

3680



International Criminal Tribunal for Rwanda

TRIAL CHAMBER II

OR: ENG 9/9

Before: Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Pavel Dolenc

Registrar: Agwu U. Okali

Date: 8 September 2000

THE PROSECUTOR
v.
SYLVAIN NSABIMANA
ALPHONSE NTEZIRIYAYO
PAULINE NYIRAMASUHUKO
ARSÈNE SHALOM NTAHOBALI
JOSEPH KANYABASHI
ELIE NDAYAMBAJE

Case No. ICTR-97-29A-T

JUDICIAL RECORDS/ARCHIVES
RECEIVED
ICTR

2000 SEP 11 P 2:39

DECISION ON THE DEFENCE MOTION SEEKING A SEPARATE TRIAL FOR
THE ACCUSED SYLVAIN NSABIMANA

The Office of the Prosecutor:

Japhet Daniel Mono
Ibukunolu Alao Babajide
Andra Mobberley

Counsel for the Accused:

Josette Kadji
Charles Tchakounte Patie, Co-counsel

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: *Dr. M. N. M. K. M. A. A. A.*
SIGNATURE: *[Signature]* DATE: *11.09.2000*

[Handwritten signature]

Case No. ICTR-97-29A-T

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II of the International Criminal Tribunal for Rwanda (the "Trial Chamber") composed of Judge Laïty Kama, Presiding, Judge William H. Sekule, Judge Pavel Dolenc as assigned by the President to temporarily replace Judge Mehmet Güney;

BEING SEIZED OF the "Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana ("the Accused") (the "Defense Motion") filed on 18 April 2000, and the Brief in support of the Defense Motion filed on 15 May 2000;

CONSIDERING the "Prosecutor's Response to Sylvain Nsabimana's Motion to Have a Separate Trial" (the "Prosecutor's Response") filed on 23 May 2000;

CONSIDERING the "Decision on the Defence Motion for Orders to Sever Proceedings, Set a Date for a Status Conference and for the Return of Personal Effects", rendered on 8 July 1998 by the Trial Chamber dismissing the said Motion;

CONSIDERING the "Decision on the Prosecutor's Motion for Joinder of Trials", rendered on 5 October 1999 by the Trial Chamber granting the Prosecutor's Motion for joint trials for *Sylvain Nsabimana & Alphonse Nteziriyayo* (ICTR-97-29A-T and 29B-T), *Pauline Nyiramasuhuko & Arsène Shalom Ntahobali* (ICTR-97-21-T), *Joseph Kanyabashi* (ICTR-96-15-T), and *Elie Ndayambaje* (ICTR-96-8-T) (collectively the "joined accused");

HAVING HEARD the parties at a hearing held on 7 June 2000.

SUBMISSIONS OF THE DEFENCE

1. The Defence submits, *inter alia*, that the Defence Motion is admissible, pursuant to Rules 72(A), 73 and 82, that a separate trial is necessary to avoid conflicts of interests between the Accused and the 5 other accused in the joint trial, and that a joint trial is not in the interests of justice and will infringe upon the rights of the Accused to a fair and expeditious trial.
2. The Defence argues that the Defence Motion is not time-barred because the Prosecutor failed to comply with the disclosure requirements in accordance with Rule 66(A)(i). The supporting material related to the first indictment was effectively disclosed to the Defence only on 30 August 1999. Following the Accused's further appearance on 13 August 1999, when new counts were added to the amended indictment, the Prosecutor is still in the process of disclosing witness statements. The Defence argues that because the Prosecutor has not complied with the obligation of timely disclosure, the Defence cannot be held to the deadline prescribed under Rule 72(A).
3. The Defence submits that the Trial Chamber should consider the issues raised by the Defense Motion on a case-by-case basis, and that the criteria of consideration have been established to protect the interests of justice and to ensure that the rights of the Accused and of other joined accused in a joint trial are not violated.

Case No. ICTR-97-29A-T

4. The Defense asserts that a separate trial for the Accused is necessary because there are conflicts of interests between him and the other joined accused. The Defence submits, *inter alia*, that there is animosity between the Accused and the other joined accused which arose when the Accused disassociated himself from the other joined accused because he did not participate in writing a book that purportedly was written and signed by all the joined accused in this case. This animosity led the Trial Chamber to render a Decision on 18 November 1998 to remove the Accused from the Detention Facility for a period of 90 days.
5. The Defense further argues that no common ground exists between the Accused and the other joined accused. In support of this argument the Defence refers to a Rwandan Government report dated February 1996 which shows that the Accused, unlike the other joined accused, was not depicted as having masterminded the genocide. The Defence further alleges that the transcript of the Accused's interview with the Prosecutor indicates that he may make revelations which are likely to implicate some of the joined accused in this case.
6. The Defence submits that a joint trial will violate the Accused's right to a fair trial because of the aforementioned differences between the Accused and the other joined accused. The Defence attached documents (newspaper articles and correspondence) in existence before the arrest of the Accused to show that the facts and circumstances of his case are substantially different from that of the other joined accused and that the Accused is not guilty of the charges against him.
7. The Defence further argues that a joint trial will violate the Accused's right to an expeditious trial because some of the joined accused are still in the early stages of the pretrial proceedings, whereas the Accused is ready to stand trial now on the merits. A further delay of the Accused's trial not only will breach the interests of justice, but also will have a detrimental psychological impact on the Accused.
8. Finally, on the basis of the above submissions, the Defence submits that a joint trial is not in the interests of justice, and that the Accused's individual criminal responsibility should be determined in a separate trial.

