

ICTR - 99-52-I  
30<sup>th</sup> November 1999  
(54 - 47) rev.

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**International Criminal Tribunal for Rwanda**

**TRIAL CHAMBER I**

OR: ENG

Before: Judge Navanethem Pillay, Presiding  
Judge Asoka de Zoysa Gunawardana  
Judge Erik Møse

Registry: Ms Aminatta N'gum

Decision of: 30 November 1999

**THE PROSECUTOR**  
v.  
**FERDINAND NAHIMANA**  
Case No. ICTR-96-11-I

**THE PROSECUTOR**  
v.  
**HASSAN NGEZE**  
Case No. ICTR-97-27-I

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Registrar

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**DECISION ON THE PROSECUTOR'S MOTION FOR JOINDER**

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The Office of the Prosecutor:

Ms Carla Del Ponte

Mr. Bernard Muna

Mr. N. Sankara Menon

Counsel for Nahimana:

Mr. Jean-Marie Biju-Duval

Counsel for Ngeze:

Ms Patricia Mongo

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”)**

SITTING AS Trial Chamber I composed of Judge Navanethem Pillay, presiding, Judge Asoka de Zoysa Gunawardana and Judge Erik Møse;

CONSIDERING the Prosecutor’s motion for joinder of the accused Ferdinand Nahimana and Hassan Ngeze, filed 2 July 1999;

NOTING that the Prosecution limited its motion, that was initially applicable to Nahimana, Barayagwiza and Ngeze, to the two accused Nahimana and Ngeze;

CONSIDERING Nahimana’s brief in reply to the Prosecutor’s motion, dated 18 November 1999;

CONSIDERING Ngeze’s brief in reply to the Prosecutor’s motion, dated 18 November 1999;

CONSIDERING the submissions of the Parties on 25 November 1999.

**Preliminary Matters - Pre-maturity**

1. The Counsel for both accused argued that the motion for joinder is premature on two procedural grounds and, therefore, should be denied. Firstly, the Defence argued that the motion should be denied as the appeals against the Trial Chamber’s decisions allowing the Prosecution to amend the indictments, are pending. The Trial Chamber is of the view that a decision on this motion for joinder would not prejudice the accused, notwithstanding the pending appeals. Should the Appeals Chamber grant the said appeals, then the case can be revisited by the Trial Chamber, accordingly. It is pertinent to note that, as at present, there is no order for stay of the proceedings in the cases of Nahimana or Ngeze. The application for stay of proceedings pending the appeal in Ngeze’s case, was denied by this Chamber. Accordingly, the Trial Chamber finds no reason to stay these proceedings in either case, at this stage.

2. Secondly, Counsel for both accused argued that the motion for joint trial is premature, pursuant to Rule 72(A) of the Rules, because the Trial Chamber must first give the Defence the opportunity to bring preliminary motions within 60 days, following

disclosure of supporting materials to the Defence, in relation to the amendments of the indictments. The Trial Chamber is of the view that the accused will not suffer prejudice if the motion for joinder is granted, as the Defence could still bring the preliminary motions: for defects in the form of the Indictment (under Rule 72 (B) (ii)); for severance of crimes (under Rule 72 (B)(iii)); or file a motion for severance of the proceedings (under Rule 82 (B)). Accordingly, the rights of the accused persons in relation to preliminary motions are protected by the Rules.

### **The Legal Basis for Joinder**

3. It is observed that Rule 48 states, “persons accused of the same crime or different crimes committed in the course of the same transaction may be jointly charged and tried.” The criteria envisaged there for a joint trial is that the offences should have been committed in the course of the same transaction. 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.”

4. In *Prosecutor v. Kayishema, Ntakirutimana and Ruzindana*, 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.

(See ICTR-95-1-T, Decision on the Motion of the Prosecutor to Sever, to Join in a Superseding Indictment, and to Amend the Superseding Indictment, 27 March 1997, at p. 3).

5. This aforementioned approach was clarified in *Prosecutor v. Ntabakuze, Kabiligi*, by Trial Chamber II who (having quoted the above) 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*.

