ICC-01/04-01/07-HNE-57

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 27 March 2006

THE PROSECUTOR
v.
Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON REQUEST FOR SEVERANCE OF THREE ACCUSED

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence
Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

BEING SEIZED OF the "Extremely Urgent Joint Motion for Severance", filed by the Defences of Kabiligi, Nsengiyumva and Ntabakuze on 17 March 2006;

CONSIDERING the Prosecution Response, filed on 20 March 2006; the Bagosora Response, filed on 21 March 2006; the Joint Reply to the Prosecution Response, filed on 21 March 2006; the Joint Reply to the Bagosora Response, filed on 21 March 2006; and the oral submissions on 22 March 2006;

HEREBY GIVES WRITTEN REASONS for having denied the motion.

INTRODUCTION

1. The Accused Kabiligi, Nsengiyumva and Ntabakuze argue that they will be prejudiced by the testimony of two witnesses whom the Bagosora Defence wishes to call, Jean Kambanda and Marcel Gatsinzi.[1] This prejudice is said to justify their severance from the present trial, pursuant to Rule 82 (B) of the Rules of Procedure and Evidence ("the Rules").[2] The motion does not ask for a new trial; rather, the remedy requested is that the evidence tendered by the Bagosora Defence after the moment of severance would not form part of the case against the three Accused. Suspension of the testimony of Jean Kambanda is requested pending resolution of the motion.

2. On 22 March 2006, the Chamber denied the motion orally.[3] These are the reasons for that decision.

DELIBERATIONS

3. The present motion is brought under Rule 82 (B):

> 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.

Whether to order a separate trial of an accused is within the discretion of the Trial Chamber.[4] 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 in the exercise of this discretion.[5] 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] The burden of establishing serious prejudice rests with the moving party.[7]

4. The Defence argues that the Bagosora witnesses will "introduce evidence which is Prosecution-oriented and highly prejudicial to the defence cases of all four defendants".[8] Given the allegations in Kambanda's plea agreement against, amongst others, the Rwandan Armed Forces, the potential prejudice against the Accused is said to be "obvious".[9] Furthermore, the testimony will include evidence "which does not currently form part of the Prosecution evidence against the defendants". No procedural mechanism is available, according to the motion, which can adequately mitigate this prejudice other than severance.[10]

5. The fact that one co-accused may adduce evidence which is said to be disadvantageous to another co-accused does not, in and of itself, justify severance. Even intentionally antagonistic defences do not necessarily outweigh the positive effects of a joint trial. In rejecting severance where two co-accused sought to blame one another for criminal acts with which they were both charged, an ICTY Trial Chamber has held:

Nor does the Trial Chamber see any possibility of serious prejudice resulting from the prospect that Brdanin may give evidence which incriminates Talic or that Talic will be unable, without fear of contradiction, to blame Brdanin and others for the orders which the prosecution may establish that he followed. A joint trial does not require a joint defence, and necessarily envisages the case where each accused may seek to blame the other. The Trial Chamber will be very alive to the "personal interest" which each accused has in such a case. Any prejudice which may flow to either accused from the loss of the "right" asserted by Talic here to be tried without incriminating evidence being given against him by his co-accused is not ordinarily the type of serious prejudice to which [Rule 82 (B)] is directed. The Trial Chamber recognises that there could possibly exist a case in which the circumstances of the conflict between the two accused are such as to render unfair a joint trial against one of them, but the circumstances would have to be extraordinary.[11]

Requests to sever trials on the basis of hostile or inconsistent defences have been repeatedly rejected by Chambers of the international tribunals, as in national jurisdictions.[12]

6. The applicants submit, however, that the present situation is more prejudicial than the intentional introduction of adverse evidence by a co-accused. Having failed in its attempt to call Kambanda as its own witness, the Prosecution will now have the opportunity to obtain "Prosecution-oriented" evidence by an indirect route. The cross-examination will give it a chance to "fill the gaps" in its case and, effectively, to reopen its case. The three co-Accused will have no choice but to call "a litany of additional witnesses" to rebut the prejudicial evidence of these witnesses.[13]

