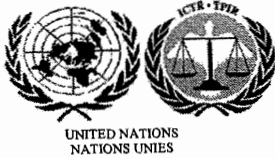


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International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

Original: English

TRIAL CHAMBER II

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

**Registry:** Adama Dieng

**Decision of:** 25 April 2001

THE PROSECUTOR  
v.  
Élie NDAYAMBAJE  
Case No. ICTR-96-8-T

JUDICIAL RECORDS/ARCHIVES  
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DECISION ON THE DEFENCE MOTION FOR SEPARATE TRIAL

**The Office of the Prosecutor:**  
Japhet D. Mono  
Ibukunolu A. Babajide  
Manuel Bouwknecht

**Counsel for the Defence:**  
Pierre Boulé  
Frédéric Palardy

[Signature]

[Signature]  
25.04.2001.

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (“the Tribunal”),

**SITTING** as Trial Chamber II (“the Chamber”), composed of Judge Laïty Kama, Presiding, Judge William H. Sekule, and Judge Mehmet Güney;

**CONSIDERING** that, in a “Decision on the Prosecutor’s Motion for Joinder of Trials of 5 October 1999” rendered in the present case (the “Decision of 5 October 1999”), the Chamber granted the Prosecutor’s request for joinder of the Accused’s trial to that of five other Accused (“the other Accused”);

**BEING SEIZED** of:

A “Requête en exception préjudicielle, Article 72 B) iii) du Règlement de Procédure et de Preuve (en disjonction d’instance)” filed by the Defence on 7 February 2001 (“the Motion”);

A “Prosecutor’s Response to the Defence Preliminary Motion and Brief Pursuant to Rule 72(B)(ii) (Application for a Separate Trial under Rule 82(B))”, filed on 9 March 2001;

**CONSIDERING** the provisions of the Statute of the Tribunal (the “Statute”), notably Article 20 of the Statute, and the Rules of Procedure and Evidence of the Tribunal (the “Rules”), in particular Rules 66, 72 and 82 of the Rules;

**HAVING HEARD** the Parties on 12 April 2001;

**NOW CONSIDERS** the Motion.

**ARGUMENTS OF THE PARTIES:**

*Admissibility of the Defence Motion*

1. The Defence alleges that the Chamber should, pursuant to Rule 72(F) of the Rules, grant the waiver of the time limit for filing this preliminary Motion. This would be in the interests of justice with regard to the allegation that severance is warranted by the need to avoid a conflict of interests.
2. The Prosecutor, on the other hand, submits that the Motion should not be reviewed on the merits as it was filed long after the expiration of the deadline for filing any preliminary motions, pursuant to Rule 72(A) of the Rules. Indeed, the Prosecutor submits that the Accused was served with the material envisaged under Rule 66(A)(i) well over 12 months ago.

*Merits of the Motion*

3. The Defence requests that the Accused's trial be severed from that of the other Accused for, *inter alia*, the following reasons:

(a) The existence of a conflict of interests between the Accused and the other Accused, as follows:

(i) A comparison of the Accused Indictment and the other Accused respective Indictments shows the lack of direct and significant link between the former and the latter, specifically in the case of the Accused Nyiramasuhuko, Ntahobali, Nsabimana and Kanyabashi;

(ii) The Defence intends to call one of the other Accused, Alphonse Nteziryayo, to testify for the Accused, which measure is not envisioned in the Statute and the Rules;

(iii) The concurrent presentation of evidence of all the accused in this case could be unfair as most of the allegations in the indictment do not relate to him

(b) The acts of each and all the Accused, constituting the alleged criminal transaction, lack determination in both time and space to warrant a joinder;

(c) The joinder will create further delays in the Accused's case, pending trial, and once the trial is commenced. These delays would add to the latter's lengthy detention.

4. The Prosecutor submits that the Defence Motion should be dismissed on the basis of, *inter alia*:

(a) The failure by the Defence to particularise the nature of the conflict of interests;

(b) The fact that this Motion is a disguised appeal, in the wrong forum and where no appeal lies as of right in any case, against the Decision granting a joint trial of 5 October 1999 rendered in the present case;

(c) The proximity of the joint trial in the present case, commencement of which is scheduled on 14 May 2001.

**HAVING DELIBERATED,**

5. The Defence Motion is brought pursuant to Rule 72(B)(iii) of the Rules, as a preliminary application for separate trial under Rule 82(B) of the Rules.

**(a) On the admissibility of the Defence Motion**

6. The Prosecutor submits that the Motion should not be reviewed on the merits as it was filed long after the deadline for filing preliminary motions had expired, pursuant to Rule 72(A) of the Rules. The Defence does not contest that fact. Rather, they are moving

for a waiver of the said deadline pursuant to Rule 72(F), mainly in the light of the existence as submitted, of a conflict of interests between the Accused and the other Accused.

