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SCSL-2003-11-PT
(1038-1065)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

Before: Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Robin Vincent

Date filed: 24 October 2003

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL – 2003 – 11 – PT

**PROSECUTION RESPONSE TO DEFENCE REQUEST FOR AN
EXTENSION OF TIME FOR FILING A RESPONSE TO THE
PROSECUTION MOTION FOR JOINDER**

Office of the Prosecutor
Luc Côté, Chief of Prosecutions
James C. Johnson, Senior Trial Counsel
Adwoa Wiafe, Assistant Trial Counsel

Defence Office
Michiel Pestman

SPECIAL COURT FOR SIERRA LEONE	
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INTRODUCTION

1. On 9 October 2003, the Prosecution filed the “Prosecution Motion for Joinder” (the “**Prosecution Motion**”) requesting that the accused Samuel Hinga Norman, Allieu Kondewa and Moinina Fofana be jointly tried. On 21 October 2003, the Defence filed a “Request for Extension of Time for Filing of a Response to The Prosecution Motion for Joinder” (the “**Defence Motion**”) on behalf of Moinina Fofana (the “**Accused**”).
2. In the Defence Motion, the Defence seeks an extension of time to respond to the Prosecution Motion for Joinder on the grounds that by not receiving disclosure as envisaged under Rule 66(A) of the Rules, the Defence is not in a position to determine whether joinder of the accused persons is appropriate, and that, the rights of the accused would be irreparably harmed if Defence Counsel is compelled to respond. The Prosecution submits that disclosure is not necessary for a determination of the Prosecution Motion for Joinder and therefore, the

Defence has failed to establish good cause for an extension of time to be granted.

ARGUMENT

I. Disclosure not necessary to determination of Prosecution Motion for Joinder

3. The Prosecution submits that receipt by the Defence of Rule 66(A)(i) disclosure materials is not necessary to respond to the Prosecution Motion for Joinder. The Prosecution Motion for Joinder is brought as a pre-trial proceeding pursuant to Rule 48(B), which clearly stipulates the criteria for “Joinder of Accused or Trials”:

(p)ersons who are separately indicted, **accused of the same or different crimes committed in the course of the same transaction**, may be tried together, with leave granted by a Trial Chamber pursuant to Rule 73 (Emphasis added).
4. While the Prosecution recognizes the importance of timely disclosure to the Accused, it is nevertheless the Prosecution’s contention that such disclosure is not essential to enable the Defence make an assessment of the appropriateness of the joinder motion, contrary the argument in paragraph 5 of the Defence Motion. The Prosecution relies on the reasoning in *Prosecutor v. Nyiramasuhuko et al* where the Trial Chamber held that disclosure is not an issue at this stage of the proceedings where the question was not one of evaluating the evidence but of assessing whether or not there was sufficient factual and legal basis to support the joint trial.¹ The issue at this pre-trial stage is simply to determine whether there is sufficient legal and factual basis to support the joint trial and not to evaluate the evidence. Therefore, non disclosure does not prevent the Defence in any way from responding to the issues raised in the Prosecution’s Motion.
5. The Prosecution reiterates its submission in the Motion for Joinder that a determination by the Trial Chamber as to whether acts or events were committed in the course of the same transaction is to be based upon the factual allegations

¹ ICTR-97-21, ICTR-97-29A and B-1, ICTR-96-15-T and ICTR-96-8-T, “Decision on the Prosecutor’s Motion for Joinder of Trials”, 5 October 1999 at paragraph 3. See also, *Prosecutor v. Bagasora et al*, ICTR-96-7, ICTR-97-34, ICTR-97-30 and ICTR-96-12, “Decision on the Prosecutor’s Motion for Joinder”, 29 June 2000. (Cited in Prosecution Motion for Joinder.)

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as contained in the Indictment and its supporting materials.²

6. The Prosecutor submits that judicial determination of a joinder motion based upon the face of the indictment and a weighing of the overall interests of justice with the rights of the individual accused is consistent with the practice of the International Criminal Tribunal for Rwanda (“ICTR”). As held by the Trial Chamber III in *Prosecutor v. Kabiligi & Ntabakuze*³

the question of joinder is also one of practice. If the **allegations** contained in the indictment support the existence of a common transaction amongst the accused, and if no material prejudice arises to the accused as a result of joinder, joinder may be granted (At paragraph 108, emphasis added).

