

**International Criminal Tribunal for Rwanda**

**TRIAL CHAMBER II**

OR: ENG

ICTR-98-44-T  
6/7/2000  
(10-1)

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

Registrar: Agwu U. Okali

Decision of: 6 July 2000

**THE PROSECUTOR**  
v.  
**AUGUSTIN BIZIMANA**  
**EDOUARD KAREMERA**  
**CALLIXTE NZABONIMANA**  
**ANDRE RWAMAKUBA**  
**FELICIEN KABUGA**  
**MATHIEU NGIRUMPATSE**  
**JOSEPH NZIRORERA**  
**JUVENAL KAJELIJELI**

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Case No. ICTR-98-44-T

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**DECISION ON THE DEFENCE MOTION IN OPPOSITION TO JOINDER AND  
MOTION FOR SEVERANCE AND SEPARATE TRIAL FILED BY THE ACCUSED  
JUVENAL KAJELIJELI**

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The Office of the Prosecutor:

Ken Fleming  
Don Webster  
Ifeoma Ojemeni

Counsel for the Accused:

Lennox S. Hinds  
Richard Harvey



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

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

**BEING SEIZED OF** the "Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvénal Kajelijeli" (the "Defence Motion") filed on 27 March 2000;

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

**CONSIDERING** the "Decision on the Prosecutor's Motion for Joinder of Accused and on the Prosecutor's Motion for Severance of the Accused" filed on 29 June 2000 by this Trial Chamber on the Prosecutor's Motion for Joinder and Severance of Accused in *Prosecutor v. Mathieu Ngirumpatse, Joseph Nzirorera, Juvénal Kajelijeli*;

**CONSIDERING** the Prosecutor's Motion for Joinder of the Accused in the *Prosecutor v. Mathieu Ngirumpatse, Joseph Nzirorera, Juvénal Kajelijeli* (indicted in one single indictment with five others, namely *Augustin Bizimana, Callixte Nzabonimana, Félicien Kabuga, André Rwamakuba and Edouard Karemera* (Case No. ICTR-98-44-T) filed on 3 March 2000; the Prosecutor's Brief Amending Brief in Support of Motion for Joinder of the Accused, filed on 13 March 2000;

**CONSIDERING** the Prosecutor's Motion dated 24 February 2000, requesting that the Motion for Joinder of the Accused in the *Prosecutor v. Elièzer Niyitegeka* (Case No. ICTR-96-14-T), *Casimir Bizimungu, Justin Mugenzi, Jérôme Bicamumpaka, Prosper Mugiraneza* (Case No. 99-50-T), *Augustin Bizimana, Callixte Nzabonimana, Félicien Kabuga, André Rwamakuba, Edouard Karemera and Juvénal Kajelijeli* (Case No. ICTR-98-44-T) filed on 2 July 1999, be withdrawn and the Decision on said Motion granting the withdrawal, dated on 2 May 2000;

**CONSIDERING** the indictment confirmed on 29 August 1998 by Judge Navanethem Pillay, against Juvénal Kajelijeli (the "Accused") and seven others charging crimes of 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;

**NOTING** that the Accused made his initial appearance before the Tribunal on 7 April 1999 and entered a plea of not guilty to all eleven counts of the indictment;

**HAVING HEARD** the parties at a hearing held on 5 and 6 June 2000;

**CONSIDERING** the Statute of the International Criminal Tribunal for Rwanda (the "Statute") particularly Rules 72 and 82 of the Rules of Procedure and Evidence (the "Rules").

