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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 13 February 2009

JUDICIAL OFFICE
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THE PROSECUTOR

v.

JOSEPH NZIRORERA

JOSEPH NZIRORERA'S OPPOSITION TO
PROSECUTION MOTION FOR SEVERANCE

The Office of the Prosecutor:

Mr. Don Webster
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera hereby opposes the *Prosecution Motion to Sever Mathieu Ngirumpatse Pursuant to Rule 82(B)*(10 February 2008). He requests an evidentiary hearing on the motion.¹

Severance is Not Necessary to Protect the Interests of Justice

2. Rule 82(B) provides that:

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.

3. Since there is no issue of conflict of interests among the accused, who are united in their desire to continue to be tried together, and to wait for Mr. Ngirumpatse to regain his health and rejoin the trial, the only possible ground for severance would be to protect the interests of justice.

4. The prosecution recognizes that burden is squarely on the party seeking severance to show that a severance is necessary to protect the interests of justice.² As the prosecution said in its original submission on severance:

The Prosecutor submits that severance is an extreme measure which should be considered as a last resort when it appears to offer the only viable remedy for a conflict of interest or to protect the interest of justice.³

5. The prosecution's claim that severance is necessary to protect the rights of Mr. Karemera and Mr. Nzirorera to a speedy trial is false and inadmissible.⁴ Both accused

¹ In its *Scheduling Order* (11 February 2009), the Trial Chamber also requested the parties to address the issue of whether the trial could proceed in the absence of Mr. Ngirumpatse with or without his consent. The answer is simple. With his consent, the trial can proceed in his absence. Without his consent, as the Presiding Judge himself recognized at the 9 February 2009 status conference that the Chamber has "no discretion" to proceed. *Prosecutor v Stanasic & Simatovic*, No. IT-03-69-AR73, *Decision on Defence Appeal of the Decision on the Future Course of the Proceedings* (16 May 2008)

² *Motion to Sever* at para. 11; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance of Three Accused* (27 March 2006) at para. 3

³ *Prosecutor's Submission on Severance of Ngirumpatse Pursuant to Rule 82(B)* (3 November 2008) at para. 17

strongly support a delay of the trial until Mr. Ngirumpatse can be present. They prefer a fair trial to a speedy one. Therefore, it is dishonest to use their right to a speedy trial as a means to deny them a fair trial.

6. The Appeals Chamber has held that “factors that a Trial Chamber may look to in the interests of justice include (1) avoiding the duplication of evidence; (2) promoting judicial economy; (3) minimising hardship to witnesses and increasing the likelihood that they will be available to give evidence; and, (4) ensuring consistency of verdicts.”⁵

7. An examination of each of these factors will demonstrate that the prosecution cannot carry its burden of establishing that severance is necessary to protect the interests of justice.

Duplication of Evidence

8. The prosecution has made it clear that if severance were granted, “it does not propose to amend the indictment or modify its case in any manner.” It insists that “each Accused will be expected to mount a Defence against the entirety of the Prosecution case, as presented against them jointly, before this very same Trial Chamber.”⁶

9. There is an extremely close link between Mathieu Ngirumpatse, the President of the MRND, and Joseph Nzirorera, the party’s Secretary General, in the indictment. They are charged with being members of the same joint criminal enterprise and with the same conspiracy. Indeed, Mr. Nzirorera can be convicted for the acts of Mr. Ngirumpatse if it is shown that they had an agreement to exterminate the Tutsis, and Mr. Ngirumpatse can likewise be convicted for the acts of Mr. Nzirorera.

⁴ *Motion to Sever* at para. 12

⁵ *Prosecutor v Gotovina et al*, No. IT-03-73-AR73.1, *Decision on Interlocutory Appeals Against the Trial Chamber’s Decision to Amend the Indictment and for Joinder* (25 October 2006) at para. 17

⁶ *Motion to Sever* at para. 17

10. Therefore, at separate trials, each accused would have to call witnesses to rebut the prosecution's evidence as to the conduct of the other. Mr. Nzirorera estimates that he would have to call 25 of the 35 witnesses on Ngirumpatse's witness list, as well as Mr. Ngirumpatse himself, at a separate trial. These witnesses would presumably also be expected to testify a second time at a separate trial of Mr. Ngirumpatse.

