



**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

OR: ENG

**TRIAL CHAMBER II**

Before: Judge Laïty Kama, Presiding  
Judge William H. Sekule  
Judge Mehmet Güney

Registry: Agwu U. Okali

Date: 12 December 2000

8/8

**THE PROSECUTOR**

v.

**André RWAMAKUBA and others  
Case No. ICTR-98-44-T**

**DECISION ON ANDRÉ RWAMAKUBA'S MOTION FOR SEVERANCE**

The Office of the Prosecutor:

Ken Fleming  
Ifema Ojemeni  
Melinda Pollard

Counsel for the Accused:

Mr. D. Hooper

JUDICIAL RECORDS ARCHIVES  
RECEIVED  
ICTR

2000 DEC 12 11 A 4: 01

12.12.2000  
*[Signature]*

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The “Tribunal”);**

SITTING as Trial Chamber II, composed of Judges Laïty Kama, Presiding, William H. Sekule, and Mehmet Güney;

BEING SEIZED of a Motion for severance by the Accused André Rwamakuba, filed on 11 October 2000 (the “Motion”);

CONSIDERING the Response of the Prosecutor to the Defense Notice of Motion for Severance filed on 2 November 2000 (“Prosecutor’s Response”);

CONSIDERING the provisions of the Statute of the Tribunal (the “Statute”) in particular Article 19(1) and the Rules of Procedure and Evidence (the “Rules”), specifically Rules 72(A) and (F), 73(A) and 82(B);

NOTING that the Indictment against the Accused, wherein he was jointly indicted with seven others, was confirmed on 29 August 1998 (the “Indictment”) and that the Accused was arrested on 21 October 1999, transferred to the Tribunal on 22 October 1998 and made his initial appearance on 7 April 1999;

HAVING HEARD the parties on 7 November 2000, the Chamber now considers the Motion.

**SUBMISSIONS OF THE DEFENSE***Relief for Time*

1. The Defense seeks to sever the Accused from the Indictment relying on Rule 72(A) of the Rules, as a preliminary matter. Alternatively, the Defense seeks to bring the Motion under Rule 73(A) of the Rules for leave to separate the Accused from his co-Accused pursuant to Rule 82(B) of the Rules on allegations that there is evidence and information disclosing a conflict of interests that might cause serious prejudice to the Accused or to protect the interests of justice.

2. As Rule 82(B) is subject to time limits pursuant to Rule 72(A), the Defense requests that the Chamber *proprio motu* waive the time limits for filing the Motion as it did in *Prosecutor v. Kajelijeli et al*, ICTR-98-44-T, Decision on the Motion in Opposition to Joinder and Motion for severance and Separate Trial filed by the Accused Juvenal Kajelijeli, 6 July 2000, and in *Prosecutor v. Nzirorera et al*, ICTR-98-44-T, Decision on the Defense Motion in Opposition to Joinder and Motion for Severance and separate Trial Filed by the Accused Joseph Nzirorera, 12 July 2000.

*Joinder on the Facts is not Appropriate*

3. The Defense alleges that it is not appropriate for the Accused to be tried with the existing co-Accused, namely, Karemera, Ngirumpatse and Nzirorera as many of the allegations concerning the co-accused do not directly concern the Accused.

4. The Defense further alleges that the case against the Accused, differs markedly to the cases against his three co-Accused.



5. The Defense alleges that the Accused had no prior association with his co-Accused, and that on the contrary, he was a member of the opposition MDR Party whose members, including the Accused, were persecuted by the *Mouvement Républicain National pour la Démocratie et le Développement* ("MRND"), whose membership included the co-Accused and who had control over the *Interahamwe*.

6. The Defense further alleges that the Prosecutor has been reforming the Indictment was because there was no compelling reason to join the Accused to the co-Accused. In the Prosecutor's earlier motions for joinder, she argued that separate trials of the Accused from his co-Accused, characterized therein as "political," will lead neither to delay nor place a burden on witnesses.