**SUBMISSIONS OF THE DEFENCE**

1. Pursuant to Rules 48, 72, 73 and 82 of the Rules, the Defence submits, *inter alia*, that the joinder of the Accused with other co-accused is not justified in law, the Prosecutor has failed in her proofs and evidence to establish that the Accused should be joined with other co-accused, that joining the Accused will deprive him of a fair trial, and that the Accused would be irreparably prejudiced if he is denied a severance and a separate trial.
2. The Defence asserts that the “same transaction” requirements of Rule 48 and Rule 2 are not satisfied because the Prosecutor failed to produce any credible evidence showing that the Accused committed “one or more acts following a common scheme, strategy or plan” in her motion and supporting indictment.
3. The Defence argues that the Prosecutor’s basis for joining the Accused with other government officials because he was one of the former government officials is flawed. Instead, the Prosecutor must establish that the Accused has acted together and in concert with other co-accused to commit genocide.
4. The Defence submits that the Prosecutor’s evidence in support of allegations against the Accused is vague and speculative. There is no credible and admissible evidence that the Accused has conspired with others to commit genocide. The Prosecutor has not offered and cannot produce any evidence to support her allegations that the Accused was a leader of the *Mouvement Révolutionnaire National pour le Développement* (MRND), and that he developed the *Interahamwe*. There is also no evidence to support the Prosecutor’s allegation that the Accused was aware or took directions or instructions during the Cabinet meetings between 9 April and 14 July 1994, that incited, aided or abetted the massacres of Tutsi population.
5. The Defence submits that the only piece of evidence that is in the possession of the Prosecutor is that the Accused was arrested in the residence of one of the co-accused (Nzirorera). The Defence alleges that the Prosecutor is attempting to prosecute the Accused by associating him with Nzirorera, and that the Prosecutor was allowed to incriminate the Accused in a conspiracy by virtue of his being found in Nzirorera’s residence and the fact that they lived in the same prefecture. The Defence also asserts that the reason why the Accused was found in the residence of Nzirorera is because he sought and was given refuge.
6. The Defence further alleges that the Prosecutor used identical background facts for this Accused and Nzirorera in support of instant Indictment. He points out that the Accused was the only one among the seven other accused that is charged with same identical 29 supporting paragraphs for each of the 11 counts, and that the Accused name is mentioned in only 4 of the 29 paragraphs, while Nzirorera is mentioned alone without any association with the Accused in 15 out of the 25 paragraphs.
7. The Defence further submits that if the Accused is tried together with these co-accused, he will suffer irreparable prejudice from “guilt by association.” This is

because the Prosecutor knows that she has a weak case against the Accused and she is attempting to use the conspiracy law to bootstrap the Accused to government Ministers and Cabinet Members against whom there may be more evidence. The Defence asserts that this tactic greatly prejudices the Accused as the levels of culpability of the Accused and the rest of the co-accused are vastly different.

- 8. The Defence also asserts that, contrary to the assertion of the Prosecutor, evidence will show that the Accused was not a high government executive like the other co-accused, and that between January and 14 July 1994, the Accused held the position of mayor of Mukingo for a period of 14 days in July 1994. In addition, the Defence submits that between January and 14 July 1994, there were two other individuals who occupied the Office of Mayor of Mukingo, one of whom was killed in April 1994.
- 9. The Defence makes a good faith representation to the Tribunal that the Accused plans to call three of the co-accused (Karemera, Ngirumpatse and Nzirorera) as witnesses in the Accused's defense, but in the absence of a severance and a separate trial for the Accused, they are not prepared to do so.

The Defence thus submits that for the above reason, and in the interests of justice, a severance and a separate trial must be granted and that it may be an abuse of discretion to deny the motion.

**PROSECUTOR'S RESPONSE**

- 10. In response to the Defence's allegations opposing the joinder, the Prosecutor submits, *inter alia*, that neither Rule 48 nor Rule 2(A) specifically requires the Prosecutor to make an independent showing that each accused acted together and in concert with every other accused as a basis for joinder, that the Defence misconceives the standard for joinder, and that there were a number of factual inaccuracies in the Defence's Motion which form no basis for arguments against the joinder in this present confirmed indictment.
- 11. The Prosecutor further asserts that Defence submission 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 the *prima facie* case. The Prosecutor further submits that the Defence's contention of lack of evidence supporting the charges can be remedied by reference to the supporting materials. In support of this, the Prosecutor cites the case of *Prosecutor v. Ntabakuze, Kabiligi*, Decision on Defence Motion Requesting an Order for Separate Trials Case No ICTR-95-1-T (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".
- 12. The Prosecutor contends that the legal criteria for the permissibility of joinder of accused under Rule 48 and 48bis is whether the persons, charges or indictments sought to be joined concern "crimes committed in the course of the same transaction." The Prosecutor argues that the issue of the "common strategy, scheme, or plan" is

satisfied because all of the accused are part of the necessary power structure in MRND for the implementation of the genocide. The Prosecutor also alleges that along with other Ministers, the Accused supervised the setting up and training of the *Interahamwe* in Mukingo, including the incitement and planning of massacre.

