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UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

OR: ENG

Before: Judge Lloyd George Williams, Presiding
Judge Pavel Dolenc
Judge Erik Møse

Registrar: Dr. Agwu Ukiwe Okali

Decision of: 11 October 1999

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CRIMINAL REGISTRY
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THE PROSECUTOR
v.
André NTAGERURA
Case No. ICTR-96-10-I

THE PROSECUTOR
v.
Emmanuel BAGAMBIKI
Samuel IMANISHIMWE
Yusuf MUNYAKAZI
Case No. ICTR-97-36-I

DECISION ON THE PROSECUTOR'S MOTION FOR JOINDER

The Office of the Prosecutor:
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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SIGNATURE: [signature] DATE: 15/12/99

1. **THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the "TRIBUNAL")

SITTING as Trial Chamber III, composed of Judge Lloyd G. Williams, presiding, Judge Pavel Dolenc and Judge Erik Møse (the "Trial Chamber");

BEING NOW SEIZED OF the Prosecutor's Motion for Joinder (the "Motion") filed with the Registry on 8 April 1999;

NOTING the Brief in Support of the Prosecutor's Motion for Joinder of the Accused, filed 8 April 1999, the Addendum to the Prosecutor's Motion for Joinder of the Accused: Annex B & Annex C, filed 19 April 1999, the Reply of the Accused André Ntagerura, filed 12 July 1999, the Prosecutor's Reply to the Brief Filed by the Defence for Ntagerura, filed 5 August 1999, the Defence Response to the Prosecutor's Motion for Joinder of the Accused, filed on behalf of Samuel Imanishimwe on 30 June 1999, and the Prosecutor's Reply to the Brief in Reply filed by the Defence for Imanishimwe, filed 9 August 1999;

HAVING HEARD the arguments of the Prosecution and Defence Counsel for Ntagerura, Emmanuel Bagambiki and Imanishimwe on 10 August 1999 and 11 August 1999;

NOTING that no one appeared for Yusuf Munyakazi, who is not in the custody of the Tribunal.

THE SUBMISSIONS OF THE PROSECUTOR

2. In the Brief in Support of the Prosecutor's Motion for Joinder of the Accused (the "Brief"), the Prosecution relies on Rules 2 and 48 of the Rules of Procedure and Evidence

(the "Rules"). The Prosecutor submits that the Motion is well founded under the common law "same transaction" test and civil law test of "*connexité.*"

3. The Prosecution argues that the scope of Rule 48 encompasses joinder in this case. In support of this argument, the Prosecution refers specifically to the appellate decision and dissenting opinion of Judge Shahabuddeen in *Kanyabashi v. Prosecutor*, Case ICTR-96-15-A (Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1999).

4. The Prosecution in its submissions also refers to Rule 48*bis*. Following questions from the Bench, however, the Prosecution submitted that the Motion for joinder is not dependent on the application of Rule 48*bis*.

5. The Prosecution submits that the indictments charge all the accused with the same crimes and that the facts alleged for conspiracy for genocide are essentially similar.

6. The Prosecution further submits that joinder of these cases is well-founded because the accused allegedly committed crimes separately and jointly as part of the same series of events and as part of a common scheme, strategy, or plan.

7. The Prosecution argues that the evidence will show that Ntagerura was the government minister designated to monitor the directives in the prefecture of Cyangugu intended to incite, aid and abet the perpetration of the massacres against the civilian Tutsi population.

8. The Prosecution submits that granting the joinder will not result in "undue delay" and will not prejudice the defence. In the two cases at Bench, the trials have not commenced. The Prosecutor submits that if joinder causes delay to an individual case, such delay would be minor in comparison to the time spent if the Tribunal were to try each case separately.

9. The Prosecution contends that joinder will enhance the administration of justice, avoid contradictions of divergent decisions in separate trials, enhance judicial economy, avoid the duplication of evidence, facilitate the appearance of witnesses, enhance their safety and well-being, and reduce trauma.

10. The Prosecution revised its original estimate of the number of witnesses to be called from ninety-three to approximately thirty. The Prosecutor argues that joinder should be the rule rather than the exception, and that it is up to the Defence to establish the existence of circumstances to dismiss the Motion for joinder.

