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UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**

**TRIAL CHAMBER I**

**Original : English**

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

**Registry:** Ms Aminatta N'gum

**Decision date:** 12 July 2000

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**THE PROSECUTOR v. HASSAN NGEZE**

**Case No. ICTR-97-27-I**

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**DECISION ON THE DEFENCE REQUEST FOR SEPARATE TRIALS**

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**Office of the Prosecutor:**

M. Mohamed Othman  
M. William T. Egbe

**Counsel for the Accused:**

Ms Patricia Mongo  
M. 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 Erik Møse and Judge Asoka de Zoysa Gunawardana;

**CONSIDERING** the Defence motion for separate trials, filed on 29 April 2000;

**CONSIDERING** the reply of the Prosecution, filed on 22 June 2000;

**CONSIDERING** the Defence rejoinder to the Prosecution's reply, filed on 28 June 2000,

**NOTING** that the motion was considered on the basis of the written briefs of the Parties, pursuant to Rule 73 of the Rules of Procedure and Evidence ("the Rules").

**Submissions of the Parties**

1. The Defence argued that the joinder of the Nahimana and Ngeze trials violates Rule 48 of the Rules given that the co-accused have not been indicted together and that, at the beginning of the proceedings, the Prosecution did not intend to join them. The Prosecution responded that the condition of "same transaction", required for a joinder, has been met.
2. Counsel for the Defence argued that the joinder will violate the rights of the accused and referred to Rule 82 (A) of the Rules, pursuant to which, "In joint trials, each accused shall be accorded the same rights as if he were being tried separately". The Defence contended that there is a discrepancy between the facilities each team has been afforded, since Nahimana's Defence has had more time to prepare its case. The Defence also submitted that scheduling the trial to start on 5 June 2000 will not enable the Counsel to prepare his case properly. Furthermore, the Prosecution has not disclosed all the documents, as required by the Rules. According to the Prosecutor, this argument has no object since disclosure of witnesses statements, of the video and audio tapes and of issues of *Kangura* newspaper was made on 23 and 24 February 2000. The Defence, in response to the Prosecutor's reply, stated that the two accused are in different positions, since Nahimana's Defence received all the said documents well before these dates and that the Counsel has been preparing his case for the last four years. The Defence to Ngeze further contended that it should have one year to investigate.

3. The Defence to Ngeze further submitted that the strategies of defence of the co-accused being totally contradictory, a conflict of interest will arise which, pursuant to Rule 82 (B), is a ground for severance. The Prosecution considered that the Defence's request to adopt and conform all the motions filed by Nahimana, which was granted by the Trial Chamber on 12 May 2000, contradicts this submission. It further argued that it has indicated, as one of the grounds justifying the joinder, that several common witnesses will be called to testify and that common evidence will be produced. The Defence replied that there is no contradiction since the motion to adopt and conform only related to procedural issues and did not concern the merits of the case, as the trial has not started as yet.

## DELIBERATIONS

### *Alleged Violation of Rule 48 of the Rules*

4. The Trial Chamber notes that the Defence is out of time and that it is trying to revisit issues that has been dealt with in the joinder decision of 30 November 1999. In that decision, the Trial Chamber concluded that the condition of "same transaction" was met in the instant case. Moreover, no new facts have been addressed after the joinder was granted, which could lead the Chamber to review its decision. Nevertheless, since the Defence raised two issues that may well be new arguments, the Chamber will address them.
5. The Trial Chamber considers that Counsel has erroneously relied on Rule 48 of the Rules. The relevant provision here is Rule 48 *bis* which states: "The Prosecutor may join confirmed indictments of persons accused of the same or different crimes committed in the course of the same transaction, for purposes of a joint trial, with leave granted by a Trial Chamber pursuant to Rule 73". Rule 48 deals with the general conditions governing joinder of accused, as compared to Rule 48 *bis*, which is an application of this general principle when the condition of same transaction is met and when the accused have not been indicted together. As Trial Chamber II of the Tribunal held in its decision of 5 October 1999, in the case of *The Prosecutor v. Pauline Nyiramasuhuko and others*,



“Rule 48 *bis* is essentially a clarification of the existing Rule 48 which covers the issue of Joint Trial.”<sup>1</sup>

6. Thus, the Trial Chamber considers that even if Nahimana and Ngeze have not been indicted together, the joinder is explicitly justified on the basis of Rule 48 *bis*. The Chamber reiterates, here, its conclusion in the decision of 30 November 1999, on the Prosecutor’s motion for joinder in the Nahimana and Ngeze case, whereby the Chamber stated :

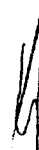
“In the instant case, the accused who are sought to be joined, have been charged with committing offences alleged against them in the course of the same transaction, but have pleaded to two separate indictments[...] The Prosecution is seeking to have a joint trial in relation to both the accused, which in the view of this court, is permissible under Rule 48 *bis*.”<sup>2</sup>

