



UNITED NATIONS  
NATIONS UNIES

TRIAL CHAMBER II

OR: ENG

Before: Judge Laity Kama, Presiding  
Judge William H. Sekule  
Judge Mehmet Güney

Registrar: Agwu U. Okali

Decision of: 29 June 2000

THE PROSECUTOR  
v.

MATHIEU NGIRUMPATSE  
JOSEPH NZIRORERA  
JUVENAL KAJELIJELI

2000 JUN 29 P 3:05  
ICTR  
COURT REGISTRY  
RECEIVED

Case No. ICTR-98-44-I

---

**DECISION ON THE PROSECUTOR'S MOTION FOR JOINDER OF ACCUSED  
AND ON THE PROSECUTOR'S MOTION FOR SEVERANCE OF THE ACCUSED**

---

The Office of the Prosecutor:

Ken Fleming  
Don Webster  
Ifeoma Ojemeni

Defence Counsel for the Accused:

Lennox S. Hinds and Richard Harvey for Juvenal Kajelijeli  
Charles Roach for Mathieu Ngirumpatse  
Andrew McCartan for Joseph Nzirorera

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME  
COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS  
NAME / NOM: *Dr. MINDUA K. M. Antoinette*  
SIGNATURE: *[Signature]* DATE: *27.06.2000*

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

**SITTING** as Trial Chamber II of the International Criminal Tribunal for Rwanda composed of Judge Laïty Kama, Presiding, Judge William H. Sekule and Judge Mehmet Güney;

**BEING SEIZED OF** the Prosecutor's Motion for Joinder of the Accused in the *Prosecutor versus Mathieu Ndirumpatse, Joseph Nzirorera, Juvenal Kajelijeli* (currently indicted in one single indictment with five others, namely Augustin Bizimana, Callixte Nzabonimana, Félicien Kabuga, André Rwamakuba and Edouard Karemera in Case No. ICTR-98-44-I) filed on 3 March 2000 ("Prosecutor's Motion for Joinder");

**BEING SEIZED OF** the Prosecutor's Motion for Severance of Accused and Other Orders in the *Prosecutor versus Mathieu Ndirumpatse, Joseph Nzirorera, Juvenal Kajelijeli* (Case No. ICTR-98-44-I), filed on 19 April 2000 ("Prosecutor's Motion for Severance");

**BEING FURTHER SEIZED OF** the Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvenal Kajelijeli on 27 March 2000 ("Kajelijeli's Response");

**BEING FURTHER SEIZED OF** the "Response to Prosecutor's Motion for Joinder for Joseph Nzirorera", filed by Defence Counsel for Nzirorera on 5 June 2000 ("Nzirorera's Response");

**CONSIDERING** the Prosecutor's Brief in Response to Motion for Severance and Separate Trial by Accused Juvenal Kajelijeli, filed on 20 April 2000 ("Prosecutor's Reply to Kajelijeli");

**CONSIDERING** the oral submissions of Counsel for Ndirumpatse on 6 June 2000;

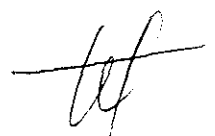
**HAVING HEARD** the oral submissions of the parties at a hearing on 5 and 6 June 2000;

**NOTING** the Statute of the International Criminal Tribunal for Rwanda ("the Statute") and the Rules of Procedure and Evidence ("the Rules") in particular Rules 48, 48*bis* and 82.

**ARGUMENTS BY THE PARTIES**

**Prosecutor's Motion for Joinder**

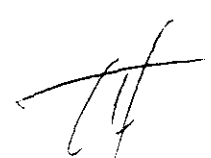
1. The Prosecutor submits, *inter alia* that the joinder is justified in law and in fact. She submits that the evidence shows that the acts of the accused were part of the same transaction and therefore meets the legal requirements for joint trial set out under Rule 48 and interpreted in Rule 2.
2. The Prosecutor further submits that jurisprudence generally supports the joint trials of co-conspirators and that this jurisprudence is applicable in the instant case.



