ICTR-98-41-T
9-9-03-2003
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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

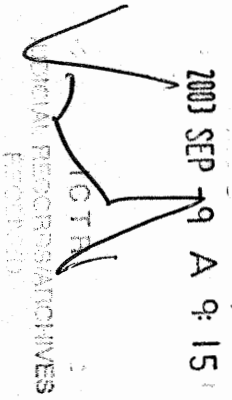
(16302-16292)

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 9 September 2003



THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON MOTIONS BY NTABAKUZE FOR SEVERANCE AND TO ESTABLISH A REASONABLE SCHEDULE FOR THE PRESENTATION OF PROSECUTION WITNESSES

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Emergency Defence Motion to Establish a Reasonable Schedule for the Presentation of Certain Prosecution Witnesses, to Ensure Effective Representation of Defendant Aloys Ntabakuze", filed by the Defence of Ntabakuze on 18 July 2003; and the "Motion for Severance of Defendant Aloys Ntabakuze", filed on 29 August 2003;

CONSIDERING the letter from Counsel for Ntabakuze to President Møse (copied to Prosecution Counsel) dated 18 July 2003; the letter from Counsel for Ntabakuze to Prosecution Counsel, dated 24 July 2003; the letter from the Prosecution to the Registry setting out the Prosecution's sequence of witnesses expected to testify during the session starting on 1 September 2003, filed on 6 August 2003; the letter from Counsel for Ntabakuze to President Møse (copied to Prosecution Counsel) dated 13 August 2003, including an "Annex" dated 12 August 2003; the "Prosecutor's Response to 'Emergency Defence Motion'", etc., and an Addendum thereto, both filed on 18 August 2003; the "Notice of Intention to File a Motion for Severance of Defendant Aloys Ntabakuze", filed on 25 August 2003; the Prosecution "Request to the Trial Chamber to Invite the Registrar to Make Oral or Written Representation", etc., filed on 26 August 2003; the "Affidavit of Lead Counsel", filed by Peter Erlinder, Lead Counsel for Ntabakuze, filed on 1 September 2003; the Prosecution "Response to 'Motion for Severance of Defendant Aloys Ntabakuze'", filed on 29 August 2003; an email sent by the Prosecution to all Counsel and Judges with the subject "re: Prosecutor's List of Up coming Witnesses-September Session", dated 2 September 2003; a document purportedly under seal and for Chambers use only, containing a summary prepared by Me. Tremblay of notes of a co-Accused, submitted to Chambers on 5 September 2003;

ALSO CONSIDERING the parties' oral submissions on 18 July 2003 and 5 September 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. The four Accused, arrested between 9 March 1996 and 18 July 1997, are charged in three separate indictments: Aloys Ntabakuze and Gratien Kabiligi are named in a joint indictment; Théoneste Bagosora and Anatole Nsengiyumva are named in individual indictments. After initial appearances, individual trials of each of the Accused were scheduled to commence in 1998, but were delayed by the filing of an indictment by the Prosecution on 8 March 1998 whose intended effect was a joint trial of the four Accused and twenty-five other individuals. The proposed indictment was dismissed by Judge Khan on 31 March 1998.[1] By motions filed on 23 February 1998, Kabiligi and Ntabakuze each sought, *inter alia*, severance of their joint indictment and separate trials. Trial Chamber II rejected the motions.[2] A motion for joinder of trial of the four Accused was filed by the Prosecution on

[1] *Prosecutor v. Théoneste Bagosora and 28 Others*, Dismissal of Indictment, 31 March 1998; *Prosecutor v. Théoneste Bagosora and 28 Others*, Decision on the Admissibility of the Prosecutor's Appeal From the Decision of the a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others, 8 June 1998 (appeal inadmissible).

[2] *Prosecutor v. Aloys Ntabakuze and Gratien Kabiligi*, Decision on the Defence Motion Requesting an Order for Separate Trials, 1 October 1998.

31 July 1998, and granted by Trial Chamber III on 29 June 2000.[3] Opening statements were heard on 2 April 2002, but the hearing of evidence did not begin until 2 September 2002. Trial was adjourned on 5 December 2002 after the testimony of two Prosecution witnesses over thirty-one trial days.

