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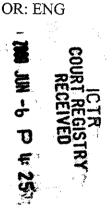
#### International Criminal Tribunal for Rwanda

#### **TRIAL CHAMBER I**

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

Registry: Aminatta N'gum

Decision of: 6 June 2000



#### THE PROSECUTOR v. JEAN-BOSCO BARAYAGWIZA (Case no. ICTR-97-19-I)

#### DECISION ON THE PROSECUTOR'S MOTION FOR JOINDER And DECISION ON BARAYAGWIZA'S EXTREMELY URGENT MOTIONS FOR LACK OF JURISDICTION AND FOR WAIVER OF

TIME LIMITS UNDER RULE 72 (A) AND (F) OF THE RULES

The Office of the Prosecutor:

William T. Egbe Cydney G. Crickard Charity R. Kagwi

Counsel for Barayagwiza:

Carmelle Marchessault David Danielson

Counsel for Nahimana:

Jean-Marie Biju-Duval Dianna Ellis

Counsel for Ngeze:

Patricia Mongo John Floyd

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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 trials of Prosecutor v. Jean-Bosco Barayagwiza, Prosecutor v. Ferdinand Nahimana and Prosecutor v. Hassan Ngeze, and its brief in support, dated 10 April 2000;

CONSIDERING Barayagwiza's notice of intent to file a motion for reconsideration and review and stay of execution, filed in the Appeals Chamber, dated 28 April 2000;

CONSIDERING Barayagwiza's brief in response to the Prosecutor's motion for joinder of Barayagwiza, dated 28 April 2000, and the correction to the brief in response, dated 15 May 2000;

CONSIDERING Barayagwiza's extremely urgent motion for lack of jurisdiction, and Barayagwiza's extremely urgent motion for waiver of time limits provided under Rule 72 (A) and (F) of the Rules, dated 15 May 2000;

CONSIDERING Nahimana's brief in response to the Prosecutor's motion for joinder of Barayagwiza, dated 30 April 2000;

CONSIDERING Ngeze's brief in response to the Prosecutor's motion for joinder of Barayagwiza, dated 14 May 2000, in which Counsel for Ngeze did not oppose the Prosecutor's motion for joinder;

CONSIDERING the Appeals Chamber's Decision on Prosecutor's Request for Review and Reconsideration, dated 31 March 2000 (hereinafter referred to as the "Review Decision").

THE Trial Chamber hereby decides the said Prosecutor's motion for joinder on the basis of the written briefs.

#### **Preliminary Matters**

#### The Jurisdiction of the Trial Chamber

1. By its extremely urgent motion, of 15 May 2000, for lack of jurisdiction, the Counsel for Barayagwiza submitted that this Trial Chamber does not have jurisdiction in the present matter, since there does not exist a valid indictment against the accused. The basis of this contention is that, by its decision of 3 November 1999, the Appeals Chamber

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dismissed the indictment against the accused with prejudice to the Prosecutor, yet did not reinstate the indictment in its Review Decision of 31 March 2000, despite the specific request of the Prosecutor to do so. The Counsel for the accused submitted that therefore the Trial Chamber had no jurisdiction to entertain and rule on the Prosecutor's request for leave to file an amended indictment, which the Chamber granted on 11 April 2000, and does not have jurisdiction to decide the present motion.

2. The Trial Chamber is of the view that a valid indictment exists against the accused, and that the Trial Chamber had the jurisdiction to decide the said Prosecutor's motion to amend the indictment, and has the jurisdiction to decide the present motion. Even though the Review Decision of 31 March 2000 did not explicitly state that the indictment against the accused was 'reinstated', the Trial Chamber holds the view that, in effect, the indictment against the accused was implicitly reinstated by that Review Decision. This is the irresistible conclusion that one must come to when one considers the Conclusion of the Review Decision, wherein it is stated, "Accordingly, the remedy ordered by the Chamber in the Decision, which consisted in the dismissal of the indictment and the release of the Appellant, must be altered" (emphasis added). The Appeals Chamber, in the Disposition of the Review Decision, went on to state, "For these reasons, the APPEALS CHAMBER reviews its Decision of 3 November 1999 and replaces its Disposition with the following:" (emphasis added). From the foregoing quotations, it is clear that the Review Decision sought to reinstated the indictment against Barayagwiza to its former legal standing prior to the Appeals Chamber Decision of 3 November 1999, but subject to the disposition of the Review Decision. The disposition of the Review Decision did not affect the legal status of the indictment. Therefore, this Trial Chamber holds that the indictment against the accused was reinstated on 31 March 2000, by the said Review Decision.