7. The Defense argues that severance is necessary in order to avoid conflict of interests that might cause serious prejudice to the Accused or to protect the interests of justice and that ordering a separate trial for the Accused will lead to an earlier, speedier trial for the co-Accused whose trial readiness is much further advanced than the Accused.

#### *Defense Prayers*

8. The Defense, therefore, requests that the Chamber grant severance of the Accused from his co-Accused and order a separate trial for the Accused.

#### **SUBMISSIONS OF THE PROSECUTOR**

9. The Prosecutor maintains that Rules 48 and 48*bis* permit joinder if the persons to be charged together have committed crimes in the course of the same transaction.

10. The Prosecutor argues that the Accused has not overcome the presumption that joinder of the Accused and his co-Accused is not proper, warranting a severance from his co-Accused, pursuant to Rule 82(B).

11. The Prosecutor maintains that there are no "extraordinary circumstances" demonstrated by the Defense for an order directing a separate trial because of conflict of interests, pursuant to Rule 82(B), in the instant case, which was the standard set in the International Criminal Tribunal for the Former Yugoslavia ("ICTY") Decision in *Prosecutor v. Brdanin* at para. 29, Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, 9 March 2000.

12. The Prosecutor further maintains that the Defense has made allegations, which she considers extraneous, such as that the Accused was a member of the opposition *Mouvement Démocratique Républicain* ("MDR") who were persecuted by the MRND, whom he has fear of. The Prosecutor contends that she has evidence, in the form of witness testimony in the supporting material, to prove that the top members of the MDR, were appointed to be Ministers in the Interim Government and that they took active part in the incitement of ethnic hatred and other crimes.

13. As to the question of the right of the Accused to be tried without undue delay, the Prosecutor contends that there are no allegations that the joinder compromises the right of the Accused to be tried expeditiously. At the hearing, the Prosecutor argued that the Defense's

concern for the co-Accused is misdirected because it lacks standing to make the assertion that the co-Accused trial readiness is much further advanced than the Accused.

14. As to the Accused speculations concerning potential Defense witnesses who may be discouraged from giving evidence, the Prosecutor argues that this is complete conjecture on the part of the Defense.

*Prosecutor's Prayers*

15. The Prosecutor prays that the Motion be denied as lacking a basis in fact and in law.

**AFTER HAVING DELIBERATED**

*On the Timeliness of the Motion*

16. Rule 72(A) specifies that preliminary motions must be filed within 30 days following disclosure of all material envisaged by Rule 66(A)(i). Rule 72(F) provides that failure to comply with the time limits prescribed in Rule 72(A) shall constitute a waiver of the rights unless the Trial Chamber grants relief from the waiver upon showing good cause.

17. The Chamber notes that the Defense application for severance is made under Rule 82(B) of the Rules, which falls into the category of preliminary motions, pursuant to Rule 72(B)(iii) of the Rules, and that the prescribed time limit for the Defense Motion has expired. In the instant case the Defense has sought waiver of the time limits pursuant to Rule 72(F) for good cause.

18. 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 a conflict of interests that might cause him serious prejudice and that a separate trial is necessary to protect the interests of justice. The Chamber is 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.

19. The Chamber finds the Accused's application constitutes good cause and, *proprio motu* waives the prescribed time limit stipulated in Rule 72(A) and considers the Defense Motion.

*As Regards the Joinder Not Being Proper in Fact*

20. The Chamber notes that the Defense Motion is based on the general grounds that a joint trial of the Accused with his co-Accused is not proper in fact because a joint trial will cause serious prejudice to the Accused and that in the interests of justice, a separate trial for the Accused is justified under Rule 82(B).

21. Rule 82(B) states 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.



22. The Chamber will consider whether the Defense allegations of conflict of interests causing serious prejudice to the Accused are made out and subsequently, whether it is in the interests of justice to order a separate trial for the Accused.

(a) Conflict of interests that might cause serious prejudice

23. The Chamber notes that the Defense alleges conflict of interests that would cause serious prejudice to the Accused if he is joined with the co-Accused, warranting a severance and a separate trial under Rule 82(B).

