



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 29 June 2001

THE PROSECUTOR
V.
Joseph NZIRORERA et al
Case No. ICTR-98-44-T

2001 JUN 29 P 12:31

DECISION ON JOSEPH NZIRORERA'S MOTION REQUESTING *INTER ALIA*
THE DELETION OF REFERENCES TO HIM IN
THE INDICTMENT AGAINST JUVENAL KAJELIJELI

The Office of the Prosecutor:

Silvana Arbia
Japhet Daniel Mono
Jonathan Moses
Adesola Adebeyejo
Manuel Bouwknecht

Counsel for Nzirorera:

Andrew McCartan
Martin Bauwens

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
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NAME / NOM: JOHN P. Niyeyea	
SIGNATURE: [Signature]	DATE: 29.06.01

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29 06 2001

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Winston C. Maqutu and Judge Arlette Ramarosan (the "Chamber");

BEING SEIZED of

- i. the "Extremely Urgent Motion for the Accused, Joseph Nzirorera" filed on 16 March 2001;
- ii. the "Replacement Extremely Urgent Motion for the Accused Joseph Nzirorera lodged on 16 March 2001," (the "Motion") filed on 20 March 2001;
- iii. the "Prosecutor's Response to the Urgent Motion filed by the Accused, Nzirorera on 20 March 2001" (the "Prosecutor's Reply") filed on 26 March 2001;
- iv. the "Defendant Kajelijeli's Brief in Response to the Replacement Extremely Urgent Motion for Joseph Nzirorera Dated 20 March 2001," ("Kajelijeli's Brief") filed on 3 April 2001;
- v. the "Defense Response to Prosecutor's Response to Urgent Motion Filed for Joseph Nzirorera," (the "Defense Response to the Prosecutor's Reply") filed on 4 April 2001.

CONSIDERING that the Defense requests to replace the Motion filed on 16 March 2001 with the instant Motion because it clarifies the terms of the former Motion, the Chamber grants the Defense request and only considers the instant Motion;

CONSIDERING the Chamber's Decision, which denied the severance of Nzirorera from other co-Accused, made on 12 July 2000, "Decision on the Defense Motion in Opposition to Joinder and Motion for Severance and Separate Trial filed by the Accused Joseph Nzirorera," of 12 July 2000 (the "Decision of 12 July 2000"); and its Decision, which granted the severance of Kajelijeli from Nzirorera and other co-Accused, made on 6 July 2000, "Decision on the Defense Motion in Opposition to Joinder and Motion for Severance and Separate Trial filed by the Accused Juvénal Kajelijeli," of 6 July 2000 (the "Decision of 6 July 2000"), which resulted in the Prosecutor finally filing such Indictment on 25 January 2001 ("Kajelijeli's Indictment"), on the basis of which the trial against Kajelijeli commenced on 13 March 2001;

CONSIDERING the Statute of the Tribunal (the "Statute"), particularly Articles 20(3) and 20(4) thereof and, the Rules of Procedure and Evidence (the "Rules");

CONSIDERING that the Motion is decided solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73 of the Rules;

SUBMISSIONS OF THE PARTIES

Defense Submissions

1. The Defense, submits that frequent references are made to Nzirorera in the Case of Kajelijeli, in particular, the various Indictments against Kajelijeli, Prosecution Witnesses against Kajelijeli, the Pre-trial Brief and the Prosecutor's Opening Statement at the trial of Kajelijeli. The Defense submits that these references are sufficiently serious to amount *de facto* to a trial against Nzirorera in his absence without being given an opportunity to defend

himself. The Defense argues that on the basis of its submissions, such trial *in absentia* is contrary to his fundamental rights provided for under Articles 20(3) and 20(4) of the Statute.

2. The Defense requests the Chamber to order the following on its behalf:
 - i. that the Prosecutor delete all references to Nzirorera in the Indictment against Kajelijeli; alternatively
 - ii. that the Chamber adjourn and stay the ongoing trial against Kajelijeli until the conclusion of the trial of *inter alia* Nzirorera; or alternatively
 - iii. that as a matter of urgent relief, the trial of Nzirorera be joined with the ongoing trial of Kajelijeli; or alternatively that Counsel for Nzirorera be allowed (a) to hold a watching brief in the ongoing trial of Kajelijeli; (b) to cross examine Prosecution witnesses in the ongoing trial of Kajelijeli; (c) and to have defense witnesses examined on behalf of Nzirorera in the said trial.

3. In its Response, the Defense recalls the Prosecutor's Opening delivered on 13 March 2001, at the trial of Kajelijeli where she stated that she will lead evidence against Nzirorera to prove that he is guilty of directing, planning, ordering and carrying out crimes under the Statute in Mukingo commune with Kajelijeli (*See* pages 17, 18 and 19 of the Transcripts of the hearing of 13 March 2001). The Defense submits that the Prosecutor's continued linkage of Nzirorera with Kajelijeli is a violation of the Orders made on 6 July 2000 for severance of Kajelijeli from his trial.