2. On 4 June 2003, the case was reassigned to Trial Chamber I, following the withdrawal of one Trial Chamber III judge and the non-re-election of another. After a formal hearing, at which all of the Accused, through Counsel, expressed their preference for continuing with the trial rather than re-commencing *de novo*, and expressly waived any right they may have had to a trial *de novo*, the Chamber decided that the trial would continue on the basis of the existing trial record.[4] The trial resumed before Trial Chamber I on 16 June 2003 and, after nine Prosecution witnesses heard over twenty days of trial hearings, adjourned on 18 July 2003. Hearings re-commenced on 1 September 2003 and are scheduled to continue through 3 October 2003, and then from 3 November 2003 through 18 December 2003.

3. On 31 July 2002, before evidential hearings had commenced, Lead Counsel for Mr. Ntabakuze, Mr. Monterosso, submitted a letter resigning his commission. Co-counsel, Me. André Tremblay, represented his client throughout the hearings before Trial Chamber III in the absence of lead counsel. Mr. Ntabakuze expressed his complete satisfaction with the representation provided by Me. Tremblay and requested his appointment as Lead Counsel. Me. Tremblay indicated to the Registry that he was ready and willing to so act. After the position of Lead Counsel had been offered to, and declined by, someone other than Me. Tremblay, Mr. Ntabakuze submitted a motion to Trial Chamber III requesting it to order the Registrar to appoint Me. Tremblay. The Chamber ruled the motion inadmissible. On 19 June 2003, Professor Peter Erlinder was appointed as Lead Counsel, with Me. Tremblay continuing in his role as Co-counsel.

SUBMISSIONS OF THE PARTIES

4. The Defence for Ntabakuze has filed two closely related, but distinct, motions. As there is substantial overlap in the arguments presented and the remedies sought, both motions are addressed in this decision.

5. The first motion (the "Scheduling Motion") requests the Chamber to order the Prosecution not to presenting any witness who is to testify directly as to the conduct of Mr. Ntabakuze until December 2003; or in the alternative to order a postponement of proceedings, or severance of the trial of Mr. Ntabakuze from the other Accused which would have the same effect. Lead Counsel states that he has had insufficient time to be in a position to provide professionally competent representation in the event that these Prosecution witnesses are presented before December, as currently scheduled. For Lead Counsel to proceed with the trial under these circumstances would call into question the fundamental fairness of the proceedings and deny the right of the Accused to a fair trial. He might also be violating the ethical and professional codes of the jurisdiction in which he is admitted and of the Tribunal, and he may be obliged to consult with the appropriate professional organizations before continuing as counsel.

6. The second motion (the "Severance Motion") asks for severance of the trial of Mr. Ntabakuze, pursuant to Rule 82 of the Rules of Procedure and Evidence ("the Rules").

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[3] *Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva, Gratien Kabiligi, and Aloys Ntabakuze*, Decision on the Prosecutor's Motion for Joinder, 29 June 2000.

[4] *Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva, Gratien Kabiligi, and Aloys Ntabakuze*, Decision on Continuation or Commencement *De Novo* of Trial, 11 June 2003.

Relying on the severance Decision in *Prosecutor v. Kajelijeli*, and independent of the issue of preparedness of counsel, the Defence argues that Ntabakuze is prejudiced by being tried with his co-Accused. As in *Kajelijeli*, Mr. Ntabakuze is of much lower rank than his co-Accused; he faces far less evidence than his co-Accused, which may impair the defendant's right to a fair and expeditious trial; and he would wish to call his co-Accused as witnesses, which is said to be impossible in the context of a joint trial. This prejudice is aggravated by lead counsel's claims, presented in the Scheduling Motion, that he is unable to provide effective representation to his client in the context of the Prosecution's decision to call the relatively small percentage of its witnesses who will testify against Mr. Ntabakuze in September and November.

