UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

OR:Eng.

Before: Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal Hossain Khan

Registry: Mr. John Kiyeyeu

THE PROSECUTOR
versus
EMMANUEL BAGAMBIKI,
SAMUEL IMANISHIMWE
AND
YUSUF MUNYAKAZI

Case No. ICTR-97-36-T

DECISION ON THE DEFENCE MOTION FOR THE SEPARATION OF CRIMES AND TRIALS

The Office of the Prosecutor:

Mr. William T. Egbe

Counsel for Samuel Imanishimwe:

Ms. Marie Louise Mbida Kanse Tah
Mr. Georges So'o

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

SITTING AS Trial Chamber II, composed of Judge William H. Sekule, Presiding , Judge Yakov A. Ostrovsky and Judge Tafazzal H. Khan (the "Trial Chamber");

CONSIDERING the indictment filed on 9 October 1997 by the Prosecutor against Emmanuel Bagambiki, Samuel Imanishimwe and Yusuf Munyakazi pursuant to Article 17 of the Statute of the Tribunal ("the Statute") and Rule 47 of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

CONSIDERING THAT the indictment against Samuel Imanishimwe was confirmed by Judge Lennart Aspegren on 10 October 1997;

CONSIDERING THAT the initial appearance of Samuel Imanishimwe took place on 27 November 1997;

BEING NOW SEIZED OF a motion filed by the Defence Counsel on 23 February 1998 pursuant to rule 72 of the Rules in which he seeks to sever the counts as well as the proceedings;

CONSIDERING the Prosecutor's response to the said motion filed on 24 March 1998;

TAKING INTO ACCOUNT the provisions of rules 48, 49 and 82(B) of the Rules pertaining to joinder of accused, joinder of crimes and joint and separate trials respectively;

CONSIDERING rule 73 which provides for motions generally;

HAVING HEARD the arguments of the parties on 25 March 1998.

PLEADINGS BY PARTIES

On the issue of *severance of crimes*, the Defence contended:

(a) that the concise statement of facts clearly indicate which offences each accused committed. However, various other persons, who are named but not charged (the "named others") are included and yet they are not connected to the Cyangungu Cathedral or other specific crime sites. Thus, accordingly, the named others in count 19 should be deleted;

(b) that the motion is concerned with rule 49 of the Rule (joinder of crimes) as it pertains to Count 19 of the indictment rather than rule 48 of the Rules (joinder of accused).

The Defence Counsel then elaborated on the above said rule and explained as hereunder:-

(a) that rule 49 refers to joinder of crimes, whereby two or more crimes could be joined in one indictment, if the series of acts are committed together, form the same transaction and the said crimes were committed by the same accused persons;

(b) that it was not the intent of the drafters of this rule that several accused should be included in the same indictment and thereby found guilty of several charges. Rather that the same accused may, if found guilty, be declared guilty of several charges hence the inclusion of

other persons unconcerned with this trial in count 19 of the indictment is unacceptable and should be deleted.

With regard to the issue of holding *separate trials* for each accused, the Defence Counsel argued:

(a) that pursuant to rule 48 of the Rules, there must be the "same or different crimes committed in the course of the same transaction." Therefore, there is a need for a connection between the accused that illustrates the "same transaction." This connection necessitates the existence of previous complicity;

(b) that in the instant case there is no prior complicity between the three accused namely, Emmanuel Bagambiki, Samuel Imanishimwe and Yusuf Munyakazi ;

(c) that further, there is no commonality between the said accused because no relationship exists between the accused and moreover, each accused was responsible for different State duties. The Prosecutor has not indicated that any illegal meeting took place between the accused;

(d) that in the instant case the joinder of the case of Imanishimwe with those of others, namely, Emmanuel Bagambiki and Yusuf Munyakazi was inappropriate because to do so would be violative of the interests of justice since Imanishimwe, as a soldier, could not be linked to the activities of politicians and as such, he would be tried together with people he did not even know as indicated in count 19 of the indictment.

(e) that pursuant to rule 82(B) of the Rules (joint and separate trials), there are two reasons specified in rule 82(B) of the Rules for ordering a separation of trials and this could be ordered, *inter alia* between Samuel Imanishimwe and the other accused in the interest of justice;

Prosecutor's Response

On the issue of *separating crimes*, the Prosecutor contended:

(a) that any reference to 'severance of crimes' by the Defence Counsel is challenged. However, if the phrase 'severance of crimes' means 'separation of trials,' then the issue may be discussed;

(b) that the issue of separation of crimes is connected with rule 72(C) of the Rules (preliminary motions) which must be addressed along with the conditions enumerated in rule 82 of the Rules.

