

ICTR-97-21-5
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International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994

Case No ICTR-97-21-I

Date :

ENGLISH

Original: FRENCH

TRIAL CHAMBER

THE PROSECUTOR

Vs.

PAULINE NYIRAMASUHUKO

AND

ARSÈNE SHALOM NTAHOBALI

ICTR
COURT MGMT.
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**DEFENCE RESPONSE ON BEHALF OF PAULINE NYIRAMASUHUKO
TO THE PROSECUTOR'S MOTION FOR JOINDER OF ACCUSED**

I. C. T. R.
SENIOR LEGAL OFFICER
RECEIVED
DATE: 29-10-99
ACTION:

DEFENCE RESPONSE, ON BEHALF OF PAULINE NYIRAMASUHUKO, TO THE PROSECUTOR'S MOTION FOR JOINDER OF ACCUSED

TO THE JUDGES SITTING IN ARUSHA IN TRIAL CHAMBER I OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, THE ACCUSED SUBMITS AS FOLLOWS :

I. THE FACTS

1. On 22 May 1997 Pauline Nyiramasuhuko was jointly charged with Arsène Shalom Ntahobali in the same indictment, for Genocide, Crimes against humanity and Serious Violations of Article 3 common to the Geneva Conventions;
2. On 29 May 1997 the indictment was confirmed and a warrant of arrest as well as an order for surrender were issued by Judge Yakov Ostrovsky;
3. Pauline Nyiramasuhuko was arrested in Kenya on 18 July and transferred the same day to the Tribunal's Detention Facility in Arusha, Tanzania;
4. On 3 September 1997 Pauline Nyiramasuhuko made her initial appearance before Trial Chamber I, and pleaded not guilty to the five charges brought against her;
5. On 18 August 1998, the Prosecutor filed a motion for joinder of accused (the "Joinder Motion") in the cases of Pauline Nyiramasuhuko and Arsene Shalom Ntahobali (ICTR -97-21-I), Sylvain Nsabimana and Alphonse Nteziryayo (ICTR - 97- 29A and B - 1), Joseph Kanyabashi (ICTR - 96 - 15 - T) and Elie Ndayambaje (ICTR - 96- 8 - T);
6. On the same date, the Prosecutor filed a motion seeking leave to amend the indictment (the "Leave Request" in each of the cases referred to above);
7. The said motions were set for hearing before Trial Chamber I of the ICTR on 24 September 1998;
8. That day, the hearing on the Leave Request was adjourned, following a decision rendered by the Chamber on a question of jurisdiction raised by Joseph Kanyabashi's Defence ;
9. The said decision was appealed against and, on 3 June 1999, the Appeals Chamber rendered a decision according to which Leave Requests must be heard by the Chamber before which the defendant concerned had initially appeared, whereas Joinder Motions could be heard by any of the three Chambers of the ICTR ;
10. The said motions are now set for hearing during the week of 9 to 13 August 1999, for all the defendants concerned ;

II. ARGUMENT

A. Joinder of accused is not justified in law

11. The joinder of accused is not lawful because the evidence does not demonstrate their

participation in the same transaction, as required in a request for joinder under Rule 48 of the Rules and defined under Rule 2 of the Rules ;

- 12. The Tribunal has defined participation in the same transaction as follows : “Involvement in a same transaction must be connected to specific material elements [and mental] which demonstrate on the one hand the existence of an offence, of a criminal act which is objectively punishable and specifically determined in time and space, and on the other hand prove the existence of a, common scheme, strategy or plan and that the accused therefore acted together and in concert” ;

The Prosecutor vs. Kayishema (ICTR-95-I-T), Ntakirutimana (ICTR-96-10-T, ICTR-96-17-T) and Ruzindana (ICTR-95-I-T, ICTR-96-10-T), Decision on the Prosecutor’s motion to sever, to join in a superseding indictment and to amend the superseding Indictment, 27 March 1997, page 3, paragraphs 5 and 6.