7. Consequently, in making a case for joinder, the Prosecution need not provide evidence supporting allegations made in the indictments for the Trial Chamber to exercise its discretion in deciding whether joinder is in the interests of justice as alleged by the Defence.⁴
8. Further, the Defence erroneously equates the *proof* required in a motion for joinder to the *proof* needed to substantiate the charges against the Accused at trial. However, the jurisprudence from the ad hoc tribunals makes a clear distinction between the two. In *Prosecutor v. Kabiligi & Ntabakuze*, the Trial Chamber III of the ICTR held:

[a]t this stage of the proceedings, only allegations can be made. These allegations will have to be proved at trial. **This is not the stage of proceedings where proof is established.** We are not having two trials; one at the joinder stage and one at the trial stage.... We are not at this point in time trying the case (At paragraph 121, emphasis added).⁵

9. The Prosecution fails to see the merit in the argument by Defence at paragraph 6

² See paragraphs 13 and 14 of the Prosecution Motion, citing *The Prosecutor v. Ntabakuze et al.*, ICTR-97-34-I, “Decision on the Defence Motion Requesting an Order For Separate Trials”, 30 September 1998; *Prosecutor v. Krajišnik*; *Prosecutor v. Plavš*}, IT-00-39-PT and IT-00-40-PT, “Decision on Motion for Joinder”, 23 February 2001. (Cited in Prosecution Motion for Joinder).

³ ICTR-96-12, “Decision on the Prosecutor’s Motion for Joinder”, 29 June 2000.

⁴ See Defence Motion, paragraph 5.

⁵ ICTR-96-12, “Decision on the Prosecutor’s Motion for Joinder”, 29 June 2000.

At paragraph 121, after referring to the Trial Chamber II of “Kabiligi, Ntabakuze Motion for Separate Trial Decision”, which held “(f)or the purposes of joinder, in the absence of evidence to the contrary, the Trial Chamber shall act upon the Prosecutor’s factual allegations as contained in the indictment and related submissions” (Citing page 2 of the Decision of the Trial Chamber II).

of the Defence Motion. The apparent Defence proposal that the Counsel for the various accused “check whether the proposed witnesses are indeed common to the other accused persons,” would seem to be in violation of the Witness Protection Orders issued in all three cases. In any case, in light of the nearly identical nature of the indictments against the accused sought to be joined, it is reasonable to expect that the Prosecution’s witnesses will likewise be identical.

10. The Prosecution reiterates its argument in the Prosecution Motion for Joinder that joinder is in the interest of justice. The Prosecution maintains that as currently framed, the Indictment against the Accused sufficiently establishes the requirement of the existence of “the same or different crimes committed in the course of the same transaction” (See Rule 48(B)). As the charges are identical within each case of each accused sought to be joined, the Prosecution maintains that a joinder of cases as requested meets standards of judicial efficiency and would not prejudice the rights of the Accused – considerations which have not been rebutted by the Accused in the Defence Motion.
11. Moreover, the Rules provide sufficient safeguards to protect the rights of the Accused. Under Rule 82 each accused in a joint trial shall be accorded the same rights as if he were being tried separately. In addition, the Accused has a right to seek severance of the trial to avoid potential conflicts of interest that would prejudice the Accused’s case.

II. Defence Motion does not establish good cause for an extension of time to be granted

12. The evolving jurisprudence of the Special Court stipulates that an extension of time to file a motion may be granted if the party seeking the extension establishes good cause or exceptional circumstances.⁶ Even though the Prosecution appreciates the constraints under which Defence Counsel has to operate, to the extent that questions of joinder are determined solely on the factual allegations

⁶ See *Prosecutor v. Kallon*, SCSL-2003-07-PT, “Order on the Defence Application for Extension of Time to File Preliminary Motions”, 24 June 2003 at paragraph 9. See also, *Prosecutor v. Kallon*, SCSL-2003-07-PT, “Order on the Defence Application for Extension of Time to File Reply to Prosecution’s Response to Preliminary Motions”, 24 June 2003.