4. The Defense further submits that, among other reasons, severance of Kajelijeli from the other Accused he was jointly indicted with, including Bizimana, Karemera, Nzabonimana, Rwamakuba, Ngirumpatse and Nzirorera, was granted because Kajelijeli intended to call Nzirorera to testify on his behalf. The Defense argues that by making constant reference to Nzirorera, the Prosecutor attempts to discredit him as a credible or reliable Defense witness.

5. Furthermore, the Defense recalls that at the trial of Kajelijeli on 15 March 2001, the Prosecutor admitted that, "[w]e don't care if you [the Court] remove his [Nzirorera's] name" from the documents in dispute or the Indictment." This, the Defense interprets as being consent on the part of the Prosecutor to the deletion of all references to Nzirorera in the Indictment against Kajelijeli. The Defense therefore, emphasizes that this relief should be granted.

6. The Defense finally submits that if the remedies sought are not granted him, in violation of Nzirorera right to be presumed innocent until proven guilty, he will be forced to advance the plea of Double Jeopardy.

Kajelijeli's Brief

7. In its Brief, the Defense for Kajelijeli submits that, the Chamber in its Decision of 6 July 2000 conclusively decided to try Kajelijeli alone and that therefore, the Defense for Nzirorera's request must fail as being highly unprecedented and prejudicial to Kajelijeli.

8. The Defense for Kajelijeli submits that the only relief to be considered fair is the one requesting the Chamber to order the Prosecutor to strike out all references to Nzirorera from the Indictment against Kajelijeli. The Defense joins the request made by the Defense for Nzirorera in this respect and requests that this relief is granted.

Prosecutor's Submissions

9. The Prosecutor points out in response that crimes such as genocide, conspiracy and crimes against humanity are crimes that can be committed only with planning and often with assistance. The Prosecutor submits that the issue of joinder and severance with regard to Nzirorera and Kajelijeli was concluded.
10. The Prosecutor submits that the plea of double jeopardy cannot lie because Nzirorera is not on trial for crimes in the Indictment against Kajelijeli.
11. The Prosecutor therefore submits that the Motion is misconceived and should be dismissed because Nzirorera is not on trial.

AFTER HAVING DELIBERATED

As regards the request that the Prosecutor delete all references to Nzirorera in Kajelijeli's Indictment

12. The Chamber notes that the Defense request to have all references to Nzirorera deleted from Kajelijeli's Indictment is echoed by the Defense for Kajelijeli. The Chamber also notes that, although the Defense submits that the Prosecutor did not object to the said request at the trial of Kajelijeli on 15 March 2001, the Prosecutor objects to it in her response to the Motion.
13. In the instant case, the Défense draws the attention of the Chamber to the allegations made at paras. 4.6, 4.61, 4.16, 4.16.1, 4.18 and 5.2 in Kajelijeli's Indictment, according to which Nzirorera was a principle actor in the formation, arming, training and direction of the *Mouvement Republicain National pour la Democratique et le Developpement* (the "MRND") and the *Interahamwe*, which allegation is is similarly made in the Indictment against Nzirorera. The Defense submits that if the allegations of Kajelijeli's having provided the *Interahamwe* with arms and uniforms are proven, then it follows that Nzirorera is also guilty of having provided arms to the *Interahamwe* without his having been given any opportunity to challenge that allegation nor to put his own case before the Chamber.
14. The Chamber recalls its unanimous oral Decision rendered at the trial of Kajelijeli on 15 March 2001, which denied the Defense for Kajelijeli's request to strike out the name of Joseph Nzirorera on each of the documents tendered as Prosecution exhibits, stating that, "[t]he Judges...are professional jurists, capable of clearly distinguishing between Accused at trials, and also to make independent findings."
15. The Chamber, upon analyzing the paragraphs which make reference to Nzirorera in Kajelijeli's Indictment, finds that their purpose is to identify Kajelijeli's co-conspirators so that the Defense for Kajelijeli will be in a better position to mount its defense. At the trial of Kajelijeli, Nzirorera's guilt or innocence will not be at issue, because he is not being tried with Kajelijeli. In any case, at the trial of Nzirorera, if similar allegations as those made against Kajelijeli are made against him, the Prosecutor must bring evidence to prove those allegations beyond a reasonable doubt, and a specific finding of guilt or innocence of Nzirorera will be made by the Chamber.

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16. Therefore, the Chamber considers that references made to Nzirorera in Kajelijeli's Indictment should not be deleted, as these references are only made to enable the Defense for Kajelijeli to prepare its defense by mentioning at least one of Nzirorera's co-conspirators. The Chamber, therefore, considers that the request is not warranted.

As Regards the Defense request that the Chamber adjourn and stay the ongoing trial against Kajelijeli until the conclusion of the trial of inter alia Nzirorera or alternatively, that as a matter of urgent relief, the Chamber join the trial of Nzirorera with the ongoing trial of Kajelijeli

17. In opposition to these requests, the Defense for Kajelijeli as well as the Prosecutor recall the Chamber's Decision of 6 July 2000 and the reasons for granting the severance of Kajelijeli, as well as its Decision of 12 July 2000, which denied the severance of Nzirorera from his co-Accused.