3. The Prosecutor asserts that joinder is justified in the interests of justice because it will reduce stress and minimise safety risks to witnesses. She cites case law to support her contention that joinder may minimise the risk of contradictions in decisions rendered on the same set of facts.
4. The Prosecutor submits that joint trials do not breach the right of individual accused to trial without undue delay. She argues that the economy of a joint trial outweighs the disadvantage of a delay in final judgment in the case of any single accused that may be caused by trying the accused jointly.
5. The Prosecutor submits that it is appropriate to join these three accused because they are all charged with the same counts, namely Conspiracy to Commit Genocide, Genocide, Complicity in Genocide, Crimes against Humanity and Violations of Common Article 3 of the Geneva Conventions and Additional Protocol II thereto. She further submits that it is appropriate to join these three accused because they have a common interest in that they were leaders and long-standing members of the MRND and that they helped to define the policies of the MRND, including the development of its youth wing, the *Interahamwe*, and the militarization of the *Interahamwe* and the distribution of weapons to militiamen prior to and during the 1994 mass killings. The Prosecutor submits that the evidence will show a systematic modus operandi in the way in which massacres were carried out, which she argues is proof of a common scheme and plan by government authorities, prefects and military personnel.

#### **Prosecutor's Motion for Severance**

6. On 19 April 2000, the Prosecutor filed a Motion for Severance of the three accused under Rule 82, in case her above-mentioned Motion for Joinder is not considered the appropriate legal means of separating out the three accused. In oral submissions on 5 June 2000, the Prosecutor clarified that she is principally relying on Rule 82 to support the application for separate trials of the accused.
7. The Prosecutor asserts that the term "separate" under Rule 82, can mean "a unit that is apart or by itself". She therefore relies on Rule 82 to separate the three accused from the other accused in Case No. ICTR-98-44-I into a distinct unit to be tried separately.
8. In oral submissions on 5 June 2000, in response to a question from the bench, asking the Prosecutor how the proposed severance would affect the indictment and how the Prosecutor, in practice, would lead evidence in relation to the conspiracy charges if the severance was granted, the Prosecutor responds that severing the three accused from the other five accused would not affect the indictment. She submits that some ninety percent of the indictment is common to all eight accused and that some ten percent relates to individual activity. In practice, this would mean leading evidence to show that the three accused conspired with the other five accused and with each other, as well as any other evidence of individual activity necessary to sustain the charges against each of the three accused.



### Kajelijeli's reply

9. Counsel for Kajelijeli argues, *inter alia*, that the Prosecutor has not produced any credible evidence showing that Kajelijeli committed "one or more acts following a common scheme, strategy or plan" with the other seven accused in the indictment and that therefore the requirement of "same transaction" under Rule 48 has not been satisfied.
10. Counsel for Kajelijeli contends that the Prosecutor's theory for joinder is based on the assumption that they were all high government national figures who exercised considerable influence among the population. Counsel for Kajelijeli asserts that Kajelijeli was not a government minister, but held the position of mayor of Mukingo for a period of 14 days in July 1994. He further submits that the attempt by the Prosecutor to connect the three accused and separate them from the other five accused in Case No. ICTR-98-44-I on the ground that the three were leaders of the MRND, is flawed in relation to Kajelijeli, as there is no evidence to support Kajelijeli's role in MRND as alleged by the Prosecutor. He therefore submits that the factual basis for joinder is flawed.
11. Counsel for Kajelijeli asserts that there is a substantial risk of prejudice to Kajelijeli, through guilt by association, if he is tried along with the other co-accused. He therefore moves to sever Kajelijeli from the other co-accused. The Trial Chamber deals with Kajelijeli's Motion in a separate decision.

### Nzirorera's reply

12. Counsel for Nzirorera asserts, *inter alia*, that the evidence in the indictment does not meet the standard required in the three pronged "same transaction" test set out in *The Prosecutor v Nyiramasuhuko and Ntahobali* (ICTR-99-27-I), *The Prosecutor v Nsabimana and Nteziryayo* (ICTR-97-29A and BI), *The Prosecutor v Kanyabashi* (ICTR-96-15-T), *The Prosecutor v Ndayambaje* (ICTR-96-8-T), Decision on the Prosecutor's Motion for Joinder of Trials, 5 October 1999, namely that the acts of the accused must:
  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.
13. Counsel for Nzirorera submits that the convenience of witnesses is not a valid consideration for joinder. He further submits that the interpretation of the case law relied upon by the Prosecutor in asserting that joint trials will not cause undue or unreasonable delay is wrong. He submits that joinder will cause further unreasonable delay, not expedite trial and that this breaches the right of the accused to trial without undue delay under Articles 19 and 20 of the Statute.



### **Ngirumpatse's submissions**

14. Counsel for Ngirumpatse confirms that he considers the Prosecutor's Motion for Joinder to be, in reality, a motion for severance under Rule 82, as the three accused are already joined and there is no new indictment.
15. Counsel for Ngirumpatse confirms that Ngirumpatse does not oppose the severing of the three accused from the other five in Case No. ICTR-98-44-I. However, he requests that if the severance is granted, that the Trial Chamber order an amended indictment that refers more specifically to the alleged acts of the three accused in question be laid. He refers to the Prosecutor's assertion that ninety percent of the indictment relate to all of the accused and states that this indicates that the involvement of the individual accused is not being properly considered. He raises concerns in relation to the leading of evidence against the three on the basis of the current indictment, given three of the accused on the indictment are at large.

