008, para. 7.5; *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 23. The Chamber noted, at paragraph 8, that since the UNAMIK is the entrusted with ensuring public safety and order in Kosovo, it is the property authority to provide such guarantees.

¹⁴ United Nations Interim Administration in Kosovo.

13. However, in that case, the accused provided medical evidence of his father's illness, a guarantee from UNAMIK¹⁴ to ensure his return to the Tribunal at the conclusion of the provisional release, and a letter from the host country, indicating that it had no objections to his release.¹⁵

14. Since the Tribunal cannot execute a warrant for arrest, it is advisable for the accused to provide such guarantees from the relevant governmental authorities.¹⁶

15. The Defence has provided no supporting material to show that the Accused would return for trial.¹⁷ Further, the Government of Canada advises that it cannot provide any guarantees in respect of the Accused, and the Republic of Tanzania submits that it is unable to host the Accused if provisionally released. The two other States to which the Accused seeks to be released made no submissions in respect of the Accused's request for provisional release.

16. The Chamber therefore finds that the Accused has not discharged the burden of demonstrating that the minimum conditions of Rule 65 (B) are met. 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.¹⁸

FOR THESE REASONS, the Chamber

DENIES the Defence Motion in its entirety.

Arusha, 17 December 2008

For and on Behalf of
Khalida Rachid Khan
Presiding Judge

Lee Gacuiga Muthoga
Judge

For and on Behalf of
Emile Francis Short
Judge

[Seal of the Tribunal]

The Chamber noted, at paragraph 8, that since the UNAMIK is the entrusted with ensuring public safety and order in Kosovo, it is the property authority to provide such guarantees.

¹⁴ United Nations Interim Administration in Kosovo.

¹⁵ *Prosecutor v. Baton Haxiu*, Case No. IT-04-84-R77.5, Decision on Provisional Release of Baton Haxhiu, 23 May 2008, paras. 3-5, 11.

¹⁶ *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.

¹⁷ Motion.

¹⁸ *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 Zejnir Delalic (TC), 25 September 1996, para. 1).