7. The Prosecution opposes both motions. As to the Scheduling Motion, the Prosecution argues that Mr. Ntabakuze has been in possession of the redacted statements of the witnesses concerned and the Prosecution's pre-trial brief since January 2002, giving it ample time to make the investigations necessary to prepare its cross-examination. Me. Tremblay, who has been representing his client since 26 October 2001, has provided effective representation of his client throughout the trial and is capable of effectively confronting the Prosecution witnesses as scheduled. This is convincingly demonstrated by Mr. Ntabakuze's efforts to have Me. Tremblay appointed as Lead Counsel, and the latter's readiness to do so. The Prosecution further argues that sequencing of witnesses is entirely within its discretion and that, in any event, re-sequencing of witnesses would be damaging to its case, its credibility *vis à vis* witnesses, and would be practically difficult.

8. In response to the Severance Motion, the Prosecution argues that the Accused will suffer no prejudice in this joint trial justifying severance. The Accused is entitled to no delay in the presentation of the case against him for the reasons mentioned above. Severance would not expedite his trial, as he would likely be placed at the bottom of the list of trials scheduled before the Tribunal. The Prosecution contests the characterization of Mr. Ntabakuze's involvement in the crimes alleged as minor or insignificant relative to his co-Accused. All of the Accused were "key figures" in a conspiracy alleged in the indictments, and there is an "intrinsic link" between Mr. Ntabakuze and the co-Accused, to which two witnesses have already testified. For these and other reasons, the *Kajelijeli* severance Decision is readily distinguishable. In its written submissions, the Prosecution maintained that no prejudice is suffered in respect of testimony unavailable at a joint trial, as co-accused may be compelled to testify for one another in a joint trial.

DELIBERATIONS

9. There are three issues before the Chamber. First, whether the Accused is entitled to a postponement of the case against him based on the need for preparation of his Defence; second, if there is such an entitlement, whether the appropriate remedy is the separate trial of the Accused, ordering the Prosecution not to present any witnesses against him for some period, or a postponement of the joint trial; and third, even if there is no entitlement to a postponement of the case against the Accused, whether severance of his trial should be ordered.

Postponement of the Case Against the Accused

10. The Chamber is of the view that the Defendant Ntabakuze is not entitled to any postponement in the case against him based upon the asserted lack of preparation of recently-appointed Lead Counsel. Article 20 (4)(b) of the Statute provides that the Accused shall be entitled "to have adequate time and facilities for the preparation of his or her defence and to

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communicate with counsel of his or her own choosing." The right is possessed by the Accused, not Counsel. The relevant issue is whether the Defence as a whole, not any single counsel, has had adequate time and facilities to provide effective representation.

11. A number of factors demonstrate that the Accused is competently represented and that his rights will not be impaired by proceeding as scheduled. Co-counsel, Me. Tremblay, has been working on the case without interruption since 26 October 2001. He is a senior attorney with prior experience as counsel before this Tribunal, and has handled the Ntabakuze defence since the beginning of evidential hearings without the assistance of Lead Counsel. In submissions to the Registrar and Trial Chamber II, the Accused has made known his preference for the appointment of Me. Tremblay as lead counsel stating, *inter alia*, that:

> [Me. Tremblay] has worked, *de facto*, for over five months as Lead Counsel. He is familiar with the case, its procedures, evidence, witness statements, and ongoing investigations. In short, he is familiar with all of the components of the case.[5]

Registry records indicate that the Ntabakuze legal team has included a legal assistant, from December 2001 through June 2003, succeeded by the current legal assistant, appointed on 12 February 2003. The team has also had a series of investigators. At least one investigator was assigned to the Ntabakuze defence from November 1998 to 8 August 2003, although the Defence claims that this investigator effectively ceased work for personal reasons in January 2003. Two new investigators have now been hired, one on 17 July 2003, another on 1 August 2003.

12. The adequacy of these resources must be considered in relation to the needs of the case. The pre-trial brief was disclosed in January 2002, in anticipation of trial commencing in April of the same year, along with redacted statements of witnesses identified therein. All of the witnesses to which the Ntabakuze Defence is now objecting were identified in that pre-trial brief, and their redacted statements were disclosed. Witness testimony did not commence until 2 September 2002, almost eight months after redacted disclosure, the trial having twice been postponed. By the time the witnesses to whom the Accused objects in this motion will testify, starting in the second week of September 2003, it will have been twenty months since disclosure to the Defence of their redacted witness statements.