### **Prosecutor's response**

16. As a preliminary matter, in oral submissions on 6 June 2000, the Prosecutor argues that the Kajelijeli's motion for severance and the arguments contained in Kajelijeli's Response in relation to sufficient factual basis for joinder should be properly characterised as preliminary motions, and submits that therefore, they are filed out of time.
17. The Prosecutor argues that the Defence submissions that there is insufficient evidence to support an allegation of "same transaction", is moot as the indictment is already confirmed and hence meets the required standard of a *prima facie* case.
18. The Prosecutor submits that the arguments made by Kajelijeli in relation to lack of evidence supporting the charges can be answered by reference to the supporting materials. The Prosecutor cites the case of *Prosecutor v. Ntabakuze, Kabiligi*, (ICTR-95-I-T) Decision on Defence Motion Requesting an Order for Separate Trials, 27 March 1997 where the Trial Chamber held that "[t]he Trial Chamber shall act upon the Prosecutor's factual allegations as contained in the indictment and the related submissions". She asserts that in the instant case the related submissions are the supporting materials.

## **DELIBERATION**

### **Legal Basis of the Prosecutor's motion**

19. The Trial Chamber notes that the Prosecutor first filed a motion for joinder under Rule 48 and then filed a motion for severance under Rule 82. She did this, she submits, as she was unclear as to which procedure was appropriate to apply to separate out as a distinct unit the three co-accused (Ngirumpatse, Nzirorera and Kajelijeli) from the other five co-accused indicted in Case No. ICTR-98-44. However, in oral submissions on 5 June 2000,

the Prosecutor clarified that "it is particularly under Rule 82 that we finally depend for our application to have three people tried together."

20. While the Prosecutor's Motion for Joinder was brought under Rule 48 only, the Trial Chamber now considers all of the Rules in relation to joinder and their application in the instant case. Rules 48, 48*bis* and 49 set out the law in relation to joinder. Rule 48 allows the joint charging and joint trials of persons accused with the crimes committed in the course of the same transaction. As the three accused have already been jointly charged, Rule 48 does not apply. Rule 48*bis* allows for the joinder of confirmed indictments. Again, as the three accused are already jointly charged in the same confirmed indictment, Rule 48*bis* does not apply. Rule 49 allows for the joinder in the same indictment of two or more crimes committed by the same accused. As the crimes of the accused are already joined, Rule 49 does not apply. The Trial Chamber consequently rules that the Prosecutor's Motion for Joinder of Accused is inadmissible.
21. The Prosecutor filed a Motion for Severance under Rule 82 in the alternative. The Trial Chamber finds that the real intention of the Prosecutor is to *sever* the three accused from the other five co-accused and have them jointly tried under Rule 82(B). Rule 82(B) provides "[t] Trial Chamber may order that persons jointly accused under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice". The Trial Chamber now considers the submissions of the parties and the law in relation to severance.

#### **Severance of a unit**

22. The Prosecutor submits that the term "separate" can mean to separate out into a distinct unit. Some Defence Counsel oppose the interpretation of the term "separate" relied upon by the Prosecutor. They argue that the term "separate" means to separate out accused persons *individually* and cannot refer to the separating out of a group of people into a single unit.
23. The Chamber notes that the term "sever" in Black's Law Dictionary is defined as "to separate the cases of multiple defendants in such a way as to allow separate trials for each or for fewer than all." (Black's Law Dictionary, 5<sup>th</sup> ed. 1979, p.1231). Generally speaking, separation of a unit that has the same interest, subject to other requirements, is allowed in national jurisprudences.
24. Severance of a group of accused from other accused jointly charged has been accepted in a number of decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the *Prosecutor v. Delalic et al.*, (IT-96-21) Decision on Motions for Separate Trial filed by the Accused Zejnir Delalic and the Accused Zdravko Mucic, 25 September 1996, Accused Delic moved to sever himself from Accused Delalic and Mucic but did not oppose a joint trial with Accused Landzo. Landzo moved to sever his trial from Delalic or Mucic but also accepted a joint trial with Delic. While the motions were denied, the proposition that separate trials require the separation of the accused individually was not one of the grounds for denial. In the case of the *Prosecutor v. Blaskic et al.*, six persons

were originally jointly charged in the same indictment. Accused Blaskic had a separate and individual trial, whereas Accused Kordic and Cerkez were separated and tried jointly. After two co-accused were released, Accused Aleksovski was tried alone. *See Prosecutor v. Aleksovski*, (IT-95-14) Judgement, (25 June 1999), at para. 4. The Trial Chamber considers that this jurisprudence indicates that Rule 82 should not be interpreted so as to automatically bar a request for severance of accused into groups. It leaves it open to the Chamber to define term "separation" on a case by case basis, having considered all the requirements for separate trials. Therefore, the Trial Chamber finds that an application for "severance" can be either an application to separate out individually or to separate out into distinct units.