13. In oral submissions on 6 June 2000, the Prosecutor further argues that the Defence Motion is properly characterized as a preliminary motion, and submits that it is time-barred pursuant to Rule 72 and therefore, it is inadmissible.

**AFTER HAVING DELIBERATED,**

**On the Timeliness of the Filing of Defence Motion**

15. Rule 72(A) specifies that all preliminary motions must be filed within 30 days following disclosure by the Prosecutor to the Defence of all materials envisaged by Rule 66(A)(i). Rule 72(F) further provides that failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights unless the Trial Chamber grant relief from the waiver upon showing good cause.
16. The Trial Chamber notes that, as pointed out by the Prosecutor, the Defence application for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82(B) falls within the category of a preliminary motion, pursuant to Rule 72(B)(iii). The Trial Chamber takes notice that the prescribed time limit for the Defence Motion has expired, and the Defence has not sought relief for the waiver of this time limit, as provided in Rule 72(F).
17. However, the Trial Chamber also notes that the Defence may move for a separate trial pursuant to Rule 82(B) at any time that the information and evidence discloses that there are conflicts of interests between the Accused and one or more accused charged in the same indictment or joined with him for trial.
18. The Trial Chamber further notes that the Prosecutor has filed two separate joinder motions and a severance motion in various dates, that the withdrawal of one of the joinder motions was granted on 2 May 2000, and that a Decision denying the Prosecutor's Motion for joinder/severance was filed on 29 June 2000.
19. In light of the specific context of the case, the Trial Chamber finds that there is showing of good cause, and that it is in the interests of justice to grant relief for the waiver of this time limit.

The Trial Chamber thus *proprio motu* waives the prescribed time limit stipulated in Rule 72(A) and considers the Defence Motion.

**Applicable Laws**

20. Rule 82(A) states that in joint trials, each accused shall be accorded the same rights as if he were being tried separately.

Rule 82(B) further states that the Trial Chamber may order that persons accused jointly 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.

21. The Defence Motion is based on the general grounds that the Prosecutor has not sufficiently alleged that the acts of the Accused were part of the same transaction under Rules 48 and 2; that a joint trial will be prejudicial to the Accused, and that in the interests of justice, a separate trial for the Accused is justified under Rule 82(B).
22. Although the Defence challenges the propriety of joining the Accused in accordance to Rule 48, for this present Decision, the Trial Chamber points out that it is not dealing with the issue of whether the “same transaction” requirements of a joinder is satisfied or not under the present indictment.

Instead, the Trial Chamber notes that although the Accused is jointly indicted, the issue nevertheless remains as to whether, in the circumstances of this case, it is appropriate for the Accused to be tried with the rest of the co-accused based upon the allegations against him. This rationale is consistent with the rationale in the Decision in the *Prosecutor v. Ntabakuze, Kabiligi* cited by the Prosecutor. *Supra*.

23. Thus, pursuant to Rule 82(B), the Trial Chamber may order a separate trial for the Accused, either to avoid conflicts of interests that might cause serious prejudice to the Accused, or to protect the interests of justice.

**Conflict of Interests That Might Cause Serious Prejudice To an Accused**

24. The concept of “a conflict of interests that might cause serious prejudice to the accused” as indicated in Rule 82(B) is examined in several Decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY).