PROSECUTOR'S RESPONSE

9. The Prosecutor submits that the Defence Motion constitutes an abuse of process and should be dismissed in accordance to the principle of *res judicata*, that there is insufficient factual basis for a separate trial, and that the Defence misconceives the procedural standard for joinder of indictments and joinder of trials.
10. The Prosecutor submits that the Defence Motion has been adjudicated in earlier Decisions and should be dismissed. The Prosecutor refers to the "Decision on the Defence Motion for Orders to Sever Proceedings, Set a Date for a Status Conference and for the Return of Personal Effects" rendered on 8 July 1998, which dismissed the motion; and the "Decision on the Prosecutor's Motion for Joinder" rendered on 30 November 1999, which granted the joinder of trials.



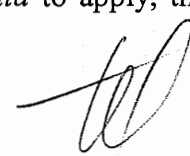
Case No. ICTR-97-29A-T

11. The Prosecutor also contends that the alleged facts by the Defence are not supported by affidavits and that all attachments are of no evidential value.

AFTER HAVING DELIBERATED,

Admissibility of Defense Motion

12. The Trial Chamber notes that the Defence submits that his application for a separate trial under Rule 82(B) should not be time-barred under Rule 72(A) because the Prosecutor is still in the process of disclosing witness statements and hence has not complied with the disclosure requirement of Rule 66(A)(i).
13. Rule 66(A) provides that the Prosecutor shall disclose to the Defence: (i) within 30 days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought, as well as all prior statements obtained by the Prosecutor from the accused, and (ii) no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial.
14. Rule 72(A) requires that all preliminary motions, including applications for separate trials under Rule 82(B), must be filed within 30 days following disclosure by the Prosecutor to the Defence of all materials envisaged by Rule 66(A)(i).
15. The Trial Chamber observes that the prescribed 30-day time period of Rule 72(A), including filing an application for a separate trial under Rule 82(B) as a preliminary motion, starts only after the Prosecutor has satisfied the disclosure requirement of Rule 66(A)(i). As set forth above, Rule 66(A)(ii) specifically provides that statements of all witnesses whom the Prosecutor intends to call to testify at trial are not part of the disclosure requirement under Rule 66(A)(i). Thus, the disclosure of witness statements has no impact on the time limits under Rules 66(A)(i) and 72(A).
16. The Trial Chamber notes that, at this stage of the proceedings, the Defense application for a separate trial under Rule 82(B) falls within the category of a Preliminary Motion pursuant to Rule 72(B)(iii). The Trial Chamber concludes that the Defense Motion is time barred under Rule 72(F) and that the Defense has not sought relief for any waiver under the said Rule.
17. To grant a waiver of the time limit under Rule 72(F), one must show good cause. In the instant case, the Accused applies for a separate trial under Rule 82(B) in order to avoid conflict of interests that might cause him serious prejudice and that a separate trial is necessary to protect the interests of justice. The Trial Chamber is therefore, of the opinion that the Accused's application raises serious issues in the administration of justice, and as such the application should be considered on merit. Thus, the Trial Chamber finds that the Accused's application constitutes good cause and *proprio motu* waives the time limit stipulated in Rule 72(A).
18. The Trial Chamber also points out that the Defence Motion is not subject to the principle of *res judicata* as the Prosecutor has alleged. For *res judicata* to apply, the matter



adjudged requires identity in cause of action, of persons and parties to action. The previous Decisions referred to by the Prosecutor concern different parties and different causes of action. Hence the instant motion is not barred by the principle of *res judicata*.

Accordingly, the Trial Chamber may order a separate trial for the Accused to avoid conflicts of interests that might cause serious prejudice to the Accused, or to protect the interests of justice.

