International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER I

Original: English

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

Registry: Ms Aminatta N'gum

Date of Decision: 22 February 2001

THE PROSECUTOR
v.
ELIZAPHAN NTAKIRUTIMANA
GERARD NTAKIRUTIMANA
CHARLES SIKUBWABO

ICTR-96-10-I
ICTR 96-17-T

DECISION ON THE PROSECUTOR'S MOTION TO JOIN THE INDICTMENTS ICTR 96-10-I and ICTR 96-17-T

Office of the Prosecutor:
Ms Carla Del Ponte
Mr Charles Adeogun-Phillips

Counsel for the Elizaphan Ntakirutimana:
Mr Ramsey Clark

Counsel for the Gerard Ntakirutimana:
Mr Edward Medvene

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (hereinafter the "Tribunal")

SITTING as Trial Chamber I, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Navanethem Pillay and Judge Erik MØse;

CONSIDERING the indictment, ICTR-96-10-I, as amended on 27 March 2000 and on 6 October 2000, in the case of Prosecutor v. Elizaphan Ntakirutimana, Gerard Ntakirutimana, and Charles Sikubwabo (hereinafter "the Mugonero indictment");

CONSIDERING the indictment, ICTR-96-17-T, as amended on 7 July 1998, in the case of Prosecutor v. Elizaphan Ntakirutimana, and Gerard Ntakirutimana (hereinafter "the Bisesero indictment");

CONSIDERING the Prosecution's oral motion, argued on 2 November 2000, to join the indictments ICTR-96-10-I and ICTR-96-17-T, pursuant to Rule 48*bis* of the Rules of Procedure and Evidence (hereinafter "the Rules");

CONSIDERING the brief in opposition filed jointly by the Defence for Elizaphan Ntakirutimana and Gerard Ntakirutimana, on 8 December 2000;

NOTING that counsel did not appear for Charles Sikubwabo, who is still at large;

THE Trial Chamber hereby decides the motion.

THE FACTS

1. The Mugonero indictment, ICTR-96-10-I, charges Elizaphan Ntakirutimana, Gerard Ntakirutimana, and Charles Sikubwabo for events that occurred at the Mugonero Church Complex, Gishyita Commune, Kibuye, on or about 16 April 1994. Elizaphan Ntakirutimana and Gerard Ntakirutimana are also charged jointly in the Bisesero indictment, ICTR-96-17-T, for events that occurred in the area of Bisesero, Kibuye, in April to June 1994. Charles Sikubwabo, who is still at large, is charged, along with others, in another separate indictment, ICTR-95-1-I, for events that occurred in the area of Bisesero, and at Mubuga Church, Kibuye, in April to June 1994.

THE MOTION

2. On 2 November 2000 the Prosecution orally requested leave to join the Mugonero and Bisesero indictments, pursuant to Rule 48*bis*. The Prosecution submitted that the Motion is well founded under the common law 'same transaction' test and civil law test of "connexité". According to the Prosecution, joinder of the two indictments is well founded since the offences in both sites were committed in furtherance of a common scheme or plan and, therefore, a common transaction in relation to the alleged massacres in Mugonero and Bisesero can be inferred. The joinder would enable the Prosecution to

lead the whole of the evidence, available against the accused, in regard to their culpability in respect of the alleged genocide.

3. The Defence asked the Trial Chamber to deny the motion.

DELIBERATIONS

Preliminary Matters

The application of Rule 48bis in light of Rule 6(C)

4. The Defence submitted that the application of Rule 48*bis* to join the Mugonero and Bisesero indictments is prevented under Rule 6(C), since such a joinder would prejudice the rights of the accused. Rule 6(C) states, "An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case."

5. Rule 48*bis*, upon which the Prosecution relied in the present motion, was adopted during the Sixth Plenary Session, held from 31 May to 4 June 1999. Cases ICTR 96-10-I and ICTR-96-17-T, were pending cases at that time. Therefore, the Trial Chamber must consider whether the application of Rule 48*bis* prejudices the rights of the accused at the time when the motion was filed.