THE SUBMISSIONS OF THE DEFENCE

11. The Defence submits that the Trial Chamber must deny the Motion.

12. The Defence requests that the Trial Chamber reject the Prosecution's Motion for joinder because Trial Chamber II has not verified yet that the Prosecutor has complied with its Order of 30 September 1998 to clarify paragraph 3.14 of the indictment against Bagambiki, Imanishimwe and Munyakazi (the "Bagambiki Indictment").

13. The Defence submits that Rule 48 and Rule 48*bis* do not apply in this case. The Defence argues that Rule 48 deals only with the joinder of accused in one indictment and that Rule 48*bis*, which does provide for the joinder of indictments, could not have retroactive effect in this case. The Defence further argues that Rule 48*bis* infringes the rights of the accused as guaranteed by the Rules and the Statute of the International Criminal Tribunal for Rwanda (the "Statute").

14. The Defence contends that the accused persons are at different stages of proceedings. Bagambiki made an initial appearance on 19 April 1999. Munyakazi is at large. Ntagerura has spent the most time in detention of the accused in the case at Bench.

15. Defence Counsel for Bagambiki submits that if the Trial Chamber granted the Motion for joinder the accused would not have adequate time for the preparation of his defence and his rights would be infringed.

16. The Defence requests that the Trial Chamber withdraw Munyakazi's name from the Bagambiki Indictment because the retention of his name on the indictment would prejudice the other accused.

17. The Defence argues that joinder will cause undue delay and prevent a fair trial.

18. Defence Counsel for Ntagerura submits that Article 19(1) of the Statute and Rule 48 do not apply. Particularly, the Trial Chamber must interpret restrictively Rule 2.

19. The Defence submits that the Prosecutor has not established the elements of a same transaction between the charges against Ntagerura, and those against the three accused named in the Bagambiki Indictment, pursuant to Rule 48. The Defence argues that the different status of the accused in the Rwandan society shows that there was not a common scheme, strategy or plan. The Defence submits that the Prosecution has failed to prove that joinder will afford better protection for witnesses or result in judicial economy.

20. The Defence argues that there exists potential for "contamination" of evidence if the Trial Chamber grants the Motion for joinder.

DELIBERATIONS

The Amendment of Paragraph 3.14 of the Bagambiki Indictment

21. The Trial Chamber notes that the Statute and Rules do not require that a Trial Chamber's order on the wording of an indictment shall be returned to that same Trial Chamber to verify compliance with said order.

22. Moreover, if the Defence wish to invoke an alleged requirement that compliance with such order must be ensured by the Trial Chamber which made the order, a formal motion to this effect should have been filed. The Defence may not rely upon such an argument at this stage as a bar to the competence of this Trial Chamber to rule upon a motion for joinder.

23. A further observation is that the Defence did not show that the amendments to paragraph 3.14 failed to comply with the Trial Chamber's Order of 30 September 1998. Nor did the Defence demonstrate any specific objections to the content of the amendment or show any prejudice.

24. Consequently, the Trial Chamber rejects the objections of the Defence based upon the amended paragraph 3.14.

Does Rule 48 or Rule 48bis Apply?

25. Rule 48 provides for joinder of accused persons. During the hearing of the Motion, reference also was made to Rule 48*bis*, according to which the Prosecutor may join confirmed indictments for the purposes of a joint trial. The Tribunal added Rule 48*bis* to the Rules during the Sixth Plenary Session held on 31 May 1999 to 4 June 1999. It follows from Rule 6 that an amendment to the Rules shall enter into force immediately, but shall not operate to prejudice the rights of the accused in a pending case. To apply Rule 48*bis*, the Trial Chamber must determine whether there would be any hindrance to its application in this case, that is, whether the application of Rule 48*bis* would prejudice the rights of the accused if applied.

26. The Trial Chamber, however, finds that it is not necessary to decide this issue, as the Trial Chamber can decide this Motion on the basis of Rule 48, as interpreted in *Kanyabashi v. Prosecutor,* Case ICTR-96-15-A (Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1999).

27. At the 1999 Plenary Session, the Tribunal added Rule 48*bis* to the Rules. This was merely a clarification of Rule 48.

28. In the Joint and Separate Opinion of Judge McDonald and Judge Vohrah in *Kanyabashi*, the Judges observed (at para. 32) that:

> It is well accepted in some common law jurisdictions that joining accused in one indictment where the "same transaction" test is met can be initiated by the prosecutor or by an order of the court if justice so requires. The public interest clearly dictates that joint offences may be tried together.