18. Indeed, the Chamber considers that the Defense requests for a stay or adjournment of the trial of Kajelijeli until the conclusion of the trial of *inter alia* Nzirorera or alternatively, that as a matter of urgent relief, the Chamber join the trial of Nzirorera with the ongoing trial of Kajelijeli, are disguised requests for review or appeal of its Decisions of 6 and 12 July 2000.

19. As regards review of the said Decisions, the Chamber recalls the Appeal Chamber Decision of 31 March 2000 in the Case of *Barayagwiza v. the Prosecutor*, at para. 49, it clearly stated that, "[o]nly a final judgment may be reviewed pursuant to Article 25 of the Statute and to Rule 120 of the Rules," and that, "a final judgment in the sense of the above-mentioned articles is one which terminates the proceedings." Moreover, as regards appeals against the said Decisions, the Chamber recalls the provisions of Rule 72(D) of the Rules that stipulates that, "Decisions on Preliminary Motions," such as the said Decisions of 6 and 12 July 2000, "[a]re without interlocutory appeal."

20. In any case, the Chamber draws the attention of the Defense to the provisions of Articles 19(1) and 20(4)(c) of the Statute, which guarantees a fair and expeditious trial and the rights of Nzirorera to a trial without undue delay. On that basis, the Chamber considers that ordering the adjournment or staying the proceedings against Kajelijeli or alternatively joining the trial of Nzirorera with that of Kajelijeli would unduly delay Kajelijeli's trial, against the interests of justice and the rights of Kajelijeli, particularly as his trial commenced on 13 March 2001, and the trial against Nzirorera has not yet commenced.

As regards the Defense for Nzirorera's request to be allowed to hold a watching brief, to cross examine Prosecution witnesses, and to have defense witnesses examined on behalf of Nzirorera in the ongoing trial of Kajelijeli

21. The Chamber notes that both the Prosecutor and the Defense for Kajelijeli object to this request for being unprecedented. Defense for Kajelijeli specifically states that if Prosecution witnesses in the trial of Kajelijeli have information pertaining to Nzirorera, the Prosecutor will call them at his trial. The Defense for Kajelijeli submits that the intention of the Defense for Nzirorera's request is, "to shift guilt, memory, testimony to his co-Accused," whereas the Defense for Kajelijeli will use the opportunity of interviewing and cross-examining witnesses, "to test the witnesses' memory, credibility and certainty." The Defense for Kajelijeli submits that the two Defenses have two very separate and conflicting agendas.

22. The Chamber agrees with the submissions of the Defense for Kajelijeli and recalls its Decision of 6 July 2000 on joinder and separate trials in the case of Kajelijeli and considers that granting the request made by the Defense of Nzirorera would be contrary to the interests of justice. The Chamber therefore denies the relief sought by the Defense.

As Regards the Defense intention of pleading Double Jeopardy

23. The Defense submits that if the Chamber does not grant the relief it seeks, it intends to plead Double Jeopardy because Nzirorera's right to be presumed innocent until proven guilty will have been violated. The Prosecutor responds by submitting that the only person on trial is Kajelijeli and therefore, because Nzirorera is not on trial he will be presumed innocent, pursuant to Article 20(3) of the Statute, until a verdict is given to the contrary when he is on trial.

24. The Chamber recalls the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") Trial Chamber II "Decision on the Defense Preliminary Motion on the Form of the Indictment" in the Case of *Prosecutor v. Krnojelac* of 24 February 1999, which defined the principle of Double Jeopardy in very general terms to be, "[t]hat a person should not be prosecuted for an offence where he has already been prosecuted and either convicted or acquitted of a different offence arising out the same or substantially the same facts. This principle has found expression in the Constitution of the United States of America."

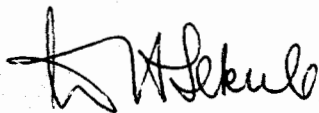
25. In the instant case, if Nzirorera were to plead Double Jeopardy successfully, he would need to have been jointly tried with Kajelijeli and either convicted or acquitted and then, if the Tribunal tries him a second time with the Butare group for the same charges as he was tried in the trial with Kajelijeli, then his plea of Double Jeopardy may be entertained. In the instant case, Nzirorera is not on trial with Kajelijeli and when he is to be tried, he will be on trial for the first time for charges as enumerated in the Indictment against him.

26. For the reasons stated above, the Double Jeopardy Principle does not apply to Nzirorera in the circumstances of the case.

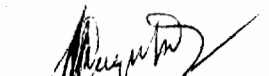
FOR THE ABOVE REASONS, THE TRIBUNAL:

DENIES the Defense Motion on all grounds.


Arusha, 29 June 2001.



William H. Sekule
Judge, Presiding



Winston C. Maqutu
Judge



Arlette Ramarason
Judge

