

ICTR-98-44-T
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(38162-38154)

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Duffy

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: 3 November 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES
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Joseph Nzirorera

JOSEPH NZIRORERA'S OPPOSITION
TO SEVERANCE OF NGIRUMPATSE CASE
AND ANCILLARY APPLICATIONS

The Office of the Prosecutor:

Mr. Don Webster
Ms. Allayne Frankson-Wallace
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. On 28 October 2008, the Trial Chamber issued its *Ordonnance Relative du Depot de Conclusions sur une Eventuelle Disjonction d'Instances*. The Trial Chamber ordered the parties to file its observations on the possible severance of the case of Mathieu Ngirumpatse. These are Mr. Nzirorera's observations.¹

Opposition to Severance

2. The issue of severance is governed by Rule 82(B), which provides:

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. Therefore, the issue is whether severance is **necessary** to protect the interests of justice. The burden of persuasion rests with the party seeking severance.² Mr. Nzirorera knows of no case at the International Tribunals where severance was ordered without a request from one of the parties.

4. 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."³

Every one of those factors militates against severance of the case of Mathieu Ngirumpatse.

5. The Tribunal's completion strategy can play no part in the determination of the interests of justice. The Appeals Chamber has held that the overriding consideration of

¹ On 31 October 2008, Mr. Nzirorera filed *Joseph Nzirorera's Motion for Disqualification of President/Judge Byron*. He therefore requests that the issue of severance not be deliberated on or decided until the issue of Judge Bryon's disqualification is resolved.

² *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 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

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.⁴ 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.⁵

6. Mr. Nzirorera opposes severance. It will prejudice his defence. The prosecution presented a large body of 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.

7. Because he is liable for Mr. Ngirumpatse's acts and conduct under the joint criminal enterprise form of liability and conspiracy charges in the indictment, Mr. Nzirorera would have to call many of the same witnesses which Mr. Ngirumpatse would call at a separate trial. This would create the very hardship and burden on witnesses that is the primary reason for a joint trial in the first place.

8. In addition, Mr. Nzirorera was counting on Mr. Ngirumpatse testifying during the trial. Indeed he is one of the most crucial witnesses for Mr. Nzirorera's defence. If the trials are separated, it becomes highly unlikely that Mr. Ngirumpatse would testify at

⁴ *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

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

a trial of Mr. Nzirorera, particularly because it is likely to precede his testimony at his own trial.

9. 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.⁶

10. That Trial Chamber observed that “the nature of the possible prejudice to an accused, the advantages of a joint trial, and the mechanisms for mitigating the claimed prejudice by means other than severance, must all be weighed when considering a motion for severance.”⁷

11. 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.”⁸

12. Applying those principles to this situation, there will be hardship to numerous witnesses if severance is granted. Mr. Nzirorera estimates that if the case is severed, he would have to call approximately 25 of the 35 witnesses on Mr. Ngirumpatse’s principal witness list at his own trial, and some of the witnesses on Ngirumpatse’s secondary list. An additional number of witnesses who are on Mr. Nzirorera’s list are also likely to be

⁶ *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

⁷ *Prosecutor v Bagosora et al.*, No. ICTR-98-41-T, *Decision on Request for Severance of Three Accused* (27 March 2006) at para. 3

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

called by Mr. Ngirumpatse at a separate trial. All of these witnesses would thus be required to testify twice. Thus severance would impose a hardship on many people, and call into question whether those witnesses would be willing to testify for Mr. Nzirorera knowing that they would have to come back, or had already come, to testify for Mr. Ngirumpatse.

13. 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. A joint trial will avoid the pressure and trauma to witnesses who must repeatedly testify in multiple trials⁹ This must be held applicable with the same force to defence witnesses as prosecution witnesses.

14. 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."¹⁰ 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.

15. The fairness as between the accused would also be enhanced by declining to order severance. Both Mr. Ngirumpatse and Mr. Nzirorera have prepared their defence cases in reliance on the other—sharing the responsibility of rebutting the prosecution's

⁹ *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

¹⁰ *Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial* (12 July 2000) at para. 32

evidence. If there is a severance, that would impose a serious burden on both men at this late stage of the procedure in the preparation and presentation of their defences at separate trials.

16. Indeed, the Trial Chamber in this very case has held that “in the appreciation of the interests of justice, the right to be tried fairly and without undue delay, as guaranteed by Article 20 of the Statute, must be taken into account.”¹¹ Since Mr. Nzirorera does not object to the delay occasioned by Mr. Ngirumpatse’s illness, the issue of fairness must be paramount in the Trial Chamber’s deliberations.