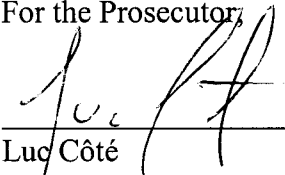
contained in an indictment, the Defence argument that it cannot properly respond to the Prosecution Motion for Joinder until he receives disclosure is not, under these circumstances, good cause.

CONCLUSION

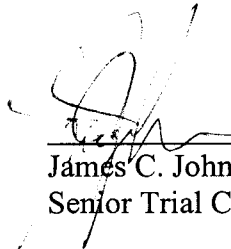
For the reasons given above, the Prosecution submits that the Defence Motion should be denied. However, if the Trial Chamber is inclined to grant an extension of time to the Defence, the Prosecution considers 10 the days suggested by the Defence to be reasonable.

Freetown, 24 October 2003.

For the Prosecutor,



Luc Côté
Chief of Prosecutions

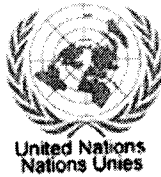


James C. Johnson
Senior Trial Counsel

PROSECUTION INDEX OF AUTHORITIES

1. Prosecution v. Kabiligi & Ntakabuze, Decision on the Prosecutor's Motion for Joinder, 29 June 2000.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

OR: ENG

Before:

Judge Lloyd George Williams, Presiding
Judge William H. Sekule
Judge Pavel Dolenc

Registrar: Dr. Agwu Ukiwe Okali

Decision of: 29 June 2000

THE PROSECUTOR

v.

Théoneste BAGOSORA
Case No. ICTR-96-7

THE PROSECUTOR

v.

Gratien KABILIGI and Aloys NTABAKUZE
Case No. ICTR-97-34 and Case No. ICTR-97-30

THE PROSECUTOR

v.

Anatole NSENGIYUMVA
Case No. ICTR-96-12

DECISION ON THE PROSECUTOR'S MOTION FOR JOINDER

The Office of the Prosecutor:

Carla Del Ponte
David Spencer
Frederic Ossogo
Holo Makwaia

Counsel for Théoneste Bagosora:

Raphaél Constant

Counsel for Gratien Kabiligi:

Jean Yaovi Degli

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Counsel for Aloys Ntabakuze:
Clemente Monterosso

Counsel for Anatole Nsengiyumva:
Kennedy Ogetto
Gershom Otachi Bw'omanwa

1. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal")

SITTING as Trial Chamber III, composed of Judge Lloyd G. Williams, presiding, Judge William Sekule (as assigned by the President) and Judge Pavel Dolenc (the "Trial Chamber");

BEING NOW SEIZED OF the Prosecutor's "Motion for Joinder" (the "Motion") filed on 31 July 1998;

CONSIDERING the "Brief in Support of the Prosecutor's Motion for Joinder of the Accused" (the "Brief"), filed on 31 July 1998, the "Corrigendum to the Brief in Support of Prosecutor's Motion for Joinder of Accused" (the "Corrigendum"), filed on 13 August 1998;

CONSIDERING Nsengiyumva's "Preliminary Objection by the Defence on the Competence of the Prosecution Motions for Joinder of Accused Persons and Leave to File Amended Indictment and on the Composition of the Trial Chamber" filed on 23 September 1998, insofar as it relates to joinder;

CONSIDERING Nsengiyumva's "Response by the Defence to the Prosecutor's Motion for Joinder of the Accused" filed on 25 September 1998;

CONSIDERING the "Prosecutor's Brief in Reply to the [Nsengiyumva's] Defence Response to Prosecutor's Motion for Joinder of Accused" filed on 21 May 1999;

CONSIDERING Kabiligi's "Submissions in Reply to the Prosecutor's Motions for Joinder and Amendment of the Indictment" filed on 12 October 1998, insofar as it relates to joinder;

CONSIDERING the "Prosecutor's Brief in Reply to the Response by Counsel for the Accused Gratien Kabiligi to the Prosecutor's Request for Leave to File an Amended Indictment and Motion for Joinder of Trials" filed on 14 October 1998, insofar as it relates to joinder;

CONSIDERING Kabiligi's "Additional Defence Brief in Reply to the Prosecution Motion and Brief to Amend the Indictment and for Joinder, as well as an Objection Based on Lack of Jurisdiction" filed on 11 January 1999, insofar as it relates to joinder;