29. In common law jurisdictions, questions of joinder lie entirely within the jurisdiction of the court, which has inherent power to formulate its own rules (See *R v. Assim* [1966] 2 QB 249, [1966] 2 All ER 881). Also in civil law jurisdictions joinder is usually granted if *connexité* exists between the crimes with which the accused are charged, even at the initiative of the court. Joinder occurs regardless of whether the accused are indicted together in one indictment or separately.

30. This approach receives support in the Separate and Dissenting Opinion of Judge Shahabuddeen in *Kanyabashi* (at pp. 14-17). It also was stated in the Joint Separate and Concurring Opinion of Judge Wang Tieya and Judge Rafael Nieto-Navia, in *Kanyabashi*, in relation to Rule 48 that (at para. 6):

> . . . permission for joint charging under that rule does not necessarily require the bringing of a new, substitute indictment in lieu of the existing ones because by adding names to one of the existing indictments which concern the same facts or transactions, the case may become a joint trial of several accused on different charges found in one single indictment, subject to, of course, any request for amendment.

31. It is clear from the foregoing that joinder of indictments is possible under both civil and common law systems. Further by analogy, under the interpretation of Rule 48 advanced in *Kanyabashi*, accused persons can be jointly tried, even if they were not jointly charged.

Legal Criteria for Joinder

32. According to Rule 48, persons accused of the same crime or different crimes committed in the course of the same transaction, may be jointly charged and tried. Rule 2 defines the term "transaction" 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."

33. In *Prosecutor v. Kayishema, Ntakirutimana and Ruzindana*, Case ICTR-95-1-T, at p. 3 (Decision on the Motion of the Prosecutor to Sever, to Join in a Superseding Indictment, and to Amend the Superseding Indictment, 27 March 1997), Trial Chamber I held 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.

34. In *Prosecutor v. Ntabakuze, Kabiligi*, Case ICTR-97-34-I, at p. 2 (Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998), Trial Chamber II considered the issue of joinder under Rule 48 and quoted the above passage from the decision in *Kayishema*. The Trial Chamber stated:

> The above interpretation has created argument as to whether the acts or omissions which are alleged to form the same transaction necessary for joinder ("acts of the accused") must be criminal/illegal in themselves or not. This Trial Chamber is of the opinion that the acts of the accused need not be criminal/illegal in themselves. However, the acts of the accused should satisfy the following:
>
> 1. Be connected to material elements of a criminal act. For example the acts of the accused may be non-criminal/legal acts in furtherance of future criminal acts;
> 2. The criminal acts which the acts of the accused are connected to must be capable of specific determination in time and space, and;
> 3. The criminal acts which the acts of the accused are connected to must illustrate the existence of a common scheme, strategy or plan.

35. Trial Chamber II further stated (at p. 2) that "these guidelines are not intended to be a rigid insurmountable three prong test."

36. On the basis of these precedents, there are a number of elements that must be shown to exist to grant a motion for joinder of accused. There must be acts of the accused, which are connected to an objectively-punishable criminal offence, this offence must be capable of specific determination in time and space, and the acts of the accused must illustrate the existence of a common scheme, strategy or plan, to which the accused were party.

37. The Trial Chamber now considers the question of the amount and the cogency of evidence which must be adduced to satisfy this test, before proceeding to consider the application of this test to the instant case.

38. In *Prosecutor v. Ntabakuze, Kabiligi*, Trial Chamber II held (at p. 2) that "[f]or the purposes of joinder, in the absence of evidence to the contrary, the Trial Chamber shall act upon the Prosecutor's factual allegations as contained in the indictment and related submissions."

39. The Trial Chamber therefore considers the allegations of fact the Prosecution has made in the indictments, Motion and Brief. The Trial Chamber considers these allegations in light of the above criteria for the application of Rule 48, to determine whether the allegations, if proven, would establish that the crimes with which the accused are charged, were committed in the course of the same transaction.

40. The Trial Chamber observes that count 2 of the indictment against Ntagerura alleges that Ntagerura conspired with Bagambiki, Imanishimwe and Munyakazi. The Trial Chamber notes, however, that the concise statement of facts in the Ntagerura indictment, upon which the counts are based, contains no reference to Imanishimwe.