13. The Defence has argued in previous motions that the apparent adequacy of this period to prepare for cross-examination is misleading because of the large number of individuals on the Prosecution witness list; because the Prosecution has not been forced to give an unchanging sequence for witnesses with sufficient notice; and because the Prosecution has been allowed to make "rolling disclosure" of unredacted witness statements.[6] Some of these concerns have recently been ameliorated as a result of practical accommodations between Prosecution and Defence; others have been resolved through Decisions of this Chamber.[7] In any event, the Defence has not convincingly explained why it has been unable, based on the pre-trial brief or statements disclosed in January 2002, to identify the "very small number" of witnesses against it and allocate its investigatory and legal resources over the last twenty

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[5] *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Extremely Urgent Motion By the Defence for Aloys Ntabakuze to Assign André Tremblay as Lead Counsel, 3 December 2002, p. 11.

[6] *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Joint Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 11 July 2003.

[7] *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Decision on the Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003.

months accordingly. Nor has the Defence adequately explained why the Prosecution's disclosure of unredacted statements on 17 July 2003 altered the situation so dramatically as to render its prior preparations inadequate.[8]

14. Newly appointed Lead Counsel, Mr. Erlinder, states that he was appointed on 19 June 2003 and that he "commenced diligent preparation" for the case on 20 June 2003. Nevertheless, he affirms that he is unable, under the circumstances, to provide professionally competent cross-examination of the witnesses intended to be called by the Prosecution against his client, and that his Co-counsel "can not and will not undertake cross-examination of major witnesses against the Accused in a successive manner, without the support of another prepared and competent attorney."[9] He further claims that appointment of new counsel "absolutely requires permitting counsel sufficient opportunity to adequately prepare" and that it would be unethical for him "to proceed with these crucial witnesses."

15. The Chamber is of the view that Me. Tremblay is sufficiently prepared to provide effective assistance of counsel in respect of the cross-examination of the scheduled witnesses based on his experience, his knowledge of the case, the confidence reposed in him by his client, the resources available to the team over the last twenty months, and by his own affirmations of readiness to proceed. The "successive" cross-examination of three (or possibly five, according to the Defence) witnesses by a single counsel, should that be necessary, is not unduly burdensome, given the likely pauses for cross-examination by other counsel, and the fact that the trial now adjourns daily at 1.00 p.m., in order to accommodate the concurrent hearing by Trial Chamber I of another case.[10] The Chamber is fortified in its conclusion by Me. Tremblay's commendable affirmations in a memo to the Registry dated 5 June 2003:

> I hereby confirm that I have talked with Professor Erlinder, and I have stated to him that, despite his present commitments, he can rely on me to carry the caseload myself, until such time this year that he will be able to join the defence team of Aloys Ntabakuze here in Arusha. I have made it clear to him, as he has acknowledged by letter to you, that I shall be remaining in the file, and that, much as I would welcome the appointment of another attorney in this file, I am willing to handle the workload myself for a transitional period, as I have been doing for some time now.[11]

16. Mr. Erlinder need not be able to personally conduct all of these cross-examinations in order to discharge his professional and ethical obligations. As newly appointed Lead Counsel, Mr. Erlinder's duty is to exercise his independent judgement as to how work should best be apportioned between himself, his Co-counsel, and the rest of his team, given the knowledge and abilities that they possess. He has had sufficient time to be able to competently make that evaluation.

17. Additional time for preparation will be available during the adjournment of the trial between 3 October and 3 November 2003. Indeed, this adjournment was scheduled precisely

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[8] *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Emergency Defence Motion to Establish a Reasonable Schedule for the Presentation of Certain Prosecution Witnesses, to Ensure Effective Representation of Defendant Aloys Ntabakuze, 18 July 2003, para. 10.

[9] *Id.* para. 17.