17. 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.¹²

18. Therefore, where issues of fairness in mounting a joint defence are pitted against the prospect of delay, the issues of fairness must prevail.

19. For all of these reasons, Mr. Nzirorera respectfully requests that there not be a severance of Mr. Ngirumpatse’s case at this time, and that the joint trial be adjourned until Mr. Ngirumpatse is able to attend.

¹¹ *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment* (14 February 2005) at para. 26

¹² *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

Alternatives to Severance

20. The Trial Chamber has also requested the parties to offer practical alternatives to severance.

21. Mr. Nzirorera suggests that the most practical alternative is the declaration of a mistrial in his case and appointment of a referral bench to consider transfer of his case to a national jurisdiction. The pollution of the fact finding process through the epidemic of disclosure violations by the prosecution and other pleading and trial issues has resulted in an unfair trial that can no longer be cured. Any conviction of Mr. Nzirorera will inevitably be overturned on appeal.

Certification to Appeal

22. Should the Trial Chamber nevertheless forge ahead with severance of Mr. Ngirumpatse's case, Mr. Nzirorera hereby applies, pursuant to Rule 73(B) for certification to appeal the decision, and a stay of the trial pending the appeal. As demonstrated above, the issue is one which significantly affects the fairness and expeditiousness of the trial, and an immediate resolution of the issue would materially advance the proceedings, since an erroneous decision would be a great hardship to witnesses and incurable after judgement.

23. This identical issue of mid-trial severance has already been found to meet the criteria of Rule 73(B) in the *Bagosora* case¹³ and in cases at the ICTY involving both mid-trial severance and pre-trial joinder.¹⁴

¹³ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Interlocutory Appeal from Decisions on Severance and Scheduling of Witnesses* (11 September 2003)

¹⁴ *Prosecutor v Trbic*, No. IT-05-88/1-PT, *Decision on Requete de la Defense en Certification d'Appel Suite a la Decision de la Chambre Datee du 26 Juin 2006*(14 July 2006); *Prosecutor v Popovic et al*, No. IT-02-57-PT, *Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal* (6 October 2005); *Prosecutor v Gotovina et al*, No. IT-01-45-PT, *Decision on Defence Applications for Certification*

24. Therefore, it is respectfully submitted that certification to appeal any decision on severance should be granted. Since there will be no scheduled session in this case until January in any event, a prompt granting of certification to appeal will allow the Appeals Chamber to rule on the issue without further delay in the proceedings.

Extension of Time

25. Should severance ultimately be accomplished, Mr. Nzirorera will be filing motions to exclude evidence admitted during the prosecution's case relating to Mr. Ngirumpatse that would not have been admitted in a separate trial—particularly evidence relating to the period before July 1993 when Mr. Nzirorera was not a member of the MRND executive bureau.

26. In addition, Mr. Nzirorera will need additional time and resources to prepare to defend the issues in the case that Mr. Ngirumpatse's defence team was responsible for. This will require interviewing the Ngirumpatse witnesses, taking Rule 92 *bis* statements from them when necessary, as well as identifying and interviewing other potential witnesses to these facts. This will result in some delay in the commencement of Mr. Nzirorera's defence case.

27. If severance is granted, the Trial Chamber's *Order to Joseph Nzirorera to Reduce his Witness List* (24 October 2008) will have to be modified to allow Mr. Nzirorera to call additional witnesses planned for the Ngirumpatse defence. Therefore, because that order has been overtaken by recent events, Mr. Nzirorera does not believe it prudent to launch an interlocutory appeal at this time, as allowed by the Trial Chamber. In addition, he hereby moves for an extension of time to comply with that order until

to Appeal Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder (14 August 2006)

such time as the future of the trial is determined. If severance is denied, there is plenty of time for the filings required by that order; if severance is granted any witness list filed before that time will have to be substantially modified. Therefore, it is preferable to resolve the issuance of severance first.

Conclusion

28. For all of the above reasons, Mr. Nzirorera suggests that the most prudent course is to wait for Mr. Ngirumpatse. If the Trial Chamber can't wait, then it is respectfully requested that the Trial Chamber declare a mistrial in Mr. Nzirorera's case and appoint a referral bench to consider transfer of his case to a national jurisdiction.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input checked="" type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Trial Chamber III A. N'Gum
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From:	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence Peter Robinson (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
	Case Name: The Prosecutor vs. Joseph Nzirorera			Case Number: ICTR-98-44-T
Dates:	Transmitted: 31 October 2008		Document's date: 3 November 2008	
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Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Ex Parte		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
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