6. The Defence submitted that an application of the Rule 48*bis* would prejudice the accused because, without it, the Prosecution has no other basis on which to seek joinder. The Chamber recalls that Rule 48*bis* is merely a clarification of Rule 48, see *Prosecutor v Natagerura and Prosecutor v Bagambiki, Imanishimwe and Munyakazi,* (Decision on Prosecutor's Motion for Joinder, dated 11 October 1999, at para 27), wherein Trial Chamber III stated "[a]t the 1999 Plenary Session, the Tribunal added Rule 48*bis* to the Rules. This was merely a clarification of Rule 48." The Chamber is of the view that Rule 48*bis* did not create a new means by which to seek joinder. Therefore, no prejudice would be caused to the accused on the ground that the Prosecution would have no other basis on which to seek joinder. Nevertheless the Chamber will discuss the issue of prejudice on the other grounds raised by the Defence. In order to establish prejudice under Rule 6(C), the Defence must demonstrate a specific prejudice to the rights of the accused, at the time when the motion was filed, due to the application of Rule 48*bis*. Since the application for joinder of the two trials was made subsequent to the adoption of Rule 48*bis*, the Rules relevant at the time of the application would apply.

7. The Defence submitted that much of the evidence that will be used by the Prosecution in support of the Bisesero indictment will not be relevant to a determination of guilt or innocence under the Mugonero indictment. Further that the Bisesero indictment contains a much broader conspiracy than the Mugonero indictment. According to the Defence, these factors may adversely prejudice the evidence in respect of the Mugonero indictment. In this regard, the Chamber notes that the procedure followed by the ICTR is not a jury trial system and that the safeguards from evidential

prejudice employed in jury trials, are not necessarily required in cases where professional judges are adjudicating the facts. In *Prosecutor v. Delalic, et al* IT-96-1-T (Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998) the Trial Chamber stated that:

> "(…) the trials before the International Tribunal are conducted before professional judges, who by virtue of their training and experience are able to consider each piece of evidence which has been admitted and determine its appropriate weight."

The Chamber agrees with the said approach articulated by the Chamber in *Prosecutor v. Delalic, et al,* and does not find that the rights of the accused will be prejudiced for the reasons stated above, if the two indictments are tried together.

8. The Defence further submitted that proceedings on both indictments in a single trial would force the accused to offer two separate defences and, therefore, prejudices the ability of the accused to offer a coherent defence. The Chamber does not accept that, having to defend allegations relating to Mugonero and Bisesero in one trial would affect the ability of the accused to offer a coherent Defence. The strength of the defence on each indictment will depend on the probity of the evidence.

9. For the above reasons, the Trial Chamber is of the view that the accused will not suffer prejudice due to the application of Rule 48*bis* in the present motion. Therefore, Rule 48*bis* may be applied to the present case.

Law of the case, estoppel and/or res judicata

10. The Defence further submitted that the Chamber has already ruled that the acts allegedly committed at the Mugonero Complex and at Bisesero should *not* be treated as being committed as part of the same transaction. The Prosecution has not offered any new justifications for the proposed joinder. Thus, according to the Defence, the Chamber is barred by the 'law of the case', by estoppel and/or by *res judicata,* from ruling on this matter again.

11. The Chamber notes that the determination of 'same transaction', for the purposes of joinder, is a factual issue. As such, if a Chamber has already determined the factual issue, even if such determination was in pursuit of a different application or a different Rule, then the Chamber will not revisit the issue again, subject to fresh grounds being argued. Therefore, the question for the Chamber in the instant case, is whether the matter has already been determined.

12. The Defence contended that the matter was determined in 1997, by Trial Chamber I, in *Prosecutor v. Kayishema, et al,* in its Decision on the Motion of the Prosecutor to Sever, and to Join in a Superseding Indictment and to Amend the Superseding Indictment, dated 27 March 1997. In that instance, the Prosecution had requested joinder of accused; namely, Gerard Ntakirutimana (in relation to the Mugonero and Bisesero indictments) with Clement Kayishema and Obed Ruzindana, on the ground that all three accused had committed acts in the course of the same transaction, in Kibuye Prefecture.

Trial Chamber I in that case rejected the application on the basis that the same transaction test had not been satisfied.[1]

13. The Chamber is of the view that, the decision of 27 March 1997 is not dispositive of the factual issue currently before this Chamber. That decision addressed the issue of same transaction in the context of Kibuye generally, and determined whether Gerard Ntakirutimana, Clement Kayishema and Obed Ruzindana acted in concert, or participated in a common scheme in Kibuye. However, in the present case the issue is quite different; namely, whether the alleged acts of Gerard and Elizaphan Ntakirutimana at the Mugonero Complex were part of the same transaction as their alleged acts in Bisesero.