(See ICTR-97-34-I, Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998, at p. 2.). The above guidelines were followed in two recent decisions on joinder. (See, Decision on Prosecutor’s Motion for Joinder of Trials, 5 October 1999, in *Prosecutor v Nyiramasuhuko and Ntahobali, Prosecutor v Nsabimana and Nteziryayo, Prosecutor v Kanyabashi, Prosecutor v Ndayambaje*. See also, Decision on Prosecutor’s Motion for Joinder, 11 October 1999, in *Prosecutor v Ntagerura and Prosecutor v Bagambiki, Imanishimwe, and Munyakazi*).

6. In the instant case, the accused who are sought to be joined, have been charged with committing offences alleged against them in the course of the same transaction, but have pleaded to two separate indictments. Rule 48(bis) states that “the Prosecutor may join confirmed indictments of persons accused of the same crime or different crimes committed in the course of the same transaction, for purpose of a joint trial . . .”. The Prosecution is seeking to have a joint trial in relation to both the accused, which in the view of this court, is permissible under Rule 48(bis).

**Whether it is Necessary to Consider Supporting Material**

7. The Defence Counsel for both accused argued that the Defence could not properly present their case and the Trial Chamber would not be able to adequately consider the present motion, because the supporting material which contained the relevant evidence had not yet been disclosed to the Defence, or reviewed by the Trial Chamber. The Defence argued that, in order to grant the motion for joinder, the Chamber must be

satisfied that there is a prima facie case to show that the accused acted together in the course of the 'same transaction.' They further submitted that the evidence necessary to show a prima facie case could only be ascertained after considering the supporting material.

8. The Trial Chamber agrees with the approach adopted in *Prosecutor v. Ntabakuze, Kabiligi*, where 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.” Hence, the Trial Chamber will not, at this stage, examine the supporting material. However, in order to ascertain whether the crimes with which the accused are charged, were committed in the course of the same transaction, the Trial Chamber has considered the allegations of fact contained in the amended indictments, the Prosecutors motion and the brief in support, along with the oral submissions of the Parties, and is of the view that the Prosecution has established a sufficient basis for joinder.

**The Existence of the Same Transaction**

*The Allegations in the Indictment*

9. It is appropriate at this stage to consider issues of evidence, that is, whether joinder can be justified on the evidence presented to court. The Prosecution submitted that the allegations demonstrate that the accused acted together, in particular, those allegations pertaining to the charges of conspiracy to commit genocide, and direct and public incitement to commit genocide. The Defence argued that the Prosecution failed to show that the accused acted in the course of the same transaction.

10. The Concise Statement of Facts in the amended indictments contain certain allegations connecting the acts of Nahimana and Ngeze. Paragraph 5.1 of both indictments avers that from 1990 until December 1994, Nahimana and Ngeze conspired amongst themselves and with others to exterminate the Tutsi population and eliminate members of the opposition; the components of this plan consisting of, inter alia,

broadcasting messages of ethnic hatred and publishing lists of persons to be killed. According to paragraph 7.14, the massacres in Rwanda were perpetrated as a result of the strategy adopted by persons such as Ngeze and Nahimana.

11. More specific allegations contained in the amended indictment of Ngeze include, that in 1990, Ngeze and Nahimana were part of a group who formed the newspaper Kangura in order to defend Hutu extremist ideology, Ngeze ultimately becoming the Editor-in-Chief (paras 5.3, 6.1, 6.17). In 1993, Nahimana and others formed the RTLM S.A, and set up a radio station (RTLM), in order to defend Hutu extremist ideology and to incite hatred and fear of the Tutsi; Ngeze and Kangura became shareholders in RTLM (para 5.9). The Kangura and RTLM are alleged to have collaborated closely in inciting violence and preparing lists of those to be killed; Ngeze was RTLM's correspondant in Gisenyi and RTLM announced whenever an issue of Kangura was published (para 5.10). Both Ngeze and Nahimana allegedly prepared articles in Kangura (para 6.6) and Kangura expressed satisfaction at the extremist direction taken by RTLM under the leadership of Nahimana (para 6.8). The Kangura and RTLM campaigned against the Arusha Accords, vilifying one of the Government's representatives (para 5.12).