*Application of Rule 82 of the Rules.*

7. The Chamber notes that during the status conference held on 16 May 2000, it was agreed, among all the Parties, to postpone the commencement of the trial to the 18 September 2000. An agenda has been established according to which the Defence should receive the last documents to which it is entitled, by 27 August 2000. Consequently, the Chamber considers that the Defence has adequate time to prepare its case. The Trial Chamber therefore holds that there is no violation of Rule 82 (A).
8. Under Rule 82 (B) of the Rules, 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. In the present case, Defence Counsel has argued for a severance on the basis that there is a conflict of interest between the two accused. For severance to be granted, the Chamber must be satisfied that the conflict of interest is of such a nature as to cause serious prejudice to the

<sup>1</sup> See *The Prosecutor v. Pauline Nyiramasuhuko and others*, Cases No. ICTR-97-21-I, ICTR-97-29A and B-I, ICTR-96-15-T, ICTR-96-8-T, Decision of 5 October 1999 on the Prosecutor’s motion for joinder of trials, p. 11, para. 6.

<sup>2</sup> See *The Prosecutor v. Ferdinand Nahimana* (Case No. ICTR-96-11-I) and *The Prosecutor v. Hassan Ngeze* (Case No. ICTR-97-27-I), Decision of 30 November 1999 on the Prosecutor’s motion for joinder, para. 6, p. 4.



accused. The Defence has the burden of showing that a joint trial creates a conflict of interest between the accused.<sup>3</sup>

9. A determination as to the nature of the specific interests of the accused and a possible conflict of these interests is best made by a Chamber at the trial stage of the proceedings, when it has a fuller picture of the parties' strategies. In this instance, however, limited material is available to the Chamber. The Trial Chamber is of the view that a difference between the strategies of defence of co-accused does not necessarily lead to a conflict of interest. However, the Chamber considers that the impact of such differences has to be assessed on a case by case basis.
10. It follows from paragraphs 30 and 31 of the motion of the Defence that the present request for severance is based on submissions of Ferdinand Nahimana's Counsel during the hearing of 25 November 1999 concerning the Prosecutor's request for joinder. According to the Defence, they imply that Nahimana admits the participation and involvement of the media in the Rwandan genocide. This submission and the possibility of witnesses for Nahimana testifying to this effect would, according to the Defence, risk incriminating the media in 1994 and notably, *Kangura* newspaper.
11. The Chamber has perused the transcripts of the said hearing and does not agree with the Defence that the said submissions reveal the strategy of Nahimana's defence. These submissions were relevant to a Prosecution motion for joinder, and represent arguments, often rhetorical, to have the Chamber dismiss the motion. They do not, in the opinion of the Chamber, represent an elucidation on likely admissions. Nor do they suffice to show that there exists a conflict of interest between the accused and co-accused.
12. Defence also quoted a decision of the ICTY in the case, *The Prosecutor v. Milan Kovacevic*, whereby the Tribunal dismissed the Prosecutor's motion for joinder of accused, on the ground that a conflict of interest will arise in the course of the trial.<sup>4</sup> The Chamber notes that that case

<sup>3</sup> See *The Prosecutor v. Bagambiki et al* (Case No. ICTR-97-36), Decision of 30 September 1998 on the Defence Motion for the Separation of Crimes and Trials, p. 6.

<sup>4</sup> See *The Prosecutor v. Milan Kovacevic and others*, (Case No. IT-97-24), Decision of 14 May 2000, p. 5, para. 10

is distinguishable from the facts of the present case. In the Kovacevic case, there was no conspiracy charged. Only one of the accused, that is Kovacevic, faced the charges of genocide, and superior responsibility over his co-accused. In that case, there was no allegation of the existence of a common plan and a common pattern of conduct of the co-accused, factors which were relied upon by this Chamber, in its above-mentioned joinder decision, to try Ngeze and Nahimana together as part of a common enterprise.

13. Accordingly, the Trial Chamber considers that no showing of a conflict of interest has been made under Rule 82 (B). Therefore, the Chamber finds that it is not necessary to order separate trials of the accused and co-accused.



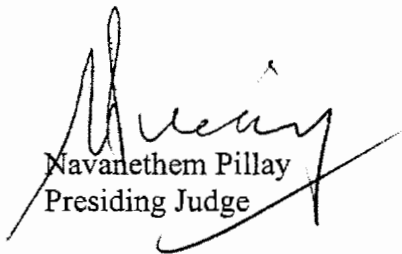
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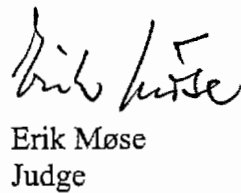
**FOR ALL THE ABOVE REASONS**

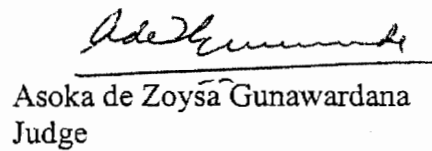
**THE TRIAL CHAMBER**

**DENIES** the Defence's request for separate trial.

Arusha, 12 July 2000

  
Navanethem Pillay  
Presiding Judge

  
Erik Møse  
Judge

  
Asoka de Zoysa Gunawardana  
Judge



Seal of the Tribunal