Concerning the issue of *separation of trials*, the Prosecutor submitted:

(a) that the Defence Counsel have prematurely submitted on the quality of the evidence instead of submitting upon the form;

(b) that further, pursuant to rule 82(B) of the Rules, the Trial Chamber may order that the accused, who have been jointly charged, be tried separately if it considers it necessary so as to avoid a conflict of interest that may bring about a serious prejudice to the accused;

(c) that count 19 of the indictment is a count on conspiracy and for such a count to exist in law, it is not necessary to have all the conspirators sit at a round table. Furthermore, the notion of conspiracy demands *a common transaction* because it requires at least two persons to agree to the commission of a crime;

(d) that in the instant case, there is evidence to show that the requirements of rule 48 of the Rules, whereby persons accused of "the same or different crimes committed in the course of the same transaction" may be joined together, have been met because the three above mentioned accused met at different occasions and acted together in concert with one another;

(e) that pursuant to rule 2 of the Rules '*same transaction*' is defined as "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." This definition corresponds to what the accused are alleged to have done in count 19 of the indictment when they conspired to commit genocide, hence a *common transaction* exists involving the three accused;

(f) that in all legal systems of the world, it is unnecessary to demonstrate that in a single event the conspirators met to prove a conspiracy. Indeed, a conspiracy can be inferred from overt acts or conduct;

(g) that consequently, in the instant case, there could be no serious prejudice to the three accused and no risk to the interests of justice to warrant their protection;

(h) that furthermore, the Defence has not raised material objections and has not even proved their claims. In fact, on the contrary, it would be in the interest of justice to have the accused tried together in a conspiracy count so that their cases may be disposed of at the same time;

(i) that the named others in count 19 of the indictment were included as accessories and nothing more.

Reply By The Defence:

The Defence contended that the meetings held between the accused were perfectly legal and as such no linkage exists to implicate them as conspirators. Consequently, there should not be any joinder of the three accused as alleged conspirators under Article 17(4) of the Statute and rule 48 of the Rules.

DELIBERATIONS

A. With Respect to Separation of Crimes

As a preliminary matter, we note that paragraph 3.14 of the concise statement of facts, which is a basis for count 19, is somewhat ambiguous and requires clarification. Specifically, paragraph 3.14 states that the accused persons and the "named others" "*held a large number* of meetings among themselves, *or* with others . . . ," (emphasis added) without supplying further details. Consequently, the Trial Chamber instructs the Prosecution to amend this paragraph, as specified in the operative part of this decision, below, in order to enable the defence to prepare its case.

Considering rule 49 of the Rules which provides for joinder of crimes, it is possible for two or more crimes to be joined in one indictment provided that the series of acts were committed together and form the *same transaction* and were committed by the same accused.

It is our view that the accused have been joined properly within the scope of rule 49 of the Rules since, according to the concise statement of facts, there is evidence to show that they could have conspired together. We recognize that the origins of conspiracy are usually secretive and may be obscure and wish to associate ourselves with the reasoning of O'Connor LJ, in the British case of *R vs. Siracus [1989] Crim. LR 712 Court of Appeal.* In that case Justice O'Connor remarked that usually it is quite impossible to establish when and where the initial agreement was made or when or where the other conspirators were recruited. Further, that the very existence of the agreement can only be inferred from overt acts and finally, that participation in a conspiracy is infinitely variable as it could be active or passive.

With regard to the exact nature of this conspiracy alleged in paragraph 3.14, beyond what is presented in the indictment, and our concerns noted above, the Trial Chamber holds that the matter is not ripe for consideration, because it concerns the merits of the case.

With regard to the named others, namely André Ntagerura, Christophe Nyandwi, Michel Busunyu and Édouard Bandeste, it is the opinion of this Trial Chamber that the inclusion of these names in no way prejudices the accused. Indeed, by having knowledge of this additional information the Defence will be better positionned to prepare their respective cases.

B. On the Issue of Separation of Trials

We note that the Defence Counsel have relied upon rules 48 and 82(B) of the Rules.

1. Rule 48 and Separation of Trials

Pursuant to rule 48 of the Rules, it is permissible to join those accused who have been charged of the same or different crimes committed *in the course of the same transaction.* Considering that *'same transaction'* is defined in rule 2 of the Rules as "a number of acts or omissions whether occurring as one event or a number of events at the same or different locations but being part of a common scheme, strategy or plan," we observe count 19, based on the concise statement of facts, provides sufficient linkage, between the accused, to satisfy the requirements of rule 48 with regard to the crimes alleged therein.

