



UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 16 July 2008

**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA**  
*Case No. ICTR-98-44-T*

**DECISION ON JOSEPH NZIRORERA'S MOTION TO STRIKE ALLEGATION OF  
CONSPIRACY WITH JUVENAL KAJELIJELI ON THE BASIS  
OF COLLATERAL ESTOPPEL**

*Rules 73 of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. Joseph Nzirorera moves the Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence, for an order striking the allegation contained in paragraph 23 of the Indictment which states that he conspired with Juvénal Kajelijeli. He contends that the Prosecution is barred under the doctrine of collateral estoppel from "convicting" Nzirorera of conspiring with Mr. Kajelijeli to exterminate the Tutsi, since Mr. Kajelijeli was acquitted of conspiring with Nzirorera in separate proceedings. The Prosecution opposes the motion in its entirety.<sup>1</sup>

## DELIBERATIONS

### *The Definition of Collateral Estoppel:*

2. Joseph Nzirorera relies on jurisprudence from the United States; in that jurisdiction, collateral estoppel and *res judicata* are regarded as related concepts. Collateral estoppel has been used in civil cases to protect litigants from the seemingly unnecessary burden of re-litigating an identical issue with the same party or someone in privity with that party. It has also been used to "promote judicial economy by preventing apparently needless litigation."<sup>2</sup> Collateral estoppel has furthermore been applied in criminal cases. The leading case in the United States is *Ashe v. Swenson*. In that case, the accused was acquitted of robbing one victim among a group of poker players. The State then prosecuted Ashe a second time in regard to the same incident, but for the robbery of another victim among the same group of poker players. The United States Supreme Court held that collateral estoppel formed part of the Fifth Amendment's guarantee against double jeopardy, and that collateral estoppel was a shield against the State's second prosecution of him for the robbery. In so doing, the Supreme Court defined the doctrine as follows:

"Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago...<sup>3</sup>

### *The Application of Collateral Estoppel to Proceedings before the ICTR*

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<sup>1</sup> Joseph Nzirorera's Motion to Strike Allegation of Conspiracy with Juvénal Kajelijeli on Basis of Collateral Estoppel, filed 2 May 2008; Prosecutor's Response to Nzirorera's Motion to Strike Allegations of Conspiracy with Juvénal Kajelijeli on Basis of Collateral Estoppel, filed 7 May 2008; Joseph Nzirorera's Reply Brief: Motion to Strike Allegation of Conspiracy with Juvénal Kajelijeli on Basis of Collateral Estoppel, filed 7 May 2008.

<sup>2</sup> *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979).

<sup>3</sup> *Ashe v. Swenson*, 397 U.S. 436 (1970) at 433; *United States v. Oppenheimer*, 242 U. S. 85.

3. Joseph Nzirorera concedes that collateral estoppel is not part of the case law of this Tribunal. However, he submits that the Chamber should apply the following test in determining whether the application of collateral estoppel is warranted in the present circumstances. Namely, whether: 1) the issue decided in the prior proceeding is the same as that raised in the instant proceeding; (2) the prior proceeding resulted in a judgment on the merits; (3) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; (4) the party against whom collateral estoppel is asserted is a party to or in privity with a party to the prior proceeding.<sup>4</sup> Nzirorera submits that each of these elements are met with respect to the finding that he did not conspire with Juvenal Kajelijeli to exterminate the Tutsi.

4. The Chamber recalls that in *Bizimungu*, the Chamber confirmed the application of the doctrine of *res judicata* in the jurisprudence of this Tribunal although it did not deal with collateral estoppel *per se*.<sup>5</sup> The Chamber held that *res judicata*, which it also referred to as "issue estoppel" could be applied in interlocutory matters in cases which have not yet reached the stage of final judgement, although the Chamber held that it did not apply in the particular circumstances of that application.<sup>6</sup> In addition, this Chamber is of the view that the prohibition against double jeopardy is an accepted principle of international law. In any event, for the reasons provided below, the Chamber considers that the doctrine of collateral estoppel does not apply to the current facts.

#### ***Is the Doctrine of Collateral Estoppel Warranted on the facts?***

5. In this case Joseph Nzirorera is not alleging any double jeopardy. The finding on which he relies is the acquittal of Mr. Kajelijeli for conspiring with Nzirorera. Nzirorera acknowledges that he had the status of a witness, and not a defendant, in that case. He submits however that the *Kajelijeli* case bars the Prosecution from re-litigating the issue of Nzirorera conspiring with Mr. Kajelijeli in the *Karemera* trial. The Chamber is of the view that this submission is flawed because Nzirorera was not party to the previous litigation.

6. In addition, the Chamber reviewed the allegations for which Mr. Kajelijeli was acquitted in his trial and considers that they differ from the allegations against Joseph Nzirorera in the present case, in several important respects. The Chamber recalls that in the *Kajelijeli* case, the Prosecution had alleged that, from late 1990 through about July 1994,

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<sup>4</sup> *Ashe v Swenson*, 397 U.S. 436 (1970)

<sup>5</sup> *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of His Right to Trial Without Undue Delay, 29 May 2007, ("*Bizimungu* Decision") and case law cited therein.

<sup>6</sup> *Bizimungu* Decision, paras. 6, 10.

military personnel, members of the government, political leaders, civil servants and other influential personalities, including Mr Kajelijeli and Nzirorera, conspired among themselves and with others to work out a plan to exterminate the civilian Tutsi population and eliminate members of the opposition, so that the MRND could remain in power.<sup>7</sup> The Trial Chamber found that there was “insufficient evidence to prove beyond a reasonable doubt that, as charged in paragraph 4.9 of the indictment, from late 1990 through to about July 1994, the Accused conspired with others to destroy, wholly or partially, the civilian Tutsi population and eliminate members of the opposition, so that the MRND could remain in power.”<sup>8</sup> Mr. Kajelijeli was acquitted of conspiring with Nzirorera and others to commit genocide in the Mukingo commune and Ruhengeri prefecture.

7. In contrast, the allegations in the present case concerning Joseph Nzirorera's alleged involvement in a conspiracy with others, including Mr. Kajelijeli, are far wider and concern events in various locations throughout Rwanda, and the number of alleged co-conspirators are larger. The Chamber is therefore of the view that the issues litigated in the *Kajelijeli* trial are not the same as those in the present proceedings. Furthermore, both cases involve separate proceedings and evidence which are based upon distinct indictments containing different allegations. Accordingly, Nzirorera's submissions in this regard also fall to be rejected.

**FOR THESE REASONS, THE CHAMBER DENIES** Joseph Nzirorera's Motion in its entirety.

Arusha, 16 July 2008, done in English.

Dennis C. M. Byron

Presiding Judge

Gberdao Gustave Kam

Judge  
(On behalf of Judge Kam)  
[Seal of the Tribunal]

Vagn Joensen

Judge

<sup>7</sup> *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44-T, Amended Indictment of 25 January 2001, para. 4.9

<sup>8</sup> *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44-T, Judgement (TC), 1 December 2003, para. 794.