24. The Chamber further notes that the Parties are in agreement that joinder is proper in law under Rules 48 and 48*bis* of the Rules. The Defense only alleges that joinder on the facts is not proper.

25. The Defense argues that many of the allegations against the Accused do not directly concern the co-Accused, because the co-Accused were prominent members of the government and of the MRND, which controlled the *Interahamwe*, while the Accused was a member of the opposition MDR Party. Furthermore, the Defense argues that many of the allegations against the Accused only arise from when he was appointed as Minister to the Interim Government and during the alleged events in Gikomero and Butare.

26. The Prosecutor responds to this by pointing out that the Defense arguments are extraneous and she has evidence, in the form of witness testimony in the supporting material, to prove that top members of the MDR, appointed as Ministers to the Interim Government, took part in *inter alia* the incitement of ethnic hatred.

27. The Chamber observes that evidence in the form of witness testimonies in the supporting material is not relevant to the present application. This was also the view of the ICTY in the *Brdanin & Talic*, at para 22 that, "The Challenge by Talic to various allegations in the indictment concerning his participation in the Crisis Staff and his association with *Brdanin*, based upon what is said to be the absence of any evidence in the supporting material, is not one which is relevant to the present application." The Chamber, therefore, will not address this question because issues of assessment of evidence are not relevant at this stage of the proceedings.

28. Nevertheless, as to the Defense argument raised above that some allegations against the Accused do not directly concern the co-Accused, the Chamber recalls the aforementioned ICTY Decision in *Brdanin & Talic supra*, at para. 29 whereby the ICTY Trial Chamber stated *inter alia* that "...a joint trial does not require a joint defence." The Chamber, in agreement with the ICTY Decision in *Brdanin & Talic* considers that there is no possibility of serious prejudice resulting from the prospect that some of the allegations against the Accused do not directly concern the co-Accused and therefore, it decides that the Defense arguments have no merit.

29. The Defense further argues that its case markedly differs from the cases of the co-Accused because the bulk of his case centers around the history of the MDR Party, while the bulk of the case of the co-Accused will center around the history of the MRND Party. The Prosecutor, in response, advances the argument laid down in the ICTY Decision in *Brdanin & Talic* whereby the Defense relied upon the fact that one accused was a member of the military forces whereas his co-accused were members of the civilian authorities and the

possibility that the co-accused may seek to present incriminating evidence at trial to support its application for separate trial. The Defense argued that these factors constitute a conflict of interest within the meaning of Rule 82(B). In denying the motion, the ICTY Trial Chamber recognized at para 29, “[..]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.”

30. The Chamber notes that, at the hearing of the Motion, the Defense, in refuting the Prosecutor’s argument *inter alia* observed that an “out of the ordinary circumstance” such as to warrant a separate trial, would have to be viewed on the basis of the facts of the case that come before the Tribunal. The Chamber agrees with the Defense observation, and notes that, as a general rule, Rule 82(B) requires that the Defense demonstrate, on a case by case basis, a conflict of interests that might cause serious prejudice to an accused. The Chamber shall, while examining all the arguments advanced by the Defense in support of its request for severance, consider whether such a conflict of interests amounting to serious prejudice does exist in the instant case as to warrant a separate trial of the Accused.

31. As to the specific issue concerning the marked difference in cases between the Accused, the Chamber recalls the holding in the Decision of *Prosecutor v. Nsabimana et al*, ICTR-97-29A-T, Decision on the Defense Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana, 8 September 2000, (“Nsabimana Decision”) at para 30. In the said Decision, the Defense alleged that the Accused defense strategy is different from that of the other joined accused, whereby the Trial Chamber held 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).” Similarly, in the instant case, the Chamber considers that the Defense allegation of a marked difference in cases is immaterial. The Chamber considers that it will only be material if there is evidence to demonstrate that there are differences that will cause serious prejudice to the Accused in a joint trial.