In the *Prosecutor v. Kovacevic et al.*, (Case No. IT-97-24, Decision on the Motion for Joinder of Accused and Concurrent Presentation of Evidence of 14 May 1998, para. 10(b)), the Prosecutor’s Motion for Joinder was not granted, on the grounds that, *inter alia*, a concurrent presentation of evidence of the proposed co-accused would cause conflicts of interests that might cause serious prejudice to the accused. The ICTY Trial Chamber in that case stated:

“The Trial Chamber considers that the course requested by the Prosecution may endanger the rights of all the accused to a fair trial, because it may lead to conflict of interests between the accused in conducting their defence. Such conflict would cause serious prejudice

to all the accused. Rule 82(B) empowers a Trial Chamber to order separate trials if 'it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused . . . .' Had the four accused been jointly indicted in this case, the Trial Chamber would have had to consider separating their trials."

25. In the *Prosecutor v. Brdanin et al*, (Decision on Motions by Momir Talic for a Separate trial and for Leave to File a Reply, at para. 21, IT-99-36, 9 March 2000), an ICTY Trial Chamber said "[s]eparate trials are required in order to avoid any conflict of interests which may cause serious prejudice and that only separate trials will ensure a proper administration of justice." In the same Decision, the Trial Chamber stated that "[t]here 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). Similarly, in *Prosecutor v. Simic*, (IT-95-9-PT, Decision on Motion for Separate Trial for Simo Zarick, 15 March 1999), an ICTY Trial Chamber found that no conflict of interests arose where one accused was a civilian and the other was a member of the military.
26. In the instant case, the Accused is charged with the same 11 counts as the other co-accused. According to the indictment, all the co-accused were either former Ministers, or top executives of the MRND. In the same indictment, the Prosecutor alleges that the Accused was the *bourgmestre* (mayor) and a leader of the local *Interhamwe* in Mukingo Commune.  
  
A close examination of the present confirmed indictment also shows that the Accused is the only one who was charged with same identical 29 supporting paragraphs for each of the 11 counts, and that the Accused name is mentioned in only 4 of the 29 paragraphs.
27. The Trial Chamber first points out that the fact that all the other co-accused were former Ministers and top executives of the MRND, does not mean that the alleged culpability of the Accused (who only had local authority in a Commune) would be lesser. However, based on the factual allegations in the existing indictment, the Trial Chamber notes that there are considerably fewer allegations against the Accused when compared to the rest of the accused.
28. Although the Trial Chamber is able to assess the evidence in a case involving conflicting defences in a fair and just manner, as pointed out by the ICTY Trial Chambers in *Kovacevic* and *Brdanin*, the concurrent presentation of evidence of all the accused in this case could be unfair to the Accused because most of the allegations in the indictment do not relate to him.

Further, noting the fact that there are considerably fewer allegations in the indictment against the Accused, the Trial Chamber finds that concurrent presentation of evidence of all the co-accused in the same trial may be prejudicial to the Accused, and that such conflicts of interests constitute extraordinary circumstances that warrant a separate trial for the Accused.

29. For the reasons discussed above, the Trial Chamber finds that the Defence has demonstrated that there is good cause to believe that there are conflicts of interests that might cause serious prejudice to the Accused to justify a separate trial for the Accused under Rule 82(B).

**Right To Be Tried Without Undue Delay**

30. The Chamber emphasizes 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. This fundamental protection is enshrined in the provisions of Articles 19(1) and 20(4)(c) of the Statute.

Similarly, in joint trials, it is in the interests of justice that each accused shall be accorded the same rights as if he were being tried separately as provided in Rule 82(A).

31. Thus, in relation to whether a separate trial is necessary to protect the interests of justice pursuant to Rules 82(A) and 82(B), the Trial Chamber now likes to examine the issues of the right of an accused to be tried without undue delay, and the right of an accused to be tried fairly.
32. Although joint trials are usually supported for reasons of judicial and prosecutorial economy, experience shows 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.
33. The same reasoning was applied in the case of the *Prosecutor v. Kunarac et al.*, (IT-96-23, Decision on Joint Trials of 9 February 2000, para. 10) where an ICTY Trial Chamber 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 not be in the interests of justice.”
34. For the instant case, the issue of delay is especially pertinent in view of the allegations by the Defence, that the Prosecutor has an inappropriate strategy of bootstrapping the Accused to other Ministers using the conspiracy law, against whom there may be more evidence, and that such strategy is unfair and unjust to the Accused.
35. In addition, because there are considerable fewer allegations against the Accused in the indictment, the amount of evidence the Prosecutor has may differ markedly in regard to this Accused. In light of this, the Trial Chamber therefore notes that concurrent presentation of evidence that is unrelated to the Accused may also deprive him of his right to be tried without undue delay.