11. While the Ngirumpatse team would be in a better position to advise the Chamber as to the number of persons on Mr. Nzirorera's witness list who he would have to call for a second time at his own trial, Mr. Nzirorera estimates that number at approximately 35, considering the commonality of those witnesses to Mr. Ngirumpatse.

12. Therefore, a severance would result in a total of approximately 60 witnesses having to testify twice in Arusha. This is a vast duplication of evidence that is clearly not in the interests of justice.

13. This was recognized by the prosecution itself in its original filing on severance, when it said that:

In these circumstances maintaining the joint trial inures to the benefit of the Defence generally, and to Ngirumpatse in particular, even if his illness causes periodic delays as the joint trial progresses. Furthermore, it promotes judicial economy and consistency to continue in this joint proceeding, which promotes savings in time, cost and resource allocation, rather than organize a separate, later proceeding for Ngirumpatse which may require that witnesses be re-called to repeat their testimony.⁷

Judicial Economy

14. There will be judicial economy in severing the trials only if Mr. Ngirumpatse were to die.

⁷*Prosecutor's Submission on Severance of Ngirumpatse Pursuant to Rule 82(B)* (3 November 2008) at para 14

15. If he were to be tried separately, the duplication of 60 defence witnesses would lengthen the combined proceedings by an estimated 90 trial days. The prosecution recognized this in his original filing on severance when it said:

To sever Ngirumpatse may result in both Karemera and Nzirorera calling more witnesses and lengthening their individual Defence cases.⁸

16. Judicial economy should not be confused with the completion strategy. The Appeals Chamber has held that the overriding consideration of the completion strategy must be the strict adherence to the minimum guarantees of the rights of the accused pursuant to Article 20 of the Statute.⁹ And this Trial Chamber itself has held that:

Despite the existence of the completion strategy, the overriding obligation is to observe the mandate to guarantee a fair trial to the accused. The requirements of expediency will not outweigh the interests of justice.¹⁰

17. Given the statement of the UNDF Medical Doctor at the Status Conference of 9 February 2009 that Mr. Ngirumpatse was “improving remarkably”, there is no basis upon which the Trial Chamber could conclude that Mr. Ngirumpatse is likely to die before being tried. Therefore, there is no judicial economy whatsoever in separating the two trials.

18. The prosecution itself took this position in its original submissions on severance in November 2008. It said:

There should be no consideration of severing Ngirumpatse if there is any prospect of his making a viable recovery within the next six months.¹¹

⁸ *Prosecutor's Submission on Severance of Ngirumpatse Pursuant to Rule 82(B)* (3 November 2008) at para 15

⁹ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR15bis.3, *Decision on Appeals Pursuant to Rule 15 bis (D)* (20 April 2007) at para. 24

¹⁰ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Scheduling Order* (21 August 2007) at para. 5

¹¹ Para 11

The Prosecution reasons that, given the tentative information provided to this Chamber by the CMO, the proceedings are not yet at a stage where the Trial Chamber may reasonably invoke Rule 82(B). As the trial record now stands, and as far as the Prosecution is aware) the Chamber relies exclusively on a report from the CMO that Ngirumpatse will be incapacitated for the next six months in "guarded condition", that his prognosis for recovery is "reserved", and that medical experts deem it necessary to review his condition after a significant period of treatment before offering a definitive opinion.¹²

According to the CMO a review of Ngirumpatse's condition after six months would permit a more conclusive assessment of his likelihood of recovery. In such circumstances, the Prosecutor does not support severing Ngirumpatse from this joint trial.¹³

19. The prosecution has offered no justification for its change in position in February 2009, well before the six months has elapsed, and in the face of the positive assessment of Mr. Ngirumpatse's recovery offered in open court by Dr. Eppe on 9 February 2009.

20. The scales of judicial economy remain weighed heavily against severance, even under the prosecution's own standards.

Hardship and Unavailability of Witnesses

21. It will be a great hardship on 60 individuals to have to make two trips to Arusha. Most of those witnesses are in Europe. Some, like former United States Ambassador Robert Flaten and former Special Representative Jacques Roger Booh Booh, are advanced in age and would have to travel great distances on two occasions.

¹²Prosecutor's Submission on Severance of Ngirumpatse Pursuant to Rule 82(B) (3 November 2008) at para 17

¹³Prosecutor's Submission on Severance of Ngirumpatse Pursuant to Rule 82(B) (3 November 2008) at para 18

22. In addition, bringing the same witnesses from Rwanda on two occasions may create unnecessary security risks for those individuals, causing further hardship.