7. The suggestion that the Prosecution case can be re-opened through cross-examination is unfounded. Rule 90 (G)(i) constrains the scope of cross-examination to

three areas: the subject-matter of the examination-in-chief; matters affecting credibility; and, "where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case". This last category must read in light of Rule 85 (A)(i), which prescribes that "the trial shall be presented in the following sequence: (i) Evidence of the prosecution; (ii) Evidence for the defence; (iii) Prosecution evidence in rebuttal; (iv) Defence evidence in rejoinder ...." This sequence implies that the Defence may reasonably infer that matters on which no evidence was led during the Prosecution case do not form part of that case. Accordingly, the "case for the cross-examining party" must now be understood as defined and limited by the evidence presented during the Prosecution case.[14] The Prosecution may adduce evidence during its cross-examination which corroborates or reinforces evidence presented during the presentation of its case, but may not, at this stage, venture into new areas.

8. The Chamber does not see that there is any basis to distinguish between the jurisprudence concerning mutually antagonistic defences of co-accused, and the present case where the allegedly prejudicial evidence rather appears to arise from a disagreement as to strategy. In either case, the issue is whether the evidence might cause "serious prejudice" to the co-accused, which can only be avoided by severance of trial. No such "serious prejudice" has been established. The fact that more evidence will be heard than would be the case if the three co-Accused had absolute control over the presentation of the defence does not constitute "serious prejudice", as is amply demonstrated by the jurisprudence concerning antagonistic defences. This is a normal incident of a joint trial which, in other respects, may be beneficial to the three co-Accused or to the administration of justice. The proposed testimony of Jean Kambanda is not even alleged to concern any of the co-Accused individually. Indeed, the motion emphasizes that the testimony is prejudicial to all four accused, demonstrating that there is a disagreement between the three co-Accused and the Bagosora Defence, rather than a conflict of interest.[15] If evidence is adduced which, in the opinion of the co-Accused, is prejudicial to their interest, then they will have the opportunity, subject to the Chamber's control, to cross-examine the witness on any matter raised by the Prosecution and, where legally justified, to call additional rebuttal evidence.[16] In short, the co-Accused have not demonstrated that there is any specific aspect of the witnesses' testimony which is particularly or unusually prejudicial so as to justify severance.[17]

9. The timing of the present motion also weighs against severance. While the appearance of a scheduled witness is never certain, the Bagosora Defence gave notice on 13 December 2005 that it had a reasonable basis to believe that the witness would testify, by including his name on a list of persons which it "intended to call during the next session". Although the three-month delay since that time does not, of itself, warrant dismissing the motion, the advanced stage of proceedings, combined with this delay, is a factor against granting severance. More than eighty Defence witnesses have been called so far. Only the two named in the present motion have given cause for a motion for severance. In these circumstances, the interests of ensuring uniform presentation of evidence and procedure strongly favour maintaining the joint trial. Severing individual segments of trials because portions, viewed separately, might cause a disadvantage to the position of some co-accused, would undermine the very purpose of joint trials. The

present claim of prejudice must be viewed in the context of the entire trial, from which the co-Accused have accrued substantial benefit as a result of being able to rely on the evidence presented by one another. At this advanced stage of proceedings, and in the absence of any particularized showing of prejudice, granting severance even in the limited form requested by the co-Accused, is unwarranted.