41. The Trial Chamber notes that Imanishimwe held the position of Commander of the Cyangugu barracks, with the rank of Lieutenant, at the relevant time. During the hearing of the Motion, the Defence argued that it is inconceivable that there should be contact between Ntagerura, who was the Minister of Transport and Communications, and Imanishimwe, who held a low ranking military post. Defence argued that due to both the differences in hierarchy and the operation of the chains of command, it was not likely that the actions of these two accused ever were connected.

42. In the Bagambiki Indictment, count 19 alleges a conspiracy between Bagambiki, Imanishimwe, Munyakazi and Ntagerura. The facts supporting that count appear in paragraphs 3.12 to 3.30 of the Bagambiki Indictment. These paragraphs allege connections between Bagambiki, Imanishimwe and Munyakazi. They also allege connections between Bagambiki, Munyakazi and Ntagerura. There, however, are only two references to any connection between Ntagerura and Imanishimwe in the Bagambiki Indictment. The first appears in paragraph 3.23 in which it is alleged that Imanishimwe and Ntagerura, among others, selected names of persons to be executed from pre-established lists. The second reference appears in the amended paragraph 3.14 which alleges that Ntagerura and others held a meeting in late June 1994, in Gisuma, with the participation of Imanishimwe and others.

43. The Trial Chamber is of the opinion that to establish the existence of a conspiracy, it is not necessary for the Prosecution to prove that the accused all acted together and at the same time. It is sufficient to establish that the accused had a common purpose or design, that they planned to carry out that purpose or design and that they executed that plan. The International Criminal Tribunal for the Former Yugoslavia (the "ICTY") stated in *Prosecutor v. Kordic, Prosecutor v. Cerkez,* at para. 10 (Decision on Accused Mario Cerkez's Application for Separate Trial, 7 December 1998) that, "[i]t is not necessary to prove a conspiracy between the accused in the sense of direct coordination or agreement."

44. The Trial Chamber notes that other than the allegations of conspiracy, there are few joint allegations. Defence Counsel for Ntagerura at the hearing pointed out that there are a number of discrepancies between the charges contained in the Bagambiki Indictment and those that appear in the indictment against Ntagerura. He specifically referred to the charges of murder, imprisonment and of torture, as crimes against humanity, all of which were contained in the Bagambiki Indictment, but not in the Ntagerura indictment. However the Trial Chamber is of the opinion that the charge of conspiracy, by its very nature, requires that all the accused be tried together, provided that the other conditions of joinder are met.

45. The Prosecution refers to evidence that establishes the roles played by the accused in Cyangugu prefecture between 1 January 1994 and 31 December 1994. In the Brief, the Prosecutor alleged, *inter alia*, that Ntagerura "exercised considerable influence over local politicians and ministerial appointees in Cyangugu" (at para. 25), that "the accused André Ntagerura traveled to Cyangugu at least once a month in order to meet with the prefect Emmanuel Bagambiki," and that "Samuel Imanishimwe, as commander of the Cyangugu military camp, and Yusef Munyakazi, a leader of the local Interahamwe militia, followed the directives of Government minister Ntagerura and prefect Bagambiki in the training of militiamen and in the distribution of weapons to militiamen" (at para. 26), among other allegations.

46. The Trial Chamber is of the opinion that the Prosecutor's allegations in relation to Bagambiki and Ntagerura establish a connection between Ntagerura, a Government Minister and Bagambiki, Imanishimwe and Munyakazi, low level authorities, in the sense of the same transaction. Consequently, the Trial Chamber is of the opinion that the submissions of the Prosecution provide a sufficient basis for concluding that the criteria for joinder as laid down in Rule 2 and Rule 48 are complied with. It remains to be seen whether these allegations will be proven at trial.

The Exercise of Discretion

47. The decision whether to grant joinder lies within the discretion of the Tribunal. In the exercise of this discretion, the Trial Chamber must weigh the overall interests of justice and the rights of the individual accused.