14. The Defence further contended that the issue has already been determined by the Chamber in the present case, in its decision, dated 6 October 2000, on the Prosecutor's Request for Leave to File an Amended Indictment. In that instance, the Prosecution had requested amendments to the Mugonero indictment, *inter alia*, to consolidate the factual allegations and incorporate the charges contained in the Bisesero indictment and in the indictment ICTR-95-1-I, into the Mugonero indictment. In its response, the Defence submitted that despite the motion being moved under the Rules governing amendment of an indictment, the Prosecution's request was, in fact, a request for joinder. Consequently, the Defence added, the Prosecution must show that the acts to be joined were committed in the course of the same transaction, which it has failed to do. In its decision of 6 October 2000, the Chamber denied the Prosecution's request to consolidate the said factual allegations and charges in the three indictments, into the Mugonero indictment. The Defence now argues that, in its decision of 6 October 2000, the Chamber implicitly ruled that the alleged acts of Gerard and Elizaphan Ntakirutimana at Mugonero and in Bisesero, were not committed as part of the same transaction.

15. The Chamber does not accept the above submission by the Defence. In its motion for leave to file an amended indictment, dated 7 April 2000, the Prosecution requested, *inter alia*, to consolidate the factual allegations and incorporate the charges contained in *two* other confirmed indictments into the Mugonero indictment. In support of its motion to amend, the Prosecution stated that the amendments were necessary to reflect the totality of the accused's conduct, because the evidence implicates the accused, together with others, in a broad conspiracy at a national level. At no time did the Prosecution make the argument that the said acts were committed as part of the same transaction. Furthermore, the said motion to amend requested consolidation of matters from a third indictment, ICTR-95-1-I, containing specific acts and a separate conspiracy, that are not part of the present motion for joinder. The Chamber dismissed the motion to amend having considered *all* the matters raised in the Prosecution's motion and in the Defence's response thereto. Nowhere in its decision of 6 October 2000, did the Chamber hold that the alleged acts of the accused, pursuant to the Mugonero and Bisesero indictments, were not committed in furtherance of the same transaction.

16. Therefore, the Chamber is of the view that the Chamber is bound to consider the question whether the acts alleged to have been committed by the accused in Mugonero and Bisesero were part of the same transaction.

Legal basis for joinder

The rules and jurisprudence

17. According to Rule 48*bis*, The Prosecutor may join confirmed indictments of persons accused of the same or different crimes committed in the course of the same transaction, for purpose of a joint trial, with leave granted by a Trial Chamber, pursuant to Rule 73. 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." In *Prosecutor v. Kayishema, Ntakirutimana and Ruzindana*, Case 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), 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.

18. In *Prosecutor v. Ntabakuze, Kabiligi*, Case ICTR-97-34-I, at p. 2 (Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998), Trial Chamber II considered the issue of joinder under Rule 48 and quoted the above passage from the decision in *Kayishema*. The Trial Chamber 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.*

Trial Chamber II further stated (at p. 2) that "these guidelines are not intended to be a rigid insurmountable three prong test." The above mentioned guidelines have been followed by the Tribunal in several decisions on joinder.

Same transaction

19. In the present case, the Prosecution submitted that many of those who survived the massacre at the Mugonero Complex in April 1994 (i.e. the acts charged in the Mugonero indictment) fled to an area known as Bisesero where, throughout April to June 1994, they were pursued and again attacked by the accused (i.e. the acts charged in the Bisesero indictment). According to the Prosecution, the accused were instrumental in the plan to kill the Tutsi at the Mugonero Complex, which plan continued in Bisesero.

20. The Defence argued that the Prosecution has failed to show that the accused acted in the course of the same transaction. The Defence pointed out that the attack at Mugonero took place on a single day in a specific place, whereas the attacks in Bisesero were conducted over a long period, in a large area. Further that only a small percentage of the survivors from the Mugonero attack fled to Bisesero and there is no allegation that, in Bisesero, the accused targeted those survivors in particular rather than the Tutsi as a whole. According to the Defence, the attacks in Bisesero involved defendants who were not involved in the Mugonero attack; the Mugonero attack allegedly being conducted by Church officials, compared to political figures in Bisesero. The Defence noted that the Prosecution has charged Dr Ntakirutimana with superior responsibility in relation to the attack at Mugonero but not in relation to those at Bisesero. Thus, according to the Defence, there was no common scheme, strategy or plan to connect the alleged acts at Mugonero and Bisesero.