23. Most importantly, there is a risk that many of Mr. Ngirumpatse's witnesses may decline to testify at a separate trial of Mr. Nzirorera. First, the Rwandan phenomenon of regionalism cannot be underestimated. Mr. Nzirorera is from the north, Mr. Ngirumpatse from Kigali. Almost all of Mr. Ngirumpatse's witnesses are from his own region. It may be very difficult for Mr. Nzirorera to convince them to come and testify at a separate trial, particularly when it is known that they will be called upon to come again and testify at Mr. Ngirumpatse's trial.

24. For example, Mr. Nzirorera's defence team has been attempting to meet one of the former high-ranking officials from Kigali on Mr. Ngirumpatse's list. When Mr. Nzirorera's lead counsel identified himself to that individual on the telephone, the person hung up. He has since refused to speak with Mr. Nzirorera's co-counsel as well.

25. Second, the power of Mr. Ngirumpatse's own personality cannot be underestimated. Mathieu Ngirumpatse was loved in Rwanda. His music, generosity, and gentle personality made him many friends and created many people with personal love and affection for him. While these people are willing to come to Arusha and testify for Mr. Ngirumpatse, they may well be unwilling to testify at a separate trial of Mr. Nzirorera.

26. For example, when Mr. Nzirorera's lead counsel met one of the persons on Mr. Ngirumpatse's list in the United States and asked him to testify at Mr. Nzirorera's trial, he refused. However, when asked by the Ngirumpatse team, he accepted.

27. In addition to the potential loss of witnesses, Mr. Nzirorera faces the real potential of losing one of the most important witnesses for his defence—Mathieu Ngirumpatse. If his case is separated, Mr. Ngirumpatse would be reluctant to testify at a separate trial of Joseph Nzirorera, while having to face his own trial in the future. However, Mr. Ngirumpatse will testify at a joint trial, during his own defence case. Therefore, severance would result in the potential loss of a critical witness for Mr. Nzirorera.

28. The Trial Chamber in the *Nyiramasuhuko* case, in denying a mid-trial severance, has also observed that the protection of victims and other witnesses should be considered when determining if a severance is in the interests of justice. It observed that a joint trial will avoid the pressure and trauma to witnesses who must repeatedly testify in multiple trials.¹⁴ This consideration is directly applicable here, and demonstrates that a severance will frustrate, rather than protect, the interests of justice.

Ensuring Consistency of Verdicts

29. This factor obviously militates against severance. If the Trial Chamber separates the cases, it is likely to hear different evidence on the same events. If the same judges preside in both cases, it will have the impossible task of segregating the evidence from both trials. Consistency of verdicts can be best obtained by one verdict in a single trial, rather than two verdicts in separate trials.

30. The prosecution has also raised concerns about the consistency of verdicts in its November 2008 submissions. It said that:

Under the circumstances, it would be more desirable to proceed jointly, even if slowly, and conclude with a single, conclusive

¹⁴ *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings* (7 April 2006) at para. 77

judgment, rather than risk inconsistent factual findings and verdicts, which would also delay the final resolution for Ngirumpatse.

The situation is all the more critical in our trial, given its long and complex history. Should any one of the three judges that presently comprise this Chamber be unavailable to sit for a separate trial of Ngirumpatse, his entire trial would have to start all over again. This would require a re-presentation of the entire prosecution case against Ngirumpatse separately.¹⁵

Indeed, severance of Ngirumpatse will require that he be tried separately, alone, by the same Trial Chamber, most likely after it has concluded its trial of his two co-Accused, a most unwelcome scenario.¹⁶

31. Therefore all four factors identified by the Appeals Chamber are aligned in opposition to severance of Mathieu Ngirumpatse's case—even in the prosecution's estimation.