7. Consistent with its jurisprudence, the Chamber considers that applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82(B) of the Rules, may be brought, once the deadline under Rule 72(A) of the Rules has expired, "whenever there is information that raises the issue of a conflict of interests between the Accused and one or more accused charged in the same indictment or joined with him for trial" ("Decision on the Defence Motion in opposition to joinder and Motion for severance and separate trial filed by the Accused Joseph Nzirorera" of 12 July 2000 and "Decision on the Defence Motion in opposition to Joinder and Motion for Severance and Separate trial filed by the Accused Juvénal Kajelijeli" of 6 July 2000, both Decisions rendered in Case No. ICTR 98-44-T, at para.12 ; *See also*, "Decision on the Defence Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana", *The Prosecutor v. Sylvain Nsabimana et alia*, Case No. ICTR-97-29A-T, 8 September 2000, at para. 17).

**(b) On the absence of a causal link between the Accused and the crimes they are charged with:**

8. The Defence alleges that the other Accused are, in fact, merely witnesses to the acts alleged against the Accused and that the Accused's Indictment entails no direct link between him and the other Accused. The Chamber does not consider that this argument falls within the category of a possible conflict of interests.

9. In any event, the Chamber notes that the Defence is thereby questioning the existence of a common criminal transaction and specifically, of a nexus, or "*lien de connexité*", between the acts of the Accused and those of the other Accused, whereas this issue was already decided upon in the Decision of 5 October 1999. In the said Decision, the Chamber indeed granted the joint trial, notably on the ground that the criminal acts to which the acts of the Accused are connected illustrate the existence of a common scheme, strategy or plan (third fold of a three-pronged test elaborated in the "Decision on the Defence Motion Requesting an Order for Separate Trials", 30 September 1998, in the Case *The Prosecutor v. Ntabakuze, Kabiligi*, No. ICTR-97-34-T, subsequently applied in the above-mentioned Decision of 5 October 1999 in the present case, at para. 8, 12 and 13). The issue being *res judicata*, this Defence objection is without merit.

**(c) On the conflict of interests**

*Concurrent Presentation of Evidence*

10. According to the Defence, paraphrasing a Decision rendered by the Chamber, "[t]he concurrent presentation of evidence of all the accused in this case could be unfair as most of the allegations in the indictment do not relate to him. Further, noting the fact that there

are considerably fewer allegations in the indictment against the Accused, the Chamber finds that concurrent presentation of evidence of all the Accused in the same trial may be prejudicial to the Accused, and that such conflicts of interests constitute extraordinary circumstances that warrant a separate trial for the Accused” (The Prosecutor v. Kajelijeli, Decision of 6 July 2000, *supra*, at para. 28).

11. The Chamber emphasises in this regard that the existence, or not, of a conflict of interests between Accused party to a same trial is to be determined on a case-by-case basis. Further, the Chamber recalls that it decided to grant the Prosecutor’s Motion for joinder in the present case, in the Decision of 5 October 1999 after noting, *inter alia*, the allegation, in the Accused’s respective Indictments, of a common criminal transaction. Concurrent presentation of the evidence pertaining to the Accused with that pertaining to the other Accused does therefore not *per se* constitute a conflict of interests. The Chamber accordingly dismisses the Defence objection.

*Testimony of other Accused party to the joint trial*

12. More specifically, the Defence contends that their intention to call other Accused party to the same trial, notably Alphonse Nteziryayo and Sylvain Nsabimana, to testify with respect to the Accused, creates a conflict of interests.

13. The Chamber recalls in this respect that, pursuant to Rule 85(C) of the Rules, “[t]he accused may, if he so desires, appear as a witness in his own defence”. In the view of the Chamber, and consistent with the practice of the Tribunal, this Rule may be applied, in the context of a joint trial, to the effect that an Accused whose trial is joined to that of other Accused may be called to testify, notably by his Defence or by that of another Accused Party to his trial, under the conditions set out in Articles 90 and 91 of the Rules, and bearing in mind the fundamental right of the accused “[n]ot to be compelled to testify against himself or herself or to confess guilt”, pursuant to Article 20(g) of the Statute.

