

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda

TRIAL CHAMBER 1

OR: FR

Before:

Judge Laïty Kama, Presiding Judge

Judge Yakov Ostrovsky Judge Lennart Aspegren

Registry:

Ms. Prisca Nyambe

Mr. Antoine Kesia-Mbe Mindua

Decision of:

27 March 1997

THE PROSECUTOR VERSUS

CLÉMENT KAYISHEMA (Case No. ICTR-95-1-T) GÉRARD NTAKIRUTIMANA (Case Nos. ICTR-96-10-T and ICTR-96-17-T) OBED RUZINDANA (Case Nos. ICTR-95-1-T and ICTR-96-10-T)

DECISION ON THE MOTION OF THE PROSECUTOR
TO SEVER, TO JOIN IN A SUPERSEDING INDICTMENT AND TO
AMEND THE SUPERSEDING INDICTMENT

Office of the Prosecutor:

Mr. Jonah Rahetlah

Ms. Elizabeth Ann Farr

Ms. Brenda Sue Thornton

Counsels for the Accused:

Mr. Pascal Besnier

Mr. N. K. Loomu-Ojare

RECEIVED

29 MAY 1997

ACTION: REGISTRAR

COPY

THE TRIBUNAL,

SITTING as Trial Chamber 1 of the International Criminal Tribunal for Rwanda (the "Tribunal"), composed of Judge Laïty Kama, Presiding Judge, Judge Yakov Ostrovsky and Judge Lennart Aspegren;

CONSIDERING the motion filed by the Prosecutor on 17 February 1997 for leave to sever, to join in a superseding indictment and to amend the superseding indictment in the cases against Clément Kayishema (Case No. ICTR-95-1-Tribunal), Gérard Ntakirutimana (Case Nos. ICTR-96-10-T and ICTR-96-17-T) and Obed Ruzindana (Case Nos. ICTR-95-1-T and ICTR-96-10-T) in which the Prosecutor asserts:

firstly, that the charges against the three accused constitute a same transaction, as stipulated in Rule 48 of the Rules of Procedure and Evidence (the "Rules") and defined by Rule 2 of the Rules;

secondly, that the joinder of accused is proper for the protection of victims and witnesses and for a fair and expeditious proceeding;

thirdly, that the joinder will also promote economy in the material organization of the trial;

WHEREAS during the hearing on the said motion held on 17 March 1997, the Prosecutor further indicated that the massacre sites in question were close to one another, that the *modus operandi* was the same, that the attackers are allegedly the same, that the identity of the victims is allegedly the same and that four of the five alleged massacres in which the accused are alleged to have participated took place over a period of five consecutive days, which would tend to demonstrate the existence of a common plan to massacre civilians, mainly Tutsis;

CONSIDERING the response to the said motion filed on 10 March 1997 by Mr. André Ferran, counsel assigned to the case of the accused Clément Kayishema, in which he submits that the Prosecutor has in no way demonstrated that the three abovementioned accused participated in a same transaction and that, on the contrary, the Prosecutor has even provided the grounds for a dismissal of the motion, by stating that each of the accused is "individually responsible for the crimes with which he is charged";

CONSIDERING the response to the said motion filed on 10 March 1997 by Mr. Pascal Besnier, counsel assigned to the case of the accused Obed Ruzindana, where he essentially maintained that, on the one hand, the Prosecutor has not demonstrated that the accused participated in a same transaction and that it cannot be deduced, as the Prosecutor has done, that a common extermination plan existed solely by virtue of the high number of victims, and that, on the other hand, the requested joinder would needlessly delay the trial on the merits of the co-accused Clément Kayishema and Obed Ruzindana in the matter of Case No. ICTR-95-1-T;

WHEREAS at the hearing of 17 March 1997, Mr. Besnier in an oral reiteration of his written conclusions, having moreover stated that he had received power of attorney from his colleague, Mr. Ferran, counsel for the accused Clément Kayishema, objected to the Prosecution's motion, supported by Mr. N.K. Loomu-Ojare, counsel for the accused Gérard Ntakirutimana.