[10] According to the Defence, five of the seven witnesses in the Prosecution sequence, as disclosed in its email of 2 September 2003, appear to deal directly with Defendant Ntabkauze; based on the Chamber's review of the sequence, no more than three are scheduled to be presented successively. The Defence has not established that the back-to-back cross-examination of three witnesses by a single counsel is an undue burden, particularly given the time that other Defence teams will take in their cross-examinations.

[11] *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Affidavit of Lead Counsel, 1 September 2003, Exhibit E-1.

to accommodate the views of all the Defence teams, including that of Mr. Ntabakuze, that such a break would be helpful for their preparations.[12] Moreover, the Defence is many months away from presenting its own case, giving it substantial time to acquire and prepare evidence that impeaches the credibility of these Prosecution witnesses. The Defence may also request that a witness be recalled, provided that some specific and unexpected prejudice from a justifiable lack of preparation for the testimony can be established.[13] In light of all these circumstances, Mr. Ntabakuze is not entitled to an adjournment in the presentation of the Prosecution case against him.

18. The Defence has suggested that continuing with the trial under current circumstances would violate American practices, and might implicate Mr. Erlinder in a violation of the ethical obligations of the Bar to which he is admitted. Having reviewed federal practice in the United States, the Chamber cannot see that such a violation would be recognized. Trial courts in the United States are granted wide discretion to deny adjournments even when counsel has only been recently appointed. Factors which have favoured commencement of trial after a much shorter period of preparation than has been available here include the continued assistance of co-counsel or previous counsel; a lengthy interval until the Defence must present its case; and the balance of convenience given the interests of other parties, witnesses, and the court.[14]

19. There is no doubt, however, that Mr. Erlinder's task is not an easy one. Efforts between Prosecution and Defence to reach an accommodation on the sequencing of witnesses are strongly encouraged by the Chamber and it does appear that some alleviation of the Defence's situation has been achieved. Though the sequencing of witnesses is undoubtedly within the Prosecution's discretion, the Chamber might be inclined to intervene upon a showing of a conscious effort to take advantage of the lack of preparation of new counsel, or if sequencing over a particular period is unduly burdensome.[15] No such abuse or undue burden can be discerned by the Chamber. The Prosecution has offered a variety of justifications for its sequence of witnesses and the difficulty of substantially re-ordering them.

Severance

20. Joint trials of Accused are permitted under Rule 48, which provides that "[p]ersons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried." Even when the "same transaction" requirement is met and joinder has been ordered, a co-accused may request a separate trial under Rule 82:

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[12] The Ntabakuze Defence stated that it required at least a three-week recess; it got four. *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, T. 17 July 2003, p. 14.

[13] See e.g. *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73*bis* (E), 26 June 2003, p. 6.

[14] See *United States v. Burton* 584 F2d 485, p. 490-91 (DC Cir 1978); *United States v. Walden*, 465 FSupp 255, p. 258 (E.D. Pa. 1978) (recently-appointed counsel in "large trial" required to proceed with case after eight days of preparation based on assistance of prior counsel and interval before presentation of defence case). The motion cites *Strickland v. Washington*, 406 U.S. 668 (1984) (conduct of attorney at sentencing hearing in death penalty case not ineffective) and *Holloway v. Arkansas*, 435 US 475 (1978) (continuance should have been ordered where counsel jointly representing three defendant sought severance on basis of conflicts of interest). The general precepts in those cases arising from quite distinct circumstances provide limited guidance on the specific issues before the Chamber.

[15] See e.g. *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73*bis* (E), 26 June 2003, p. 8 (ordering the Prosecution to present one of its additional witnesses as late as possible within a trial session).

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Rule 82: Joint and Separate Trials

(A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.

(B) The Trial Chamber may order that person 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.

Such an order may be made after trial has begun, as the prejudice of a joint trial may only become apparent as a result of disclosures or events that occur at trial.[16] The Severance Motion does not claim that the Accused was not implicated in the "same transaction" as his co-Accused or otherwise improperly joined under Rule 48; rather, the argument presented is that the joint trial of the Accused is prejudicial within the meaning of Rule 82 (B).