#### Stay of the Proceedings Pending the Appeal

3. In its extremely urgent motion of 15 May 2000, the Counsel for Barayagwiza sought a stay of all proceedings before the Trial Chamber, until such time as the Appeals Chamber has ruled upon its motion, lodged on 17 April 2000, against this Chamber's

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decision granting the Prosecutor leave to file an amended indictment. The Counsel for Nahimana submitted the same. The Trial Chamber finds no reason to stay these proceedings, at this stage. At the initial appearance of Barayagwiza, held on 18 April 2000, the Chamber denied a request by the accused for a stay of proceedings. In this regard it may also be noted that there is no stay order granted by the Appeals Chamber. The Chamber is of the view that a decision on the present motion for joinder will not prejudice the accused or the co-accused, notwithstanding the pending appeal. Should the Appeals Chamber grant the pending appeal, then the Trial Chamber can revisit the case, accordingly.

#### **Pre-maturity**

4. The Counsel for Nahimana submitted that the motion for joinder of Barayagwiza is premature because the Defence must first have the opportunity to bring preliminary motions under Rule 72, following disclosure of the supporting materials to the Defence. The Counsel for Barayagwiza requested a waiver of the time limits under Rule 72, to file preliminary motions, because the newly appointed Counsel has belatedly received the full supporting material.

5. The Trial Chamber is of the view that the accused will not suffer prejudice if the motion for joinder is granted. Having considered the circumstances as set out in Barayagwiza's extremely urgent motion, dated 15 May 2000, for waiver of time limits provided under Rule 72(F), the Chamber is of the view that the Counsel for Barayagwiza should be granted an additional 30 days from the date of this decision, to file preliminary motions under Rule 72(A).

#### The Legal Basis for Joinder

6. 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."

7. In *Prosecutor v. Kayishema, Ntakirutimana and Ruzindana*, Trial Chamber I held that:

[I]nvolvement 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).

p. *5*).

8. 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 Trial Chamber concurs with the above approach.

9. 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 three 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 all three accused, which is permissible under Rule 48(bis).

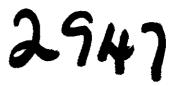
#### The Existence of the Same Transaction

#### The Factual Allegations

10. It is appropriate at this stage to consider whether joinder is justified on the factual allegations presented to the Chamber. The Prosecution submitted that the allegations demonstrate that all three accused acted together, in relation to those allegations pertaining to the charges of conspiracy to commit genocide, and to direct and public incitement to commit genocide, by way of their involvement in the media organisations Kangura and RTLM, which were used in conjunction with each other to promote ethnic hatred towards Tutsi.

11. The Prosecution further submitted that the allegations demonstrate that Barayagwiza and Ngeze acted together, by way of their high-level involvement with the *Coalation pour la Defense de la Republique (CDR)*, and its activities within the Gisenyi *prefecture;* and, that Barayagwiza and Nahimana together represented the Sindikubwabo interim government abroad.

12. The Concise Statement of Facts in the amended indictments of Nahimana, Ngeze and Barayagwiza, contain allegations connecting the acts of the three accused. Paragraph 5.1 of all indictments avers that, from 1990 until December 1994, Nahimana, Ngeze and Barayagwiza conspired amongst themselves and with others, to exterminate the Tutsi population and to eliminate members of the opposition. The components of this plan consisting, inter alia, of broadcasting messages of ethnic hatred and publishing lists of persons to be killed. According to paragraph 7.12 of the amended indictment against



Barayagwiza, the massacres in Rwanda were perpetrated as a result of the strategy adopted by persons such as Barayagwiza, Ngeze and Nahimana.

More specific allegations contained in the amended indictment against 13. Barayagwiza include, in 1990 Barayagwiza and Nahimana were part of a group who formed the newspaper Kangura, in order to defend Hutu extremist ideology (paras 5.3 and 5.9), and that Ngeze ultimately became the Editor-in-Chief of Kangura (para 5.4). Barayagwiza, 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 (para 5.9 and 6.1). At an RTLM fundraising meeting in 1993, at which all three of the accused were present, Felicien Kabuga publicly defined RTLM's purpose as the Defence of Hutu power (para 6.4). Barayagwiza, Nahimana and another exercised authority over RTLM, and were aware of, and defended, the contents of RTLM's broadcasts (paras 6.20. 6.21 and 6.22). Kangura and RTLM are alleged to have collaborated closely in conducting a campaign against the Arusha Accords (para 5.11), preparing lists of those to be killed, and of broadcasting names of Tutsis and moderate Hutus to be eliminated on RTLM (para 5.20). The Concise Statement of Facts further alleges that the formation of RTLM was applauded in Kangura (para 6.2).