AFTER HAVING DELIBERATED:

A. On the concept of a "same transaction":

WHEREAS Rule 48 of the Rules provides that:

"Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried";

AND WHEREAS Rule 2 of the Rules defines this transaction as being:

"A number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan";

WHEREAS in the opinion of the Prosecutor, this transaction existed when the three accused, for whom the joinder is requested, participated in a common scheme, strategy or plan to eliminate Tutsis in Kibuye Prefecture in 1994;

WHEREAS instead, the Tribunal considers that involvement in a same transaction must be connected to specific material elements which demonstrate on the one hand the existence of an offence, of a criminal act which is objectively punishable and specifically determined in time and space, and on the other hand prove the existence of a common scheme, strategy or plan, and that the accused therefore acted together and in concert;

WHEREAS thereby the definition of a same transaction submitted by the Prosecutor, as mentioned above, appears to be too vague and imprecise, as it makes no reference either to the material elements, or to the mental elements which must surround the said concept;

WHEREAS the Tribunal is therefore of the opinion that the Defence has grounds to think that it would be a gross generalization to deduce solely from the "elimination of Tutsis in Kibuye Prefecture in 1994" the existence of a same transaction;

WHEREAS, moreover, the Prosecutor did not offer any evidence which would demonstrate the nature of the common scheme, strategy or plan, particularly with regards to the count of Genocide, defined by Article 2 of the Statute of the Tribunal, which provides that the offences must have been committed with the intent to destroy, in whole or in part, a national, ethnical, or religious group, and the count of Crimes against Humanity, defined by Article 3 of the Statute, which provides that the offences must have been committed as part of a widespread or systematic attack against any civilian population;

WHEREAS of the five alleged massacre sites at issue in the motion, only one, in reality, that of Bisesero, is allegedly common to the three accused, for massacres allegedly committed over a period of four months, from April to July 1994; this does not demonstrate in any way that during this entire period, the accused acted in concert, or even participated in a common scheme;

WHEREAS in response to the Counsel for the accused Kayishema, the Tribunal hereunto notes that the fact that the accused are individually responsible is not necessarily antinomic with the fact that they may participate in a same transaction;

WHEREAS, finally, the Tribunal deems it appropriate to reiterate, as did the Defence, that this is a criminal matter and that the pertinent laws must be interpreted in a restrictive manner, in the interest of the rights of the accused;

FOR ALL THESE REASONS, the Tribunal feels that in this case the three accused Clément Kayishema, Obed Ruzindana and Gérard Ntakirutimana did not participate in a same transaction;

B. On witness protection which was also raised by the Prosecutor in support of her motion:

WHEREAS the Prosecutor pointed out, not without reason, that the protection of prosecution witnesses may prove to be difficult to organize if the same witnesses must return several times consecutively for different trials;

WHEREAS the Tribunal nonetheless is of the opinion that it is always necessary to strike a fair balance between witness protection, on the one hand, and the full respect of the rights of the accused, on the other;

WHEREAS, for these reasons, it is to be feared that joinder of the cases of the three accused, which would give all the Defence counsels the right to cross-examine the prosecution witnesses might be trying for the said witnesses and, definitively, counter productive;

WHEREAS, in any case, if need be, nothing prevents the Prosecutor from requesting additional specific measures for the protection of prosecution witnesses, pursuant to Rules 69 and 75 of the Rules, as she has already done;

C. On the logistical organization of the trial which, according to the Prosecutor, favours the requested joinder:

WHEREAS the Prosecutor submits that the joinder of the cases should allow for a better administration of justice;

WHEREAS the Tribunal does not share this opinion, and deems that, on the contrary, there would be a risk of retarding all the proceedings;

WHEREAS, indeed, if the request for joinder were granted, a new trial date would have to be set for the three accused, which would either infringe upon the right of Clément Kayishema and Obed Ruzindana whose trial would be postponed, to be tried without undue delay, a right provided under Article 14 of the International Covenant on Civil and Political Rights (the "Covenant") and reiterated by Article 20 of the Statute, or infringe upon the right of Gérard Ntakirutimana, whose trial would have to be brought forward to 8 April 1997, to have adequate time to organize his defence, a right also provided under Article 14 of the Covenant and Article 20 of the Statute;

FOR THESE REASONS

THE TRIBUNAL

DECIDES not to grant the Prosecutor's motion for the joinder of the cases of the accused;

REMINDS the parties, consequently, that the trial on the merits for the co-accused Clément Kayishema and Obed Ruzindana, in case no. ICTR-95-1-T, will begin on 9 April 1997 at 9:30hrs;

Arusha, 27 March 1997

Laïty Kama

Presiding Judge

Yakov Ostrovsky

Judge

Lennart Aspegren

Judge

[Seal of the Tribunal]