21. The preference for joint trials of individuals accused of acting in concert in the commission of a crime is not based merely on administrative efficiency. A joint trial relieves the hardship that would otherwise be imposed on witnesses, whose repeated attendance might not be secured; enhances fairness as between the accused by ensuring a uniform presentation of evidence and procedure against all; and minimizes the possibility of inconsistencies in treatment of evidence, sentencing, or other matters, that could arise from separate trials.[17]

22. Severance is only granted if serious prejudice to a specific right of the accused can be shown. In the present case, the Defence claims three types of prejudice concerning two different rights. First, that the right to a fair trial is violated because this joint trial makes it more difficult or impossible for the Accused to present exculpatory testimony of a co-Accused; second, that the Accused is a minor figure whose right to a fair trial is prejudiced by being associated with evidence concerning co-Accused whose culpability is significantly greater; third, that the right to trial without undue delay is violated as a result of the disparity in the quantity of the evidence against him and the others being jointly tried, forcing him to endure a long joint trial rather than a short individual trial.[18]

23. Testimony of an accused cannot be compelled by a co-accused in a joint trial; nor can an accused, at least prior to his own conviction, be compelled to testify at a separate trial of

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[16] *Prosecutor v. Hassan Ngeze*, Decision on the Defence Request for Separate Trials, 12 July 2000, p. 5; *Prosecutor v. Elie Ndayambaje*, Decision on the Defence Motion for a Separate Trial, 25 April 2001, p. 4.

[17] *Prosecutor v. Zejnil Delalic, Zdravko Mucic, and Esad Landzo*, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, 25 September 1996, para. 7; *Prosecutor v. Radoslav Brdnanin and Momir Talic*, Decision on Motions By Momir Talic for a Separate Trial and for Leave to File a Reply, 9 March 2000, paras. 30-31: "Nothing could be more destructive of the pursuit of justice than to have inconsistent results in separate trials based on the same facts." *R. v. Lake*, 68 Cr App R 172 (CCA), p. 175: "It has been accepted for a very long time in English practice that there are powerful public reasons for why joint offences should be tried jointly. The importance is not merely one of saving time and money. It also affects the desirability that the same verdict and the same treatments shall be returned against all those concerned in the same offence. If joint offences were widely to be tried as separate offences, all sorts of inconsistencies might arise." See also *R. v. Mapara* (2003) 2003 BCC LEXIS 2148, pp. 12-13 (BCCA); *R. v. Torbiak and Gillis* (1978) 40 CCC (2d) 193, p. 199 (Ont CA); *Zafiro v. United States*, 506 U.S. 534, p. 538: ("Joint trials 'play a vital role in the criminal justice system.' They promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts'") (citations omitted).

[18] The Defence also claims that it is prejudiced because it is entitled to a continuance, which can be granted by ordering severance. The Chamber has already determined, *supra*, that the Accused is not entitled to a continuance and, therefore, does not consider the claim again in relation to severance.

the co-accused.[19] There is a greater likelihood, however, that an accused would voluntarily testify at the separate trial of a co-accused, particularly where the evidence is self-incriminating.[20] Accordingly, there is a possibility that testimony of a co-accused, unavailable at a joint trial, could become available to an accused at a separate trial.

24. In order to establish serious prejudice based on this possibility, the Defence must make a threshold showing of, first, the substance of the testimony; second, its exculpatory nature and effect; third, the *bona fide* need for the testimony; and fourth, the reasonable probability that the exculpatory testimony would, in fact, be given by the co-accused at a separate trial.[21] A mere "intimation that the accused intends to call his co-accused on his behalf" is insufficient.[22] Once that showing has been made, the prejudice caused by the absence of such evidence must be weighed in relation to the likely impact of the absence of the evidence given the nature of the defendant's theory of defence and the evidence already available in support thereof; the timeliness of the motion; and the effect of severance on judicial administration and economy.[23] The burden of establishing serious prejudice rests with the moving party.[24] The essential issue is the exculpatory significance of the testimony in relation to the case as a whole, and the likelihood that the testimony will materialize.[25]

25. The Ntabakuze Defence has represented to the Chamber that it would call one or several co-Accused "as to the nature of the military command structure; the orders under which [Ntabakuze] was operating; and the content of the communications that passed between them". The only evidence whose substance is identified is contained in a document submitted to the Chamber under seal by the Ntabakuze Defence. This evidence is a summary prepared by Co-counsel for the Defence of a summary written by a co-Accused in relation to a statement of a witness. The evidence is, indeed, exculpatory. There is no showing, however, that the co-Accused who is the source of the testimony would be willing to testify.