Conflict of Interests

19. While there exists no uniform test, the Trial Chamber notes that, Rule 82(B) requires the showing of extraordinary circumstances to establish conflicts of interests between joined accused that might cause serious prejudice to an accused. The Trial Chamber further notes that the particular interest of an accused that might cause him serious prejudice because of an alleged conflict must be recognised by laws or general legal principles.
20. According to general practice of criminal law, an accused has the right to severance when she or he has been misjoined with another co-accused or when the accused is substantially prejudiced due to a clear conflict of interests between her or him and other accused persons that are later joined.
21. If the joinder is proper under the Rules, a Trial Chamber will grant a severance or a separate trial only if a party shows serious prejudice. Common grounds for demonstrating such a prejudice include, *inter alia* cases in which the admission of a statement of an accused would violate another accused's right to confront witnesses or evidence; cases in which a non-testifying co-accused would tend to exonerate an accused; cases in which co-accused have irreconcilably conflicting defenses; and cases in which the evidence against one accused would be so prejudicial as to deny that accused a fair trial. (See Chapter 13, Federal Criminal Practice; Georgetown Law Journal: Criminal Procedure Project, Vol. 87:1267).
22. The burden of proof is on the defence to demonstrate that a joint trial might result in clear and serious prejudice.
23. The Trial Chamber notes that the Defence Motion does not raise any facts that may cause a conflict of specific interests that might cause serious prejudice to the Accused in a joint trial. Rather, in support of the submission, the Defence has attached newspaper articles and transcripts of interviews (apparently to show that the Accused is innocent of the charges against him or that his culpability is lesser) which are unrelated to any factual allegations in the indictment.
24. Whether or not the Accused is guilty of the charges against him is an issue to be determined at trial and should not be considered at this stage of the proceedings. Thus, the Trial Chamber finds that all the attached enclosures are not relevant for consideration in the Defence's application for a separate trial.
25. Regarding the alleged animosity existing between the Accused and the other joined accused, the Trial Chamber notes that the Defence did not demonstrate how and which particular concrete interest of the Accused is affected by this disagreement that would



Case No. ICTR-97-29A-T

- cause him serious prejudice. Thus, the Trial Chamber finds no material serious prejudice from disputes arising during detention.
26. The Trial Chamber further finds that a mere disagreement between joined accused in a joint trial does not necessarily imply a serious prejudice to an accused, and that in itself, a disagreement does not constitute a legally recognized conflict of interest that warrants a separate trial under Rule 82(B).
 27. The Defence also argues that a separate trial is necessary because the Accused's defence strategy is different from that of the other joined accused.
 28. The Trial Chamber points out that although all joined accused pleaded not guilty to all the charges, a joint trial does not require a joint defence. Yet, since all have pleaded not guilty to all charges, "to be found not guilty or less guilty" is a common interest shared by all the joined accused.
 29. In *Prosecutor v. Brdanin et al*, paras.23-29, Case No. IT-99-36 (Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, 9 March 2000) the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") found it to be irrelevant whether two accused played different roles in the hierarchy or even in different hierarchies of command. The ICTY held that the determination must be based on the allegations made in the indictment, and that the fact that one of the co-accused was a member of the military and the other a civilian (and hence the culpability of both the accused may be different) did not constitute a conflict of interest that might cause serious prejudice to the accused.
 30. Similarly, in the instant case, the Trial Chamber holds that whether or not the Accused's culpability and his defence strategy are the same with those of the other joined accused are immaterial. Unless there is affirmative evidence to demonstrate that there are differences that will be prejudicial to the Accused in a joint trial, these differences are not grounds for a separate trial under Rule 82(B).
 31. The Defence also alleges that the transcript of the Accused's interview with the Prosecutor indicates that the Accused may make revelations that are likely to implicate some of the joined accused in this case. Again, the Defence failed to demonstrate how this assertion may affect any of the Accused's interests that might cause him serious prejudice if jointly tried.
 32. While mutually antagonistic defences (e.g. irreconcilable in that believing one accused necessarily requires the conviction of the other joined accused) may be possible grounds for a separate trial, shifting blame from one accused to other joined accused is not so antagonistic as to amount to a legally recognized conflict of interests that would cause serious prejudice to a defendant. This is especially true given that the fact-finders in the Trial Chamber are judges who are able to assess the situation and may order a separate trial if irreconcilable defenses occur.

33. For the reasons discussed above, the Trial Chamber finds that the Defence has failed to demonstrate the existence of a conflict of interests that might cause serious prejudice to the Accused in a joint trial to justify a separate trial under Rule 82(B).

Interests of Justice

34. Under Rule 82(B), a Trial Chamber may also order a separate trial to protect the interests of justice. The Trial Chamber points out that the jurisprudence of the Tribunal shows that the interests of justice may include, *inter alia*: the interest to have expeditious and fair trials as provided in Article 19 of the Statute, consistent and detailed presentation of evidence in joint trials (where the evidence relates to more than one accused), facilitation of the appearances and wellbeing of witnesses, avoidance of possible duplication and contradictions in the evidence presented, avoidance of conflicting decisions in multiple trials, and the protection of the rights of other accused in a joint trial.