10. The decisions in *Kajelijeli* and in *Kovacevic*, mentioned by the Defence, concern very different circumstances.[18] Severance in the former case was granted before start of trial because "most of the allegations in the indictment" did not relate to the accused. He would thus endure a lengthy trial concerning many matters which would be of no concern to him, impairing his right to be tried without undue delay.[19] The *Kovacevic* decision concerned a motion for joinder before the commencement of trial, not near the end of the trial, as here. Rule 82 (B) was mentioned tangentially, but the balance of prejudice and benefits of a joint trial were apparently quite different in that case.[20]

11. The Defence has requested that the testimony of Jean Kambanda be suspended pending decision on the joint motion. As he has not yet testified, this request is moot.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 27 March 2006

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

[Seal of the Tribunal]

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[1] Although the motion was filed confidentially, all the responses and replies have been filed publicly. The Chamber does not see any need for the present decision to be confidential.

[2] The trials of the four accused were joined in 2000, *see Bagosora et al.*, Decision on the Prosecutor's Motion for Joinder (TC), 29 June 2000.

[3] T. 22 March 2006 p. 8.

[4] *Bagosora et al.*, Decision (AC), 28 October 2003 p. 5 ("[U]nder Rule 82 (B) the Trial Chamber has discretion to determine whether it is necessary to order separate trials to avoid a conflict of interest that might cause prejudice, or to protect the interests of justice"); *Brdanin and Talic*, Decision on Request to Appeal (AC), 16 May 2000 ("[S]ub-Rule 82 (B) is permissive rather than obligatory, thus leaving to the relevant Trial Chamber the power to determine the matter of separate trials in the circumstances of the case

before it"); *Nyiramasuhuko et al.*, Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 32.

[5] *Bagosora et al.*, Decision on Request for Severance by Accused Kabiligi (TC), 24 March 2005, para. 13 (with references).

[6] *Bagosora et al.*, Decision on Request for Severance by Accused Kabiligi (TC), 24 March, 2005, para. 13; *Bagosora et al.*, Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses (TC), 9 September 2003, para. 22; *Delalic et al.*, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic (TC), 25 September 1996, para. 7; *Brdanin and Talic*, Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply (TC), 9 March 2000, para. 31; *Simic et al.*, Decision on Defence Motion to Sever Defendants and Counts (TC), 15 March 1999; *R. v. Lake*, 68 Cr.App.R. 172, CA (England), 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"); *R. v. Mapara* (2003) 2003 BCC LEXIS 2148, pp. 12-13 (CA) (British Columbia, Canada); *R. v. Torbiak and Gillis* (1978) 40 CCC (2d) 193, p. 199 (CA) (Ontario, Canada); *Zafiro v. United States*, 506 U.S. 534, p. 538 (Supreme Court): ("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).

[7] *Nyiramasuhuko et al.*, Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 33; *Ngeze*, Decision on the Defence Request for Separate Trials (TC), 12 July 2000, p. 5; *Bagambiki, Imanishimwe and Munyakazi*, Decision on the Defence Motion for the Separation of Crimes and Trials (TC), 1 October 1998, p. 6.

[8] Motion, paras. 17, 22.

[9] Motion, para. 18; Reply to Prosecution, para. 10.

[10] Motion, paras. 17-23; Reply to Prosecution, para. 16.

[11] *Brdanin and Talic*, Decision on Motions by Momir Talic for Separate Trial and for Leave to File a Reply (TC), 9 March 2000, para. 29 (affirmed by *Brdanin and Talic*, Decision on Request to Appeal (AC), 16 May 2000.