26. Assuming that a threshold showing has been made by the Ntabakuze Defence in respect of this particular evidence, the Chamber does not consider it sufficiently significant or exculpatory to warrant severance. The evidence in question concerns but a single event on a single day that may have resulted in an unspecified number of killings that might be attributable to the Accused, whereas the indictment alleges a conspiracy involving numerous

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[19] *Prosecutor v. Jean-Paul Akayesu*, Decision on a Motion for Summonses of Witnesses Called by the Defence, 17 February 1998, p. 3.

[20] It is also possible that an accused could be compelled to testify once the possibility of self-incrimination has disappeared, though neither this Tribunal nor the ICTY has decided whether this occurs at the moment of conviction or upon the exhaustion of appeals. See Richard May, Marieke Wierda, *International Criminal Evidence* (New York: Transnational Publishers, Inc. 2002), p. 294.

[21] *Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, and Jean-Bosco Barayagwiza*, Decision on the Motion of the Defence for Severance and Separate Trial, 26 September 2000 (rendered orally), T. 24 September 2000, p. 25 (the "*Barayagwiza* Severance Decision"); United *States v. Butler* 611 F.2d 1066, p. 1071 (5th Cir 1980).

[22] *Barayagwiza* Severance Decision, p. 25 : "A simply [*sic*] intimation that the accused intends to call his co-accused on his behalf is not enough for the Chamber to determine that there will be a conflict of interest sufficient to warrant a separate trial."

[23] *Id.* p. 26; *United States v. Butler* 611 F.2d 1066, p. 1071 (5th Cir 1980). Whether to order severance is an exercise of the Trial Chamber's discretion, based on the individual facts of the case.

[24] *Prosecutor v. Hassan Ngeze*, Decision on the Defence Request for Separate Trials, 12 July 2000, p. 5; *Prosecutor v. Bagambiki, Samuel Imanishimwe and Yusuf Munyakazi*, Decision on the Defence Motion for the Separation of Crimes and Trials, 1 October 1998, p. 6; *Prosecutor v. Mathieu Ngurimpatse, Joseph Nzirorera, and Juvenal Kajelijeli*, Decision on the Prosecutor's Motion for Joinder of Accused and on the Prosecutor's Motion for Severance of the Accused, 29 June 200, para. 39.

[25] The approach set out in the *Barayagwiza* Severance Decision closely follows the approach of a number of municipal jurisdictions, including the United States, Canada, and the United Kingdom. See e.g. *United States v. Butler* 611 F2d 1066, p. 1071 (5th Cir 1980); *R. v. Torbiak and Gillis* (1978) 40 CCC (2d) 193, pp. 198-99 (Ont CA); *R. v. Dunbar & others* [1988] Crim LR 693 (CCA).

acts over a period of many months, or longer. There is no indication in that document that the co-Accused intends to offer testimony regarding broader questions of command structure or orders, or the content of such testimony.[26] Nor is there any indication that any other co-Accused would offer such testimony, or its content. As to those broader issues, the Defence has not reached the threshold of showing what the evidence is, that it is exculpatory, or that co-Accused are willing to testify to it at a separate trial.

27. The differences between this case and one in which severance should be ordered are illustrated by the authorities relied upon by the Defence. In *United States v. Neal*, an appeals court found that severance should have been ordered where the leader of a conspiracy testified at length *in camera* that one of his co-accused "had not in any way intentionally furthered" the conspiracy.[27] If true, the testimony would have entirely exculpated the co-defendants. The evidence was also given in an affidavit, amply demonstrating the co-accused's willingness to testify, the substance of the testimony, and its exculpatory character. None of those conditions exist here.