### **Considerations under Rule 82(B)**

25. The Trial Chamber notes that the fact that persons are accused jointly under Rule 48 or Rule 48 *bis* does not necessarily mean that it will be proper to try them together. Rule 82(B) allows them to be tried separately if: (1) there is a conflict of interests that might cause serious prejudice to an accused, or (2) it is necessary to protect the interests of justice. The Trial Chamber now considers the law and the submissions of the parties in respect of these requirements under Rule 82(B).

### **A conflict of interests that might cause serious prejudice to an accused**

26. What is to be considered as "a conflict of interests that might cause serious prejudice to the accused" has been the subject of several ICTY decisions.

27. In the case of the *Prosecutor v. Kovacevic et al.*, (IT-97-24), Decision on the Motion for Joinder of Accused and Concurrent Presentation of Evidence of 14 May 1998 (hereinafter referred to as "*Kovacevic*"), the Prosecutor's Motion for Joinder was not granted, on the grounds that, *inter alia*, concurrent presentation of evidence of the proposed co-accused would cause a conflict of interests that might cause serious prejudice to the accused. In that case, the ICTY Trial Chamber held that, as one of the accused was charged with a different crime (and hence would require the introduction of different evidence), "... the concurrent presentation of evidence against all four accused would lead to a conflict of interest in their defence strategies, which would substantially prejudice the accused in their right to a fair trial." The ICTY Trial Chamber held that such a conflict would constitute a ground for separation of trials under Rule 82 (B) and denied the Prosecutor's Motion for Joinder.

28. In the *Prosecutor v. Delalic et al.*, (IT-96-21) Defence Counsel for Delalic argued that, as Delalic was the only one charged with command responsibility, the "presentation at his trial of evidence against other accused charged as direct perpetrators will result in serious prejudice to him." However, the Trial Chamber in its Decision on Motions for Separate Trial filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, of 25 September 1996, disagreed that this constituted a conflict of interest and stated "[t]here is no provision in the Rules for separate trial of distinct issues arising in the one indictment."

29. In the case of the *Prosecutor v. Brdanin et al.*, the Defence relied upon the fact that one accused was a member of the military forces whereas his co-accused were members of the civilian authorities and the possibility that the co-accused may seek to present incriminating evidence at trial to support its application for separate trial. It argued that these factors constitute a conflict of interest within the meaning of Rule 82(B). In denying the motion, the ICTY Trial Chamber stated “. . . that there could possibly exist a case in which the circumstances of the conflict between the two accused are such as to render unfair a joint trial against one of them, but the circumstances would have to be extraordinary” (para. 29).
30. The Trial Chamber notes that, in the instant case, the Accused Ngirumpatse, Nzirorera and Kajelijeli are jointly indicted with another five co-accused in a confirmed indictment. All accused persons in that indictment are charged with the same crimes. The Prosecutor seeks to sever the three accused from other five on the ground that these three persons were members of the MRND, rather than Ministers of the Interim Government. The Prosecutor does not assert that there is any conflict of interests between these three accused and the other five co-accused. Therefore, the Trial Chamber finds that conflict of interest that may cause serious prejudice to an accused is not an applicable ground for severance in this case.

#### **Protection of interest of justice**

31. Protection of the interest of justice is another basis for separate trials under Rule 82. The Trial Chamber will now consider whether the prosecution has shown that severing the three accused is in the interests of justice. The Trial Chamber has identified, *inter alia*, three issues to be addressed in relation to protection of the interests of justice are (1) the right to be tried fairly; (2) the right to be tried without undue delay; and (3) long and complicated cases.