Severance Will Cause Irreparable Prejudice

32. As the *Bagosora* Trial Chamber has observed:

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

33. That Trial Chamber went on to hold that “the nature of the possible prejudice to an accused, the advantages of a joint trial, and the mechanisms for mitigating the

¹⁵ *Prosecutor's Submission on Severance of Ngirumpatse Pursuant to Rule 82(B)* (3 November 2008) at para 15

¹⁶ *Prosecutor's Submission on Severance of Ngirumpatse Pursuant to Rule 82(B)* (3 November 2008) at para 16

¹⁷ *Prosecutor v Bagosora et al.* No. ICTR-98-41-T, *Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses* (9 September 2003) at para. 21; *Prosecutor v Bagosora et al.*, No. ICTR-98-41-T, *Decision on Request for Severance of Three Accused* (27 March 2006) at para. 3

claimed prejudice by means other than severance, must all be weighed when considering a motion for severance.”¹⁸

34. That Trial Chamber also observed that “the advanced stage of the trial weighs against severance, particularly where the accused had benefited from the presentation of evidence by their co-accused.”¹⁹

35. In denying severance of Mr. Nzirorera’s case at the pre-trial stage, the Trial Chamber held that “because of the complexity of the present case, a separate trial may impede the administration of evidence as the Trial Chamber will not be able to develop a full picture of the entire case, which is necessary to evaluate the guilt of each accused.”²⁰ It would be the height of unfairness to allow the Trial Chamber to develop that full picture only from the prosecution’s evidence, and deprive it of that full picture during the defence evidence.

36. In the *Muhimana* case, in denying the prosecution’s motion to sever the trial of Mr. Muhimana from his co-accused, the Trial Chamber said:

The Counsel for the accused has stated that it would be beneficial for the accused to await the arrest of the other co-accused, as it would facilitate the presentation of a joint defence, even though it may entail some delay. The Chamber finds some merit in this submission. Further, since the co-accused are charged as co-conspirators in the charge of conspiracy to commit genocide, the Chamber is of the view that it is in the interests of justice for them to be tried together.²¹

37. In Mr. Nzirorera’s case, the prejudice from severance would go beyond hardship and unavailability of witnesses. The prosecution presented a large body of

¹⁸ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance of Three Accused* (27 March 2006) at para. 3

¹⁹ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance of Three Accused* (27 March 2006) at para. 8

²⁰ *Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial* (12 July 2000) at para. 32

²¹ *Prosecutor v. Muhimana*, No. ICTR-95-I-I, *Decision on the Prosecutor’s Motion for Leave to Sever an Indictment*, (6 July 2000) at para. 5

evidence of Mr. Ngirumpatse's acts and speeches. Mr. Nzirorera has been relying on Mr. Ngirumpatse to mount a defence case which would answer that evidence. Severance of Mr. Ngirumpatse at this stage would be devastating to the preparation of the defence, and would require Mr. Nzirorera to assume a huge burden of investigating and presenting the evidence he was counting on the Ngirumpatse defence team to present.

38. Some witnesses, like AWD, UB, ALG, AWE, and GOB, from Kigali, testified primarily against Mr. Ngirumpatse. The defence teams of Mr. Nzirorera and Mr. Ngirumpatse have divided our work such that Mr. Ngirumpatse's team had primary responsibility to locate, interview, and bring witnesses to rebut the testimony of these prosecution witnesses. If severance is ordered, Mr. Nzirorera estimates that he would need a minimum of six months to conduct his own investigation to prepare to rebut those witnesses.

39. Therefore, Mr. Nzirorera would be severely prejudiced by the severance of Mathieu Ngirumpatse from his trial.

The Trial Chamber has Inadequate Medical Evidence to Justify Severance

40. As the prosecution has said, severance is a drastic step. It would have far reaching, damaging consequences on the fairness of the trial. A review of two other cases in which severance was considered due to the ill health of an accused demonstrates the high level of evidence and care necessary when considering severance.

41. The first case in which this issue arose was the *Brdjanin & Talic* case at the ICTY.²² The trial started against the two men in January 2002. Nine months into the prosecution case, General Talic fell ill.

²² *Prosecutor v Bradjanin & Talic*, No. IT-98-36-T, *Decision on Prosecution's Oral Request for the Separation of Trials* (20 September 2002).

42. On 9 September 2002, following receipt of the results of a series of medical tests, the Medical Officer of the United Nations Detention Unit communicated a confidential medical report to the Registrar and subsequently to the Trial Chamber, to the effect that Talic was suffering from an advanced form of carcinoma and that he was unfit to stand trial and unfit to remain in the Detention Unit.