35. As submitted by the Defence, although an accused has the right to a fair trial without undue delay as provided in Article 20, these rights must be assessed on a case-by-case basis, taken into consideration of all the above factors protected in the interests of justice.

Trial without Undue Delay

36. The Defence contends that a joint trial would infringe upon the Accused's right to an expeditious trial because the Accused is ready for trial and the rest of the joined accused are not.

37. In *Prosecutor v. Kumarac & Kovac*, IT-96-23, (Decision on Joinder of Trials, 9 February 2000) the ICTY balanced judicial economy and efficiency with other similar factors, and held that "the applicants right to a trial without undue delay under Article 21(4)(C) of the "Statute" has to be assessed in light of the same rights of the others."

38. In *Prosecutor v. Bagosora*, (paras. B(i) & (ii), Case No. ICTR-96-7-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment) (23 September 1999) the former Trial Chamber II held that in determining whether a delay in the criminal proceedings against the accused is undue, it is essential to consider the length of the delay, the gravity, nature and complexity of the case, as well as any prejudice that the accused may suffer. In that case, the Trial Chamber found that the fact that the accused was in custody for more than three years did not amount, necessarily to undue delay.

39. Similarly, in *Prosecutor v. Ntabakuze & Kabiligi*, Case No. ICTR-97-34-I (Decision on the Defence Motion Requesting an Order for Separate Trials) (1 October 1998) the former Trial Chamber II denied the Defence's application for separate trials and ruled that separate trials may cause unnecessary pressure on survivors and other witnesses who may be repeatedly called upon to testify.

40. The Trial Chamber concurs with these decisions and notes that although trial without undue delay is a fundamental right of the Accused, in itself, here it does not constitute sufficient factor to order a separate trial. When a joint trial is proper, it will inevitably cause some delay in the commencement and duration of an accused's trial if he were to

Case No. ICTR-97-29A-T

be tried alone separately. The instant case involves allegations that raise complex issues of law and fact. Thus, for the proper administration of justice, the Trial Chamber must also balance the Accused's rights against the rights of other joined accused.

41. The Trial Chamber further notes that the time period for preliminary motions has expired for all the accused in the instant joint trial. In light of the extremely complex factual nature and the difficulties involved, it is unrealistic to expect all the joined accused to be at the same stage of the pretrial proceeding.
42. In addition, as pointed out in the decision in *Kabiligi* cited above, the similarity of the allegations in the different indictments not only will further judicial efficiency, it will avoid the unnecessary pressure and trauma caused to victims and other witnesses who may be repeatedly called upon to testify in separate trials.
43. Consequently, the Trial Chamber finds that a joint trial serves the interests of justice and will not deny the Accused's right to be tried without undue delay.

Right to a Fair Trial

44. The Defence contends that the Accused's criminal responsibility should be determined in a separate trial because his case is very different from the facts and circumstances of the other joined accused. However, the Trial Chamber is of the opinion that a joint trial may be beneficial to the Accused since the Accused is charged with conspiracy to commit genocide in a common transaction. If the Accused were tried separately, he would not be able to refute any attempt by other joined accused to place the blame on him.
45. In *Brdanin*, the ICTY held that "[t]here is a fundamental and essential public interest in ensuring consistency in verdicts, and that nothing could be more destructive of the pursuit of justice than to have inconsistent results in separate trials based on the same facts." (*Brdanin, supra* at para.31). Similarly, the Trial Chamber notes that because of the complexity of the present case, a separate trial may indeed 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 case against each accused.
46. For the above reasons, the Trial Chamber finds that a joint trial for the Accused does not violate the interests of justice, and will not deprive him of a fair and expeditious trial.
47. The Trial Chamber, therefore, finds that the Defense has failed to demonstrate that there is a conflict of interests that might cause serious prejudice to the Accused, or that a separate trial is necessary to protect the interests of justice under Rule 82(B).

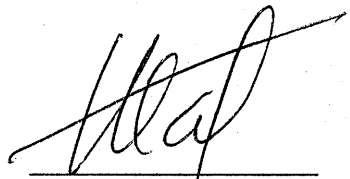


Case No. ICTR-97-29A-T

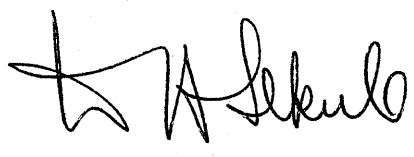
FOR ALL THE ABOVE REASONS, THE TRIBUNAL

DENIES the Defense Motion seeking a severance and a separate trial.

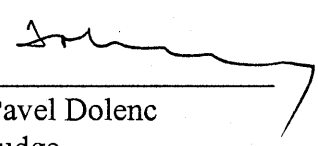
Arusha, 8 September 2000



Laity Kama,
Judge, Presiding



William H. Sekule
Judge



Pavel Dolenc
Judge

(Seal of the Tribunal)