14. In addition, the Prosecution submitted that Barayagwiza and Ngeze were both founding members of the CDR (paras 5.4 of the amended indictment against Barayagwiza and para 5.7 of the amended indictment against Ngeze), and that they acted with other members of the CDR to organise demonstrations to protest against the Arusha accords (para 5.12); took an active part in arming, training and organising the youth wing, the *impuzamungabi*, and that they both instructed and led militiamen of the *impuzamungabi* and the *interahamwe* as they attacked Tutsi and moderate Hutus, in the Gisenyi prefecture (para 5.3 of the amended indictment against Ngeze, para 5.17, 5.22, 7.6, 7.7, 7.8 and 7.9 of the amended indictment against Barayagwiza, and para 31 of the Brief in Support of the Prosecutor's Motion for Joinder of the Accused).

#### The Nature of the Charges

15. Barayagwiza, Nahimana and Ngeze are charged with conspiracy to commit genocide, and of having conspired together, along with others. The Prosecution argued that co-conspirators should typically be tried together.

16. The Trial Chamber agrees with the Prosecution. The Chamber holds 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.

17. On 30 November 1999, this Trial Chamber granted the Prosecutor's Motion for Joinder of the accused Ferdinand Nahimana and Hassan Ngeze [See, Decision on the Prosecutor's Motion for Joinder in the matters of *The Prosecutor v Nahimana* and *The Prosecutor v Ngeze*, dated 30 November 1999] on the basis, inter alia, that the involvement of each accused in the media organisations Kangura and RTLM demonstrated the existence of the same transaction. In the said Decision, the Trial Chamber stated that, "...if the allegations in the amended indictments are proved at trial, they would show that the two were involved in events which form part of a common scheme strategy or plan". *Id* at para. 15.

18. Following that decision and on the basis of the allegations linking Barayagwiza to the accused Nahimana and Ngeze in relation to both the media and CDR, the Trial Chamber is satisfied that a sufficient basis has been established to support the assertion that Barayagwiza, 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

19. The Prosecution submitted that the joinder of Barayagwiza 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.

20. In this case, the Prosecution has submitted that the witnesses, whom the Prosecutor will call in relation to RTLM, Kangura, and the events in Gisenyi will be relevant to the trials of all three accused. Furthermore, the witnesses whom the Prosecutor will call to support the conspiracy to commit genocide charge, will be the same.

21. The Trial Chamber considers this also to be a relevant consideration for granting the motion for joinder.

#### The Issue of Delay

22. The Prosecution submitted that joinder will only cause a short delay of the trial against the accused, and in totality will ensure that the three accused will be tried in a more expeditious manner, than if tried in separate trials. The Counsel for Nahimana has submitted that joinder will occasion further delay in the proceeding, where the previous delay has been caused by the Prosecution and was not attributable to the complexity of the issues, or to the accused persons.

23. At a status conference of 16 May 2000, with the Counsel for the Prosecution, and the Counsels for Barayagwiza, Nahimana and Ngeze, the parties in the trial of Prosecutor vs. Nahimana and Ngeze informed the Chamber that they would not be ready to start the trial by the scheduled trial date of 5 June 2000. Furthermore, the Counsel for Barayagwiza informed the Chamber that, in the event of joinder, he would not be ready to start trial by 5 June 2000. Accordingly, in order to accommodate all the parties, the Chamber set down a new date of trial, namely 18 September 2000. At the said status conference, the Chamber informed the Counsel for Barayagwiza that, in the event of joinder, the trial date of 18 September 2000 would also apply to Barayagwiza. Therefore, the Chamber is of the view that granting the present motion for joinder of Barayagwiza, will not unduly delay the trial of the accused persons.

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24. For these reasons, the Trial Chamber is satisfied that a joinder would not infringe the right of the accused persons 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 indictment of the accused Barayagwiza, with those of the accused Ferdinand Nahimana and Hassan Ngeze, for the purposes of joint trial.

**GRANTS** Barayagwiza's extremely urgent motion for waiver of time limits provided under Rule 72 (A) and (F) of the Rules, dated 15 May 2000. Barayagwiza is hereby granted an extension, under Rule 72(F), of 30 days from the date of this decision, in which to file preliminary motions, pursuant to Rule 72(A) of the Rules of Procedure and Evidence.

**DENIES** Barayagwiza's extremely urgent motion for lack of jurisdiction, dated 15 May 2000.

Arusha,

THIS 6th June, 2000

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Asoka de Zoysa Gunawardana Judge

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Erik Møse Judge

Seal of the Tribunal

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