48. The ICTY, in *Prosecutor v. Delalic, Mucic and Delic*, Case IT-96-21-T, at para. 35 (Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him, 1 July 1998), described the rationale for joinder of offenders as follows:

> There are reasons of undoubted public interest why joint offences should be tried jointly. Savings in expense and time are a factor of importance. It is also desirable, and in the interests of transparent justice, that the same verdict and the same treatment should be returned against all the persons jointly tried with respect to the offences committed in the same transaction. It is also to avoid the discrepancies and inconsistencies inevitable from the separate trial of joint offenders. Hence, the principles of administration of criminal justice have always accepted the practice of trying joint offenders irrespective of the attendant inevitable minimum prejudices.

49. In addition to these advantages, joinder allows for a more consistent and detailed presentation of the evidence. It allows for better protection of the victim's and witnesses' physical and mental safety, by eliminating the need for them to make several journeys and to repeat their testimony. Lastly, joinder may reduce the risks of contradictions in the decision rendered when related and indivisible facts are examined. *See Prosecutor v. Kayishema,* Case ICTR-95-1-T, at p. 3 (Decision on the Joinder of the Accused and Setting the Date for Trial, 6 November 1996).

50. The Trial Chamber therefore must consider these advantages of granting a motion for joinder, and weigh the benefits against the possibility of prejudice to individual accused.

51. In relation to the evidence and the witnesses in this case, the Prosecution represented, in the course of the oral submissions, that it plans to call thirty witnesses, fewer than anticipated in the original brief. The Prosecution further submitted that these thirty witnesses would be common to each of the accused. The Trial Chamber considers this to be an important argument in favour of joinder.

52. Once the Prosecutor has established that a common transaction occurred and that joinder is in the best interests of the witnesses and of evidentiary consistency, the Trial Chamber must review other relevant considerations.

53. The Trial Chamber does not find merit in the defence argument that joinder will result in the risk of "contamination" of the evidence adduced against individual accused. The Trial Chamber will judge each individual accused solely on the basis of the evidence adduced against each accused. Evidence against one accused is not evidence against another accused.

Delay

54. Before reaching a conclusion the Trial Chamber also must satisfy itself that a joinder would not infringe the right of the accused to trial without undue delay as laid down in Article 20(4)(c) of the Statute and other international human rights instruments. Among relevant criteria according to human rights case law are the complexity of the case and the conduct of the authorities and the accused. It is also important whether the case has been pursued with sufficient diligence.

55. In national jurisdictions the same principles have been expressed in similar ways. For instance in the case of *Barker v. Wingo*, 407 U.S. 514 (22 June 1972), the Supreme Court of the United States observed (at p. 530):

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in

different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

56. The Trial Chamber notes that the accused have spent some time in custody. For instance, Ntagerura was transferred to the Tribunal's detention facilities in Arusha on 23 January 1997, after having been detained in Cameroon. The Tribunal is not responsible for custody prior to transfer to the Tribunal. Taking into account that the cases against the accused raise complex issues of law and fact, the Trial Chamber is of the opinion that the proceedings against the accused are in conformity with the Statute and international requirements with regard to undue delay.

57. The crucial issue in the present context is whether the proposed joinder will delay the hearing of the case of the accused. This issue is of particular relevance in relation to Ntagerura. The Trial Chamber, however, is of the view that a delay, if any, will be minor as compared with the time saved as a whole. Consequently, any delay that the joinder of these two cases may occasion will not violate human rights standards.

58. In this context, it also should be noted that the trial of Munyakazi—who is not in the custody of the Tribunal—cannot proceed without the presence of that person before the Tribunal having been secured. The absence of Munyakazi will not cause any delay in the trial of the other accused, nor will it in any way affect their trial. However, if he is apprehended before the trial of the accused, the issues arising due to the change in circumstances may be reconsidered at that time.

59. The Defence, in its written submissions, argued that the sixty-day period after Bagambiki's initial appearance for filing preliminary motions had not elapsed. Bagambiki made an initial appearance on 19 April 1999 and the hearing commenced on 10 August 1999. It is clear that this time limit had elapsed prior to the hearing of the motion. Accordingly, the Trial Chamber finds without merit the defence contention that further preliminary motions will cause additional delay.

60. **FOR THESE REASONS,** the Tribunal **GRANTS** the Prosecution Motion to join the accused Ntagerura with the accused Bagambiki, Imanishimwe, and Munyakazi for the purposes of a joint trial.

Arusha, 11 October 1999.

Lloyd George Williams
Presiding Judge

Seal of the Tribunal

Pavel Dolenc
Judge

Erik Møse
Judge