12. In relation to lists of persons to be killed, Ngeze is alleged to have distributed lists in the Gisenyi prefecture and to have sent a name of an individual to RTLM who later broadcast that name. In 1994, Kangura published, and RTLM broadcast, the names of people identified as the 'enemy' (paras 5.23, 5.24, 5.26, 6.10).

13. The amended indictment of Nahimana reflects many of the same allegations outlined above from the Ngeze amended indictment. It also makes detailed allegations concerning Nahimana's control of, and shareholding in, RTLM (paras 6.1, 6.20), describing him as the ideologue and strategist of RTLM (para 6.6).

#### *The Nature of the Charges*

14. Nahimana and Ngeze are charged with conspiracy to commit genocide, having conspired together, along with others. The Prosecution argued that co-conspirators



should typically be tried together and cited the case of *R. v Miller and Others*, (*Winchester Summer Assizes*), where there was a charge of conspiracy and evidence to show that the alleged conspirators engaged in a common enterprise. In that case Lord Devlin held that, “[t]he cases must be rare in which fellow conspirators can properly in the interest of justice be granted separate trial.” (See, 2 ALL ER {1995} 667, 36 Cr. App Rep at p. 169).

15. The Trial Chamber is of the view that if the allegations in the amended indictments are proved at trial, they would show that the two accused were involved in events which form part of a common scheme, strategy or plan. Further, the Trial Chamber is of the view that, in accordance with established national jurisprudence, and in the interests of the good administration of justice, co-conspirators should generally be tried together.

16. Additionally, the amended indictments allege that Nahimana and Ngeze used the media to commit the crime of direct and public incitement to commit genocide. Allegedly, the Kangura and RTLM were established separately with the help or encouragement of both the accused, in order to promote ethnic hatred toward Tutsi, and Hutu extremist ideology. The nature and substance of the publications and broadcasts, which were controlled or sanctioned by the accused persons, are alleged to have been similar, in the two media organs – material which has, in part, been disclosed to the accused. Each accused contributed to the articles or broadcasts in both media organs. In short, the Kangura and RTLM are alleged to have been media instruments that mutually supported each other – practically and ideologically – and acted in agreement using the same medium to achieve the same goal.

17. Having considered the allegations outlined above in the amended indictments, along with the oral submissions, the Trial Chamber is satisfied that a sufficient basis has been made to support the assertion that Nahimana and Ngeze were involved in a number of acts or omissions being part of a common scheme, strategy or plan, committed in the course of the same transaction.

### The Commonality of Witnesses

18. The Prosecution argued that a joinder would ease the burden and enhance the safety of the witnesses, by avoiding the need for them to make several trips to the Tribunal and a repetition of their testimony.

19. In this case, the Prosecution submitted that it plans to call roughly 90 witnesses of fact in relation to Ngeze and 98 in relation to Nahimana; of these, 30 would be common to both accused. Additionally, the four expert witnesses would be common. The Trial Chamber considers this also to be a relevant consideration for granting the motion for joinder.

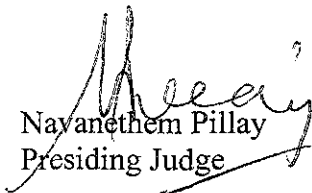
### The Issue of Delay

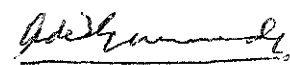
20. The Trial Chamber is satisfied that a joinder would not infringe the right of the accused to be tried without undue delay, as laid down in Article 20(4)(c) of the Statute.


**FOR ALL THE ABOVE REASONS,  
THE TRIBUNAL**

**GRANTS** the Prosecutor's motion to join the indictments of the accused Ferdinand Nahimana and Hassan Ngeze, for the purposes of joint trial.

Arusha 30 November 1999

  
Navanethem Pillay  
Presiding Judge

  
Asoka de Zoysa Gunawardana  
Judge

  
Erik Møse  
Judge

Seal of the Tribunal