- 13. The Prosecutor must provide evidence of each of those essential ingredients of the offence of conspiracy to commit genocide. The Rules, as well as the judicial interpretation of Rules 2 and 48, require the Prosecutor therefore to also prove that the accused acted together and in concert;
- 14. The evidence that the accused acted together and in concert does not flow, as the Prosecutor claims, from the evidence of the existence of a common plan, a common strategy or a common scheme ;

Brief in support of the Prosecutor’s motion for joinder of the accused, paragraph 15

- 15. In Criminal Law, legal provisions must be given the restrictive interpretation that is most favourable to the defendant. That is moreover, what the Tribunal maintains in the aforementioned case: “The Tribunal deems it appropriate to reiterate, as did the Defence, that this is a criminal matter and that the pertinent laws must be interpreted in a restrictive manner, in the interest of the rights of the accused” ;

ibid, page 4, paragraph 3

- 16. The Prosecutor has adduced no evidence tending to show that the six accused in question conspired to commit genocide. Furthermore, there is total absence of evidence that the accused acted together and in concert, or that it is a matter of related and indivisible facts;
- 17. Hence, no part of what is alleged in the Prosecutor’s brief, establishes any connection whatsoever between Pauline Nyiramasuhuko and the other accused in question (except for Shalom Ntahobali), in respect of specific material acts in time and space, or mental elements, which would show that the latter acted together and in concert. At the very most, the evidence would show that Pauline Nyiramasuhuko was seen, on very rare occasions, with Joseph Kanyabashi and or with Sylvain Nsabimana. She was never alleged to have been seen with Alphonse Nteziryayo or with Elie Ndayambaje.
- 18. Additionally, in the brief, the Prosecutor claims that Nyiramasuhuko, in her capacity as Minister of Women’s Development and Family Welfare in the Interim Government, had participated directly, at national level, in planning the extermination of Tutsis ; (*paragraph 29*).

- 19. That allegation bears no material or mental relation to the acts for which the other accused are

charged. In this specific instance, it is not at all the same transaction within the meaning of Rule 2 of the Rules and of established precedent, as previously cited. The Prosecutor can no longer claim that “related and indivisible facts” are involved;

20. One of the objectives sought by the joinder of the accused is to “obviate risks of contradiction in the decisions rendered when related and indivisible facts are examined” ;

The Prosecutor vs. Kayishema et al., ICTR-95-I-T, Decision on the joinder of the accused and setting the date for trial, 6 November 1996, page 3, paragraph 3.

21. Considering the lack of evidence of the same transaction, the Prosecutor therefore asks the Tribunal to join the trial of Nyiramasuhuko to that of the other accused in question, (except for Arsene Shalom Ntahobali who appears as co-accused in the initial indictment on the sole grounds that they all committed acts prohibited by the Statute, in Butare *Préfecture* in 1994 ;

22. As stressed by the Tribunal : “...it would be a gross generalization to deduce solely from the ‘elimination of the Tutsis in Kibuye *Préfecture* in 1994’ the existence of a same transaction”;

The Prosecutor versus Kayishema et al, ICTR –95 – I – T : Decision on the Motion of the Prosecutor to sever, to join in a superseding indictment and to amend the superseding indictment, 27 March 1997, page 3, paragraph 7.

23. We submit that the Prosecutor’s motion for the joinder of the accused should be dismissed since it does not satisfy the requirements stipulated under Rule 48 of the Rules in respect of the existence of the “same transaction” ;

B. The joinder of the accused is not justified in the interest of justice

24. The Prosecutor maintains that joinder of accused is also justified because it would eliminate the need for victims and other witnesses to make several journeys and to repeat, at separate trials, their testimony in respect of, for some of them that have been traumatized thereby, extremely painful events, inspite of the right of all Defence Counsel to cross- examine them ;

Prosecutor’s Brief, page 15, paragraphs 49 to 52 inclusive

25. In order to support this argument, the Prosecutor claims that 23 witnesses will be called to give evidence on the preparation of the genocide and that at least half a dozen witnesses would be called in at least three cases, in addition to the expert witnesses ;