21. The Chamber is of the view that the acts of the accused may form part of the same transaction notwithstanding that they were carried out in different areas and over different periods, providing that there is a sufficient nexus between the acts committed in the two areas. In the instant case, the Prosecution's allegation that the accused formed a strategy or plan to kill the Tutsi who had gathered at the Mugonero Complex up to 16 April 1994 and, in furtherance of this strategy or plan, pursued some of the survivors to Bisesero, is reflected in the indictments. The concise statement of facts in the Mugonero indictment details the allegations concerning the attack at the Mugonero Complex. The said indictment alleges specifically "[d]uring the months that followed the attack on the Complex, Elizaphan Ntakirutimana, Gerard Ntakirutimana & Charles Sikubwabo, searched for an [sic] attacked Tutsi survivors and others . . . ." Similarly, the Bisesero indictment details the allegations concerning the events at the Mugonero Complex and goes on to allege "[m]any of those who survived the massacre at Mugonero Complex fled to the surrounding areas, one of which was the area known as Bisesero." The Bisesero indictment then goes on to detail the allegations in the area of Bisesero. Thus, under each separate indictment, the Prosecution has alleged in relation to the accused that the acts committed at the Mugonero Complex were closely linked to the acts that followed in the area of Bisesero.

22. The Prosecution submitted that the evidence supports the allegations already stated in the indictments. In this regard the Prosecution asserted that its witnesses would testify that the Ntakirutimanas actively pursued refugees from the Mugonero Complex to a church in Bisesero where they had fled. According to the Prosecution, 16 of the 18 witnesses are common to both indictments, being survivors of the Mugonero Complex massacre who had fled to a church in Bisesero.

23. The Defence argued that the acts committed at Mugonero and Bisesero varied with regard to the victims (only a percentage of the survivors from the Mugonero massacre fled to Bisesero and, in Bisesero, the accused allegedly attacked refugees who had not fled from Mugonero); the fact that Dr Ntakirutimana is charged as a superior at Mugonero but not at Bisesero; and, the fact that a larger number of defendants, with political rather Church backgrounds, were involved in Bisesero. The Chamber notes that to satisfy the requirement of 'same transaction' for the purposes of joinder, the Prosecution must show that there exists a *common* scheme, strategy or plan. There is no requirement that the scheme, strategy or plan be identical. A strategy or plan may change, or be adapted, but so long as it remains common in nature and purpose it will satisfy the requirements of Rule 48*bis*. Considering the circumstances of the events in Kibuye in 1994, variations in strategy or plan between crime sites were not unlikely, particularly when the acts are alleged to have occurred in a large area and over a long period, such as those in Bisesero. It is appropriate for the Chamber to apply a definition of same transaction that is flexible enough to suit the reality of the events, and which does not serve to artificially separate evidence that should properly be considered together. Therefore, the Chamber finds that the variations, cited by the Defence, between the alleged crimes committed at the Mugonero Complex and at Bisesero, do not negate the assertion that they were committed as part of the same transaction.

24. Having considered the allegations outlined in the two indictments, along with the submissions of the parties, the Trial Chamber is of the view that the acts, as alleged under the Mugonero and Bisesero indictments, were part of a common scheme, strategy or plan, committed in the course of the same transaction.

The interests of justice

25. The decision whether to grant joinder lies within the discretion of the Tribunal. In the exercise of its discretion, the Chamber has weighed the overall interests of justice with the rights of the accused.

26. The Defence argued that joinder would result in prejudice to the accused and is unfair since the Ntakirutimanas are Church officials, rather than those who are charged or have already been found to have committed genocide in the area of Bisesero, who were political figures. The Defence submitted that joint trials would thus lead to prejudice of the evidence in the trial under the Mugonero indictment. The Chamber is not convinced that the accused would suffer prejudice for this reason. As stated above, the ICTR's procedure, which utilises professional Judges rather than a lay jury, is able to address any potential evidential prejudice during its determination of evidence.

27. The Chamber is of the view that in the present case, a joinder of the Mugonero and Bisesero indictments would enable the parties to make a more consistent and detailed presentation of evidence. It would also allow for better protection for the witnesses by limiting their travel to the Tribunal. This is particularly true since 16 out of a total of 18 Prosecution witnesses, will be common.

28. The Trial Chamber is of the opinion that joinder would not infringe the right of the accused to trial 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 request for leave to join the indictments ICTR-96-10-I and ICTR 96-17-T.

Done this 22nd day of February 2001

Asoka de Zoysa Gunawardana	Erik Møse	Navanethem Pillay
Presiding Judge	Judge	Judge

[1] In doing so, the Chamber pointed out that, "of the five massacre sites at issue in the motion, only one, in reality, that of Bisesero, is allegedly common to all three accused for massacres allegedly committed over a period of four months, from April to July 1994; this does not demonstrate in any way that during this entire period, the accused acted in concert, or even participated in a common scheme."