28. Timeliness is also an important consideration in a motion for severance. A motion for severance during trial may be timely, particularly where the prejudice could not have been discovered even with reasonable diligence prior to trial. A factor militating against severance, however, is that the prejudice was apparent or discoverable before trial and that the case has proceeded for significant period. In *Kajelijeli*, a motion for severance before trial was granted based on a pronounced asymmetry in the culpability of, and factual allegations against, the applicant and his co-accused.[28] The Defence suggests that the exculpatory evidence submitted under seal only became available because of the disclosure of a redacted portion of a witness statement on 17 July 2003. There is no explanation, however, as to why the broader category of exculpatory evidence identified by the Defence – namely, the co-Accused's knowledge of military command structure, orders, and the content of communications -- was not known or available to the Defence long before the start of the trial. Though not determinative, this factor also weighs against severance.

29. Under these circumstances, the Defence has failed to discharge its burden of showing that the Accused will suffer serious prejudice by not being granted a separate trial on the basis of anticipated testimony of a co-Accused.

30. As to the claim that Mr. Ntabakuze is a minor figure unfairly prejudiced by association with figures of much greater responsibility, the Chamber notes that this assertion was contested by the Prosecution. In the absence of a clear showing of a severe disproportion of responsibility, the Chamber can only make that determination upon a presentation of the facts at trial. Unlike a trial before a jury, there is little danger of Mr. Ntabakuze being unfairly tarnished by guilt by association before a panel of judges. Further, any such disproportion of responsibility should have been apparent from the pre-trial brief and redacted witness statements disclosed in January 2002, and could have been presented much earlier.

31. The Defence also argues that the Accused's right to trial without undue delay is prejudiced by joinder as only a small percentage of the witnesses are expected to testify

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[26] The Canadian case cited, *R. v. Silvini*, (1991) 5 OR (3d) 545, does not assist the Defence. That case involved reversal of a conviction based on the failure of counsel who was representing both co-accused to raise the issue of severance. Given the apparent conflict of interest between the co-accused, the attorney's failure to raise the severance issue was presumed to be highly prejudicial to the accused and a breach of the attorney's duty of loyalty. A new trial was ordered on that basis, not on the merits of the severance question.

[27] *United States v. Neal*, 27 F.3d 1035, p. 1047 (5th Cir 1994).

[28] *Prosecutor v. Augustin Bizimana and others*, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvenal Kajelijeli, 6 July 2000, p. 8.

against him. Indeed, the Defence claims that the Prosecution has presented no evidence against Mr. Ntabakuze up to this point, and that he is being forced to endure a lengthy trial whose principal focus is his co-Accused, both in terms of responsibility and quantum of evidence. The Prosecution contests these assertions, pointing to evidence given by expert witness Alison Des Forges and Witness ZF connecting the Defendant to a conspiracy with his co-Accused to which all of the testimony in this case is relevant.

32. The Chamber considers the degree of responsibility of the Accused and the quantum of evidence implicating him to be contested issues that can only be evaluated in the course of the trial. The Defence has made no clear showing that only a tiny percentage of the testimony in this case concerns Mr. Ntabakuze. The Chamber eschews a minute analysis of the expected testimony of Prosecution witnesses but notes that the pre-trial brief does identify many witnesses as providing evidence against Mr. Ntabakuze, and that there is testimony implicating him in a conspiracy with his co-Accused. Even assuming that there is a distinct group of "Ntabakuze witnesses," the Prosecution's repeated indications that it will call significantly fewer than the 123 witnesses on its initial witness list, suggests that the percentages given by the Defence for Ntabakuze are an under-estimate. Further, the Prosecution has committed to finishing its case by June 2004, far sooner than could be accomplished by trying the Accused in a separate trial *de novo*.[29] The right of the Accused to be tried without undue delay is best served by proceeding with the joint trial.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motions.

Arusha, 9 September 2003

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[29] See *Prosecutor v. Zejnil Delalic, Zdravko Mucic, and Esad Landzo*, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, 25 September 1996, para. 6.