#### **Right to be tried fairly**

32. In some national jurisdictions, an accused who wishes to call a co-accused to testify as a witness on his behalf may seek a separate trial, on the grounds that he has a right to be tried fairly, that is, to call the best witnesses possible for his case. A co-accused cannot be compelled to appear as a witness in a joint trial, as this would breach his right to protection against self-incrimination. The test in deciding if severance should be granted on this ground, is whether such evidence might reasonably create a doubt as to the guilt of the accused. *See R. E. Salhany, Canadian Criminal Procedure*, 6<sup>th</sup> ed., 1996, at 6.1550; also *see R. v. Silvini* (1991), 68 C.C.C. (3d) 251 (Ont.C.A.)
33. The Trial Chamber notes that, in the instant case, the Prosecutor does not rely upon this argument to support either the severance or joinder motions. However, this issue was raised in Kajelijeli's Response. The Chamber deals with Kajelijeli's motion in a separate decision.

#### **The right to be tried without undue delay**





34. One of the reasons for joint trials is that they may expedite the trial of all of the accused. However, this is not always the case. The Expert Group reviewing the ICTY and ICTR noted that "there is no guarantee that joinder will shorten the proceeding; it may actually lengthen it, since any adjournment of the trial requested and granted in respect of any one suspect in the case will result in the adjournment of the trial as a whole." *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunals for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, UNGA, A/54/634, at para. 164.
35. The same reasoning was applied in the case of the *Prosecutor v. Kunarac et al.*, (IT-96-23) where the ICTY Trial Chamber in its Decision on Joint Trials of 9 February 2000 found that the Prosecutor's request for joint trial of Accused Vokovic with two co-accused would inevitably cause the postponement of the trial of the two co-accused and that "the Trial Chamber, the Prosecutor and the two co-accused had gone past the point of preparation for the trial where any further postponement would be in the interests of justice"(para 10). The ICTY Trial Chamber in *Prosecutor v. Kovacevic et al.*, applied the same reasoning in denying the Prosecutor's motion for joinder:
36. In the case of the *Prosecutor v. Dokmanovic*, Accused Dokmanovic was indicted with three co-accused, none of who were in the custody of the Tribunal. The Trial Chamber ordered that Dokmanovic be tried separately from three co-accused in order to protect his right to be tried without undue delay under Article 21(4)(c). See Press release CC/PIO/269-E, The Hague, 2 December 1997.
37. The Trial Chamber notes that, in the instant case, the Prosecutor does not submit that the joint trial of the three accused with other five will violate their rights to be tried without undue delay. The Trial Chamber therefore finds that this is not a valid ground for granting separate trials.

#### **Long or complicated cases**

38. The length and complexity of trial is a further consideration to be taken into account when deciding whether to separate trials. See P. J. Richardson, *Archbold* 2000, p.78. This issue is linked with the right to be tried without undue delay.
39. The Prosecutor argues that one of the grounds for applying to sever the three accused from other five is that the severance of the accused into a distinct unit will make the trial more workable and manageable. The sole basis for this assertion seems to be the Prosecutor's contention that the three co-accused were leaders in the MRND. The Trial Chamber finds that the Prosecutor has not shown that severing the accused into a distinct unit will make the trial more workable and manageable, especially considering the Prosecutor's assertion that ninety percent of the indictment is common to all the accused.
40. The Chamber emphasises that the purpose of Rule 82(B) is to protect the right of the accused to be tried expeditiously and fairly, taking into consideration the interests of justice. The Trial Chamber finds that the Prosecutor has not shown good cause for

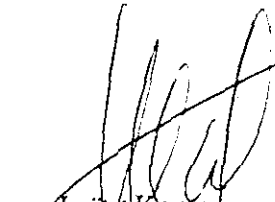
severing the three accused from the other five co-accused. She has not proved there is a conflict of interest between the three accused and the other five co-accused. She has not demonstrated that a severance is necessary to preserve the right of the three accused to a fair trial. She has not demonstrated how severing the three accused will avoid undue delay or to reduce the complexity or length of the case. To the contrary, she asserts that ninety percent of the indictment is common to all eight of the co-accused, which, the Trial Chamber finds is a factor that would facilitate joint trial and mitigate against severance.

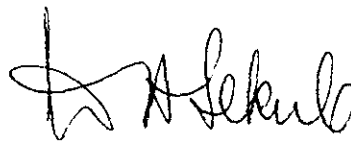
**FOR THESE REASONS, THE CHAMBER**

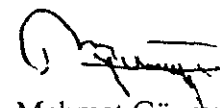
**FINDS** the Prosecutor's motion for Joinder of Accused inadmissible; and

**DENIES** the Prosecutor's motion for severance of the accused

Arusha, 29 June 2000

  
Laity Kama  
Judge, Presiding

  
William H. Sekule  
Judge

  
Mehmet Güney  
Judge

Seal of the Tribunal