Moreover, in accordance with rules 2 and 48 of the Rules, there is no need for the existence of a direct relationship between the accused persons in their State functions as proffered by Defence Counsel.

2. Rule 82 and Separation of Trials

Rule 82(B) of the Rules requires that one of two conditions is to be met before an order can be made by the Trial Chamber for separation of trials. A party must either show that separation is necessary in order to avoid a conflict of interest that might cause serious prejudice to an accused or, to protect the interests of justice.

Having heard the submission by the Defence Counsels requesting the Trial Chamber to make an order for separation of trials, the Trial Chamber does not find good cause for granting this request.

The Defence has not discharged its burden of showing that a joint trial creates a conflict interest between the two accused. Further, the Defence argument, that a separation of trials is necessary for the interests of justice because Imanishimwe as a soldier could not be linked to the activities of politicians, is unconvincing.

Additionally, the Defence claim that the Prosecutor has not indicated that any illegal meetings took place is misconceived. It is the view of the Trial Chamber that evidence of legal activity undertaken in furtherance of illegal acts may be considered when determining the existence, or otherwise, of the *same transaction*. For these reasons, the Trial Chamber opines that the Defence has failed to meet the conditions stipulated in Rule 82(B) of the Rules.

FOR ALL THE ABOVE REASONS, THIS TRIAL CHAMBER

1. **ORDERS** the Prosecution to clarify paragraph 3.14 of the concise statement of facts, which renders support to count 19 of the indictment, among others, by providing further information with regard to the alleged meetings referred to in that paragraph. Specifically, the Prosecution should present details, such as the approximate dates, locations and the purpose of these meetings, as far as possible, and also clarify whether the accused persons and named others in the indictment were the only persons present at these meetings or if others, not named in the indictment, were present also.

2. **DENIES** the Defence's request to hold separate trials in favour of Samuel Imanishimwe.

Arusha, 30 September 1998

Yakov A. Ostrovsky
Judge

Tafazzal Hossain Khan
Judge

Judge Sekule appends a separate opinion to this decision in respect of paragraph 3.14 of the concise statement of facts as it pertains to count 19 of the indictment.

Seal of the Tribunal

UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

OR:Eng.

Before: Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal Hossain Khan

Registry: Mr. John Kiyeyeu

Date of Hearing: 25 March 1998

THE PROSECUTOR
versus
EMMANUEL BAGAMBIKI,
SAMUEL IMANISHIMWE
AND
YUSUF MUNYAKAZI

Case No. ICTR-97-36-T

SEPARATE OPINION OF JUDGE SEKULE ON THE DECISION OF THE DEFENCE MOTION REQUESTING THE SEVERENCE OF CRIMES AND TRIALS.

The Office of the Prosecutor:

Mr. William T. Egbe

Counsel for Samuel Imanishimwe

Ms. Marie Louise Mbida Kanse Tah
Mr. Georges So'o

Regarding count 19:

The Defence Counsel argued that it was unacceptable to include persons named but not charged ("named others") in count 19 of the indictment and therefore they should be deleted.

I have carefully considered this issue and I agree that those named others should not be included. My reasons for agreeing with the Defence motion, as it concerns the removal of the named others, are as follows:

First, as a matter of law, the conspiracy to commit genocide charge mentioned in count 19 is complete as it already includes three persons. Accordingly, in the instant case, there is no *legal* need to *specifically* name others when the phrase "and others" would suffice.

Second, there may be prejudice to the *accused* due to evidence which may be adduced during the trial which pertains to the named others but implicates the accused. In this scenario, the Defence may not be able to challenge this evidence because the pertinent matters may be within the particular knowledge of the named others, who are not present or represented. Indeed, one of the named others may be the pivotal conspirator.

Third, the inclusion of the named others in count 19 presents a serious risk of prejudice to them because evidence will need to be adduced by the Prosecution to show the alleged linkage between the named others and the accused. Obviously, the named others will not be represented by counsel at the trial and, therefore, they will not have the opportunity to contest evidence which implicates them in conspiracy. To include the named others in count 19 may violate the spirit of Article 20(4)(d) of the Statute which requires that the trial of an accused should be in his or her presence.

Fourth, any call for additional information in paragraph 3.14 or the relevant concise statement of facts should *specifically apply to the persons charged* and not the named others.

Accordingly, in the instant case, it is my view that those named others should be deleted.

Regarding all other matters

I agree and endorse the majority opinion.

Arusha, 30 September 1998

William H. Sekule
Presiding Judge