36. Consequently, the Trial Chamber finds that trying the Accused jointly would probably result in a significantly longer trial which violates the right of the Accused to be tried without undue delay, and that the Accused would not be accorded the same rights as if he were being tried separately because of the prejudicial effect of concurrent presentation of unrelated evidence.

**Right to A Fair Trial**

37. In some national jurisdictions, an accused who wishes to call a co-accused to testify as a witness for his defence 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. 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.).

38. For the present case, as pointed out earlier, most of the allegations in the indictment dealt with the other co-accused and the indictment has markedly fewer allegations against this Accused on comparison.

The Trial Chamber notes that if the level of culpability of the Accused was indeed lower than the rest of the co-accused, evidence brought against the co-accused could have a negative spill-over effect and unfairly magnify the responsibilities and activities of the Accused.

Thus, the Trial Chamber finds it impossible to conclude that the Accused would not severely be prejudiced by evidence relevant only to the rest of the co-accused.

39. Furthermore, the Defence makes a good faith representation that the Accused is planning to call some of the co-accused (Karemera, Ngirumpatse and Nzirorera) as witnesses in the Accused's defense, and that in the absence of a separate trial for the Accused, they are not prepared to do so.

In consideration of this fact, since there is a possibility that these three co-accused may refuse to testify as witnesses in the Accused's defence if jointly tried, the Trial Chamber finds that a joint trial of the Accused could possibly violate the provision of Rule 82(A) as he would not be accorded the right to the best witnesses as would be the case if he was being tried separately.

40. Consequently, the Trial Chamber finds that a joint trial in this case would probably deprive the Accused of a fair and impartial trial because he would not be accorded the same rights as if he were being tried separately.

41. For the reasons discussed above, the Trial Chamber finds that there is good cause to believe that a joint trial for the Accused may deprive him of a fair trial and the right to

be tried without undue delay, and that therefore in the interests of justice, a separate trial for the Accused is justified under Rule 82(B).

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

**FINDS** that the Defence has demonstrated that there is good cause to believe that there are conflicts of interests that might cause serious prejudice to the Accused, and that in order to provide a fair and expeditious trial, a separate trial for the Accused is justified under Rule 82(B). In light of this finding and in the interests of justice, the Trial Chamber therefore, *proprio motu* orders the Prosecutor to file a separate indictment pertaining only to the Accused Juvénal Kajelijeli from the existing confirmed indictment.

**THEREFORE, THE TRIBUNAL**

**GRANTS**, pursuant to Rule 82(B) of the Rules, the Defence motion for a severance and a separate trial filed by the Accused Juvénal Kajelijeli;

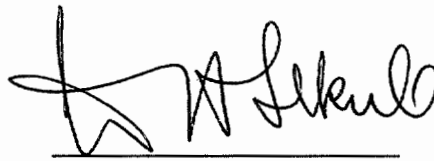
**ORDERS** the Prosecutor to file a separate indictment pertaining only to the Accused Juvénal Kajelijeli from the existing confirmed indictment bearing the Case Number ICTR-98-44, in English and in French, by 15 August 2000; and

**FURTHER ORDERS** the Registry to assign Case Number **ICTR-98-44A** to the aforementioned indictment pertaining only to the Accused Juvénal Kajelijeli.

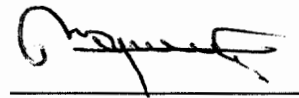
Arusha, 6 July 2000.



Laity Kama,  
Judge, Presiding



William H. Sekule  
Judge



Mehmet Güney  
Judge

(Seal of the Tribunal)