14. The Defence does not specify on what grounds calling the co-Accused to testify during the joint trial would constitute a conflict of interests between the Accused. The Chamber considers, as did Trial Chamber I of the Tribunal in an oral Decision rendered on 26 September 2000 in the Case The Prosecutor v. Jean Bosco Barayagwiza, that “a simple intimation that the accused intends to call his co-Accused on his behalf is not enough for the Chamber to determine that there will be a conflict of interest sufficient to warrant a separate trial”. The Trial Chamber notes that, on this occasion, the said Trial Chamber further defined, on the basis of principles laid out in *common law*, a “threshold showing” such an allegation of conflict of interest is to meet, as follows: “firstly, a bona fide need for the testimony, secondly the specific substance of the testimony, thirdly the exculpatory nature and effect of the testimony and lastly the reasonable probability that the exculpatory testimony would follow severance, that is, the likelihood that the co-accused would in fact testify” (See, “Decision on the Request by the Defence for Severance and Separate Trial”, The Prosecutor v. Jean Bosco Barayagwiza, Case No. ICTR-97-19-I, Oral Decision rendered on 26 September 2000, at para. 9). No such

showing was made by the Defence. The Trial Chamber accordingly dismisses this objection.

**(d) On the lack of determination in both time and space of the acts of all the Accused which allegedly constitute the criminal transaction**

15. In this respect, the Chamber again reminds the Defence of its Decision of 5 October 1999, in which the request for joint trials was granted, *inter alia*, on the basis that “the second prong of the Kabiligi test is satisfied because the criminal acts connecting all the accused can be specifically determined in time and space. The events in which they are alleged to have participated occurred between 1 January to 31 December 1994 in various Communes in Butare” (Decision of 5 October 1999 at para.11). The issue being *res judicata*, the Defence objection is moot.

**(e) On the issue of delay**

*Delay and commencement of trial*

16. The Chamber is aware of the length of the detention of the Accused since his arrest in 1995, and his transfer to the Tribunal in November 1996, that is, more than four years ago and, indeed, expressed its concern in this regard at the last Status Conference, held on 2 February 2001, thus reminding both Parties that the trial could not be further postponed and had to take place soon for the sake of all the Accused’s right to be tried without undue delay envisioned under Article 20(c) of the Statute.

17. During this status conference, the date for commencement of the joint trial was set to the 14 May 2001. The Chamber is of the view that granting a separate trial to the Accused at this stage of the proceedings, on the eve of trial, might in fact postpone further the commencement of the trial for the Accused.

*Delay and duration of trial*

18. Furthermore, as far as duration of the joint trial, once commenced, is concerned, the Chamber notes that a joint trial might last over a longer period of time than that of a single accused. It however stems from the case law of the European Court of Human Rights that “the reasonableness of the length of the proceedings needs to be assessed in each instance according to the particular circumstances” and with regard to, “among other things, the complexity of the case” (E.Ct.H.R., *Eckle v. Germany*, Judgement of 15 July 1982, Series A no. 51; *See also, inter alia, Neumeister*, 27 June 1968, Series A, No. 8; *König*, 28 June 1978, Series A, No. 27; *Foti and others*, 10 December 1982, Series A, No. 56; *Zimmerman and Steiner*, 13 July 1983, Series A, No 66, at par. 24). A joint trial, in the view of the Chamber, might add to the complexity of a case at all stages of the proceedings, including at trial, and hence, to their length, without necessarily encroaching upon the right to be tried without undue delay. In the present case, the

Chamber is not satisfied that a joint trial would delay unreasonably the proceedings at the trial phase.

19. In any event, the Chamber notes that the European Court of Human Rights held that the fact that an accused might be tried faster, should severance be granted, does not *per se* render unreasonable the length of the proceedings. Indeed, the Court held in the *Neumeister v. Austria* case, which involved 11 co-Accused, that: “the course of the investigation would probably have been accelerated had the applicant’s case been severed from those of his co-accused, but nothing suggests that such a severance would have been compatible with the good administration of justice” (*See, supra*, our emphasis).

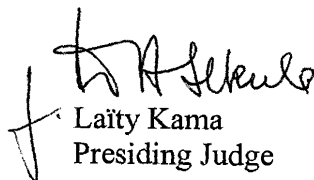
20. In this respect, the Chamber emphasises that it also granted the request for a joint trial in the interests of justice (para. 17 of the Decision of 5 October 1999), notably with respect to the physical and mental safety of witnesses, and to avoid their making several journeys to appear before the Tribunal and repeat their testimony (para. 16 of the Decision of 5 October 1999).


**FOR THE ABOVE REASONS,**

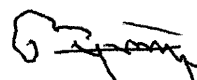
**THE TRIAL CHAMBER**

**DISMISSES** the Defence Motion for Separate Trial.

Arusha, 25 April 2001

  
Laity Kama  
Presiding Judge

  
William H. Sekule  
Judge

  
Mehmet Güney  
Judge

(Seal of the Tribunal)