CONSIDERING Kabiligi's "Defence Brief in Reply to the Prosecutor's Motion for Joinder of Accused" filed on 14 July 1999;

CONSIDERING Bagosora's "Defence Brief on the Joinder of Accused" filed on 22 July 1999;

CONSIDERING Ntabakuze's "Defence Response to the Prosecutor's Motion for Joinder of Accused" filed 26 July 1999;

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CONSIDERING Ntabakuze's oral motion made by his Defence Counsel on 1 December 1999 for lack of jurisdiction because the Prosecutor's motion does not contain an affidavit with respect to allegations based on facts in dispute;

the arguments of the Prosecutor and Defence Counsel for Bagosora, Kabiligi, Ntabakuze and Nsengiyumva on 1 and 2 December 1999, and having heard the arguments of the Prosecutor and Defence Counsel for Kabiligi, Ntabakuze and Nsengiyumva on 7 and 8 February 2000 on a number of related motions and having considered those motions and submissions before rendering this decision;

NOW DECIDES this matter.

PRELIMINARY SUBMISSIONS

2. Counsel for Ntabakuze raises a preliminary matter before the commencement of the Prosecutor's motion. Counsel raises an oral motion to strike the Prosecutor's motion on the grounds that it does not include an affidavit, as set out in Article 27 (2) (iii) of the Directive for the Registry of the International Criminal Tribunal for Rwanda (the "Directive for the Registry"), and thus that it is not a motion within the jurisdiction of the Tribunal.

3. In response to this motion, the Prosecutor submits that Defence Counsel had not included an affidavit with his motion. The Prosecutor argues that it is not the practice at the Tribunal to include affidavits with all motions. Finally, the Prosecutor submits that the proceedings before the Trial Chamber are controlled by the Statute of the International Tribunal for Rwanda (the "Statute") and the Rules of Procedure and Evidence (the "Rules") and are not subject to the Directive for the Registry.

THE SUBMISSIONS OF THE PROSECUTOR

4. The Prosecutor argues that the Motion is well founded in law, and in fact, that joinder is in the interests of justice, and that joinder will not prejudice the rights of the accused.

The Law

5. In the Brief the Prosecutor relies on Rules 2 and 48 of the Rules. The Prosecutor submits that the Motion is well founded under the common law "same transaction" test and civil law test of "connexité."

6. The Prosecutor submits that an order for joinder can be made under Rule 48. It is the Prosecutor's position that if it were necessary to apply Rule 48 bis, it could be done retroactively because the rule does not affect the substantive rights of the accused. However, the Prosecutor submits that it is not necessary to do so. The Prosecutor relies on Prosecutor v. Ntagerura and Others, Case ICTR-96-10-1 (Decision on the Prosecutor's Motion for Joinder) (11 October 1999) (the "Cyangugu Joinder Decision") and Prosecutor v. Nyiramasuhuko and Others, Case ICTR-97-21-I (Decision on the Prosecutor's Motion for Joinder of Trials) (5 October 1999) (the "Nyiramasuhuko Joinder Decision") in support of this argument.

7. The Prosecutor submits that in order for joinder to be granted, there must be allegations of a "same transaction" as defined in Rule 2 of the Rules.

8. The Prosecutor refers to the decision of Trial Chamber I in Prosecutor v. Kayishema, Ntakirutimana and Ruzindana, Case ICTR-95-1-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), (the "Kayishema")

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Decision). In that decision, the Trial Chamber stated the criteria that must be shown. Specific material elements must be shown that include the existence of a specific criminal act and the existence of a common scheme, strategy or plan.

9. The Prosecution also refers specifically to the appellate decision and dissenting opinion of Judge Shahabuddeen in *Kanyabashi v. Prosecutor*, Case ICTR-96-15-A (Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I) (3 June 1999) (the “Kanyabashi Appeal”).

10. The Prosecution further relies on the case of *The Prosecutor v. Kabiligi and Ntabakuze*, Case ICTR-97-34-I (Decision on the Defence Motion Requesting an Order for Separate Trials) (30 September 1998) (the “Kabiligi, Ntabakuze Motion for Separate Trials”) in which Trial Chamber II held that the acts relied on to establish joinder need not be illegal, but they should be connected to material elements of a crime, and the criminal acts to which they are connected must be specific criminal offences and show a common scheme, strategy or plan. Trial Chamber II noted that this is not meant to be a rigid test, but to provide guidelines for the Tribunal in exercising its jurisdiction.