Idem, page 16, paragraph 54

26. It appears on reading the Prosecutor’s brief in support of joinder of the accused in respect of the military, and, we are sure from all motions for joinder, that the 23 witnesses to be called to give evidence that there was a plan, will in any case have to appear several times. The same is true for the expert witnesses ;

27. As regards the half-dozen witnesses common to the three cases, we would like to note first of all that the number is extremely minimal, especially compared to the number of statements disclosed to date by the Prosecutor in respect of the six accused in question, namely 197, without taking account of the statements initially disclosed in the case of Nyiramasuhuko, 35 in number;

28. Further, it would be necessary to know if the three cases involving the half a dozen witnesses include that of Nyiramasuhuko, otherwise the Prosecutor's argument has is, as far as we are concerned, valueless. Be that as it may, we submit that the repetition of six witnesses' testimony in the context of a trial on this scale, could not be a significant contributory element for joinder of accused ;
29. The Prosecutor also raises the issue of safety, alleging that numerous journeys by the prosecution witnesses would increase the actual risk they are exposed to. We wish to emphasize on this point that the Tribunal has already responded to this argument by specifying that, apart from the existence of protective measures, it is always necessary to strike a fair balance between, the protection of prosecution witnesses on the one hand, and the full respect of the rights of the accused on the other;

The Prosecutor versus Kayishema et al. ICTR – 95 – I – T, Decision on the motion of the Prosecutor to sever, to join in a superseding indictment and to amend the superseding indictment, 27 March 1997

30. In the brief, the Prosecutor also states that a joinder of accused will provide better administration of justice by obviating "risks of contradictions in the decision rendered when related and indivisible facts are examined". We submit that this argument is not justified in the instant case, since the acts for which each of the accused is charged are not related and indivisible, as shown in paragraphs 12 to 16 of the present response;

Prosecutor's Brief, page 5, paragraph 55

31. The Prosecutor's argument that separate trials would present special difficulties, owing to the fact that the Judges "on each occasion would have to try to consider the evidence with minds unaffected by their prior conclusions regarding that evidence reached on earlier occasions" is also unfounded. The Tribunal has already decided what is the significant evidence common to all the cases in the Kambanda and Akayesu trials, which does not seem to prevent the Judges who sat in those trials from sitting again in those of different accused;

Idem, page 15, paragraph 56

32. The Prosecutor also raises the argument of hierarchical relationships between the various accused, as well as the relationship between them and their subordinates, to justify joinder of accused. There was no hierarchical relationship between Nyiramasuhuko as Minister of Women's Development and Family Welfare and the other accused who were solely answerable to the Minister of the Interior and, ultimately, the President ;

Idem, page 15, paragraph 57

33. Finally, in reply to the Prosecutor's arguments in respect of the delay caused by joinder of accused in the present case and the right of the accused to be tried without undue delay, and that the trial be fair and expeditious, (Articles 19,1 and 20, 4, (c) of the Statute) paragraphs 51 to 59 of the Reply by the Defence of the accused Pauline Nyiramasuhuko to the Prosecutor's request for leave to file an amended indictment is applicable *mutatis mutandis*, adding a further period of 11 months custody ;

III. CONCLUSION

FOR ALL THESE REASONS, WE RESPECTFULLY REQUEST THIS TRIAL CHAMBER:

TO DISMISS the motion filed by the Prosecutor for the joinder of the accused.

RESPECTFULLY SUBMITTED.

(Signed)

Nicole Bergevin
Counsel for the Defence of Pauline Nyiramasuhuko

Arusha, 14 July 1999

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

TRIAL CHAMBER I

THE PROSECUTOR

VERSUS

PAULINE NYIRAMASUHUKO

AND

ARSENE SHALOM NTAHOBALI

**REPLY BY THE DEFENCE FOR THE ACCUSED PAULINE NYIRAMASUHUKO TO
THE MOTION FILED BY THE PROSECUTOR FOR JOINDER OF THE ACCUSED**

Arusha, 14 August 1999