[12] *Nyiramasuhuko et al.*, Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 39 (recognizing that any prejudice from mutually antagonistic defences could be avoided in a joint trial through cross-examination and, where justified, by permitting rebuttal evidence); *Simic et al.*, Decision on Defence Motion to Sever Defendants and Counts (TC), 15 March 1999 ("a Trial Chamber of the International Tribunal, composed of professional Judges, is able to assess the evidence in a case involving conflicting defences in a fair and just manner, without prejudice to any of the accused, and that such a case is best tried by the same Trial Chamber rather than a number of different Chambers .... the possibility of such 'mutually antagonistic defences' does not constitute a conflict of interests capable of causing serious prejudice"). See also *Zafiro v. United States*, 506 U.S. 534, pp. 538-539 (federal rule of procedure authorizing severance "does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion"); *U.S. v. Talavera*, 668 F.2d 625, p. 630 (1st Cir. 1982) ("'antagonistic defences do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other.' Severance is required only where the conflict is so prejudicial and the defences are so irreconcilable that the trier of fact will unjustifiably infer that this conflict alone demonstrates that both are guilty") (citations omitted); *R. v. Crawford*, [1995] 1 S.C.R. 858, pp. 880-881 (Canada) ("There exist, however, strong policy reasons for accused persons charged with

offences arising out of the same event or series of events to be tried jointly. The policy reasons apply with equal or greater force when each accused blames the other or others, a situation which is graphically labelled a "cut-throat defence". Separate trials in these situations create a risk of inconsistent verdicts ... Although the trial judge has a discretion to order separate trials, that discretion must be exercised on the basis of principles of law which include the instruction that severance is not to be ordered unless it is established that a joint trial will work an injustice to the accused. The mere fact that a co-accused is waging a 'cut-throat' defence is not in itself sufficient"); *R. v. Cairns, Zaidi and Chaudhary* [2003] 1 Cr.App.R. 38, para. 52 CA (England) ("Of course the trial court has a discretion to be exercised in the interests of justice. But the fact that one defendant is likely to give evidence adverse to a co-defendant, after that co-defendant has given evidence, will not of itself normally require separate trials. It is, after all ... a common enough experience of the courts").

[13] Reply to Prosecution, paras. 16-18.

[14] This reading of Rule 90 (G)(i) is reinforced by Rule 90 (G)(ii), which requires the cross-examining party, when it is adducing evidence relevant to its case, to "put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness". In other words, the evidence which is being adduced must be relevant to evidence which, in the case of a party which is conducting a cross-examination of a witness after the presentation of its case, has already been presented.

[15] Motion, para. 17 (the evidence is "highly prejudicial to the defence cases of all four defendants"); Reply to Prosecution, para. 16.

[16] *Bagosora et al.*, Decision on Bagosora Request for Certification (TC), 22 February 2006, para. 9 (holding that an accused is entitled to ask supplemental questions after the Prosecution cross-examination where "(i) a new issue has arisen issue has arisen during the Prosecution cross-examination, which (ii) is adverse to the Accused who wishes to pose additional questions"); *Nyiramasuhuko et al.*, Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 39 ("several remedies ... are always available should any prejudice arise within the course of the trial. In particular, the Defence has a full opportunity to cross-examine the witnesses called by other co-accused. And, where necessary and the legal requirements have been met, it may be open to a party to apply for leave to call additional evidence in rebuttal").

[17] The fact that Jean Kambanda formerly appeared on the Prosecution witness list is not unique. Other Defence witnesses, including those called by the co-Accused, also formerly appeared on that list. Similar situations have arisen in other trials without leading to severance, see e.g. *Nyiramasuhuko et al.*, Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 6.

[18] Motion, para. 11; T. 22 March 2006 p. 6.

[19] *Bizimana et al.*, Decision on Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed By the Accused Juvenal Kajelijeli, (TC), 6 July 2000, paras, 28, 35. Furthermore, the disproportion of allegations between the accused and his co-accused might in that case unfairly exaggerate his culpability. This Chamber has already rejected severance on the basis of such arguments. *Bagosora et al.*, Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses (TC), 9 September 2003, paras. 30-31 ("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 ... 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").

[20] *Kovacevic, Kvocka, Radic, Zigic*, Decision on Motion for Joinder of Accused and Concurrent Presentation of Evidence (TC), 14 May 1998. In that case, the Accused was ready to proceed to trial immediately, whereas joinder with the other co-accused would have delayed the start of trial, impairing his right to be tried without undue delay. None of these factors are present here.