43. The very next day, the Trial Chamber held an evidentiary hearing at which it took testimony from the UNDU Medical Officer, in which he explained that the diagnosis was a carcinoma in the liquid layer of the lungs without any possible cure except palliative care. The Trial Chamber then took the extra step of appointing two leading experts—a lung cancer expert and a consultant in pulmonary medicine. The Trial Chamber subsequently convened another evidentiary hearing at which both experts were examined.

44. Based upon this careful examination of expert evidence, thoroughly vetted through cross examination by the parties, the Trial Chamber concluded that General Talic was suffering from an incurable and inoperable illness which is in its terminal phase. It ordered his trial be severed from that of Brdjanin, who himself favored severance.

45. The prosecution itself has appreciated the differences between the situation in *Brdjanin & Talic* and Mr. Ngirumpatse's situation. In its original submission in November 2008, the prosecution said:

In making this submission the Prosecution invites the Chamber to consider the situation obtained in the trial of Brdjanin and Talic in the ICTY. In that case Talic fell ill and was diagnosed as having an incurable, inoperable illness, in its terminal phase, and was deemed unfit to stand trial. The medical information suggested that he would be incapacitated for an indefinite period of time, which would cause undue delay in the proceedings. We have not yet reached that stage

in this trial.²³

46. This assessment was made even before the optimistic picture of Mr. Ngirumpatse's recovery presented by Dr. Eppe in open court on 9 February 2009.

47. The second case in which the health of the accused was considered in relation to severance was the *Stanisic & Simatovic* case at the ICTY.²⁴ There, on the eve of trial, the Trial Chamber received information from UNDU medical doctor that Stanisic might be unfit to stand trial. It immediately ordered an independent medical expert to examine the accused.²⁵

48. The expert reported that Stanisic was not currently fit to stand trial, and that his fitness was not expected to be restored within three, possibly six months²⁶ On 1 April 2008, the Trial Chamber held a hearing at which it set out the options, including severance of Stanisic's case from that of his co-accused Simatovic.²⁷

49. On 7 and 8 April 2008, the Trial Chamber held an evidentiary hearing on the medical condition of the accused. The medical expert was examined by parties and judges.²⁸

50. The Trial Chamber concluded that the trial could commence in the absence of Stanisic, with the possibility that Stanisic could participate by video link from the

²³ *Prosecutor's Submission on Severance of Ngirumpatse Pursuant to Rule 82(B)* (3 November 2008) at para 18

²⁴ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR73, *Decision on Defence Appeal of the Decision on the Future Course of the Proceedings* (16 May 2008)

²⁵ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Future Course of the Proceedings* (9 April 2008) at para. 4

²⁶ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Future Course of the Proceedings* (9 April 2008) at para. 4

²⁷ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Future Course of the Proceedings* (9 April 2008) at para. 4

²⁸ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Future Course of the Proceedings* (9 April 2008) at para. 4

UNDU. In deciding to proceed with the trial, the Trial Chamber considered right of co-accused Simatovic to expeditious trial.²⁹

51. The Appeals Chamber reversed the decision of the Trial Chamber on 16 May 2008. It held that the Trial Chamber had erred in failing to give sufficient weight to the right of the accused to be present and according undue weight to the objective of commencing the proceedings.³⁰

52. The Appeals Chamber held that given the reasonable alternative of adjourning the case for an additional 3-6 months, the Trial Chamber erred in choosing to proceed in the absence of the accused.³¹ The Appeals Chamber ordered an adjournment of the proceedings for minimum three months and then a re-assessment of Stanisic's ability to participate in his trial. Significantly, it did not choose the option of severance of Stanisic's case from that of Simatovic.

53. After the decision of the Appeals Chamber, the Trial Chamber immediately took steps to ensure the best possible care for Stanisic in the hope of a speedy recovery, and took steps to ensure that it and the parties were properly informed of the medical condition of Stanisic. It ordered the UNDU doctor to report on health of the accused once a week. It appointed two independent medical experts, and ordered them to report regularly to the Chamber on the health of the accused³²

54. As of February 2009, some ten months later, the trial of Stanisic has not yet commenced and no severance of his co-accused Simatovic has been ordered.

²⁹ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Future Course of the Proceedings* (9 April 2008) at para. 13

³⁰ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR73, *Decision on Defence Appeal of the Decision on the Future Course of the Proceedings* (16 May 2008) at para. 18

³¹ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR73, *Decision on Defence Appeal of the Decision on the Future Course of the Proceedings* (16 May 2008) at para. 19

³² *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Provisional Release* (26 May 2008)