32. Furthermore, the Chamber notes that the Defense alleges that the Accused is in fear of the co-Accused. The Accused blames the loss of his family, many friends and colleagues to be at the hands of the MRND Interahamwe and those that controlled them. The Defense alleges that it is repugnant for the Accused to have to stand trial with the very men who had control over the Interahamwe. The Chamber is of the view that the Defense has not demonstrated which particular concrete interest of the Accused is affected, and how, it is affected by this alleged fear and repugnance that would cause him serious prejudice. Thus, the Chamber finds no material serious prejudice to the Accused resulting from his alleged fear and repugnance.

33. The Chamber lastly notes that the Defense alleges that witnesses willing to testify on his behalf, will be put off because he is jointly tried with the co-Accused whom, he alleges had and still have great influence in Rwanda. To which the Prosecutor argues that this is complete conjecture on the part of the Defense as the Defense has not provided a list of witnesses, any supporting affidavits or any indication as to the nature of the testimony involved. The Chamber agrees with the arguments of the Prosecutor and considers the Defense allegations to be unfounded.



34. For the reasons discussed above, the Chamber finds that the Defense has failed to demonstrate that there exists extraordinary circumstances as to cause a conflict of interests that might cause serious prejudice to the Accused in a joint trial to justify a separate trial for the Accused under Rule 82(B).

(b) Protection of Interests of Justice

35. Under Rule 82(B), the Trial Chamber may also order a separate trial to protect the interests of justice. The 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 for under Article 19 and 20 of the Statute and the protection of the rights of the other accused in a joint trial. The Chamber will now consider whether the Defense has shown that severing him is in the interests of justice.

(i) *Trial without undue delay*

36. The Chamber notes that the Defense requests a separate trial for the Accused because this will result in a speedier trial for the co-Accused whose trial readiness is much further advanced than the Accused. The Prosecutor, in response argued that the Defense's concern for the co-Accused is misdirected because it lacks standing to make such an assertion.

37. The Chamber further notes that for the proper administration of justice, it must balance the Accused's rights against the rights of other joined accused. This was also its jurisprudence in the *Nsabimana Decision supra*.

38. As to the issue of undue delay, the Chamber points out that trial without undue delay is a fundamental right of the Accused, but that it does not of itself, necessarily constitute sufficient factor to order a separate trial. When a joint trial is proper, it will inevitably cause some delay in commencement and duration of an accused's trial as compared with his situation if he were to be tried alone separately.

39. Nevertheless, the Chamber notes that the time period of preliminary motions for all the accused in the instant joint trial has expired, which means that all the Accused are moving towards commencement of trial sixty days after the Prosecutor has made full disclosure pursuant to Rule 66(A)(ii) of the Rules. The Chamber also notes that, in light of the extremely complex factual nature and difficulties involved in a joint trial, it is unrealistic to expect all the accused to be at the same stage of pretrial proceedings and some delay is expected although the Chamber considers that this delay is not one amounting to an undue delay.

40. Consequently, the 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.

(ii) *The right to be tried fairly*

41. Pursuant to Rule 82(A), for an accused to be tried fairly that accused must be accorded the same rights as if he were being tried separately. Thus, where a joint trial is prejudicial to an accused and infringes upon his right to be tried fairly, the Trial Chamber may order a separate trial pursuant to Rule 82(B).

42. In the instant case, the Accused pleaded not guilty to the same 11 counts as the co-Accused and is also implicated in the charges of conspiracy and complicity because he is alleged to have had control and influence over all government policies as other co-Accused who were Ministers of the Interim Government. Thus, the mere fact that the Accused was not a member of the MRND as were the rest of the co-Accused would not be prejudicial to the Accused.

43. The Chamber finds that a joint trial for the Accused will not deprive him of a fair and expeditious trial.


44. The Chamber, therefore, finds that the Defense has failed to show 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).

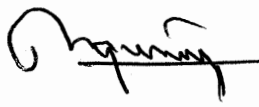
**FOR THE FOREGOING REASONS, THE TRIBUNAL:**

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

Arusha on 12 December 2000

  
Laity Kama  
Presiding Judge

  
William H. Sekule  
Judge

  
Mehmet Güney  
Judge