11. Thus, the Prosecutor submits that the test to be applied in this case is whether the acts are connected to one or more objectively punishable offences, whether those offences are capable of determination in time and space, and whether the acts illustrate a common scheme, strategy or purpose.

The Facts

12. The Prosecutor argues that the factual basis for the joinder can be found in the allegations contained in the indictments and the supporting material to the indictments.

13. The Prosecutor submits that there is a common count of conspiracy against all four accused and that therefore all the accused are charged with committing the same crime. The Prosecutor also notes that all the accused are charged with both individual personal responsibility under Article 6(1) of the Statute and responsibility as superiors for actions of their subordinates under Article 6(3) of the Statute referring specifically to the actions of the members of the military within the military hierarchy.

14. With respect to establishing whether the accused participated in the same transaction, the Prosecutor submits that the allegations in the indictments allege that there was a common scheme to exterminate the Tutsi civilian population and murder political opponents, and that the facts support the participation of all the accused in this plan. In this regard the Prosecutor refers specifically to the Bagosora indictment at paragraphs 5.1, 5.5 to 5.14, 5.19, 5.22 to 5.25, 5.28, 5.29, 5.31, 5.32, 5.37, 5.42, 5.43, 6.2, 6.4, 6.7 to 6.11, 6.13, 6.14, 6.20, 6.22 to 6.25, 6.27 and 6.73, and to the equivalent paragraphs in the other indictments.

15. The Prosecutor argues that in addition to the charges set out in Count 1 of each indictment, the remaining counts charge the accused with specific crimes committed by the accused in connection to a common plan or purpose.

16. The Prosecutor submits that joinder of these cases is well-founded because the accused had a common purpose or design which they planned to carry out and did in fact carry out.

17. The Prosecutor argues that the evidence will show that all of the accused were members or former members of the military hierarchy in Rwanda in 1994, and that all of the accused were involved in the preparation or support of the genocide regarding the development of the identification of the “enemy”, the use of that term as support for the anti-Tutsi program, the military training and supply of

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Interahamwe militias and other militias, and the dissemination of statements made against the Tutsi population generally.

Interests of Justice

18. The Prosecutor contends that joinder will result in a more consistent and detailed presentation of the evidence because much of the evidence to be presented relates to more than one accused.

19. The Prosecutor submits that joinder will facilitate the appearance of witnesses and enhances their safety and wellbeing.

20. It is the Prosecutor's position that joinder will avoid possible duplication and contradictions in the evidence presented and divergent decisions that would be possible in multiple trials:

Rights of the Accused

21. With respect to whether granting joinder will result in "undue delay" the Prosecutor submits that joinder would create the minimum amount of delay, if any at all. The Prosecutor submits that universal disclosure has been made of all of the statements to all of the accused as of August 1999. Additionally, supporting material for each of the amended indictments was disclosed to all accused. The Prosecutor argues that even if joinder causes delay to an individual case, the total time spent trying three cases of four accused individually would be greater than the time spent trying the four accused jointly.

THE SUBMISSIONS OF THE DEFENCE

Counsel for Bagosora

22. The Defence submits that the Trial Chamber ought to deny the Motion.

(i) Preliminary Matters

23. As a preliminary matter, Bagosora's Counsel expresses concern about the unavailability of documents in French, including previous Tribunal decisions with respect to joinder.

24. Bagosora's Counsel reviewed the procedural history of his client's case in detail. He asks the Trial Chamber to consider that his client has been in custody since March 1996, and that the Tribunal ordered his transfer to Arusha in August of 1996. He reminds the Trial Chamber that in November 1997 it was decided that Bagosora's trial would commence in March 1998. Due to the Prosecutor's request, the trial was adjourned to September 1998. In July of 1998 that date was adjourned when the Prosecutor sought leave to amend the indictment against Bagosora.

(ii) The Law

25. With respect to Rule 48, Counsel for Bagosora argues that it cannot be the basis for the joinder of accused who are separately indicted. He argues that Rule 48 should be interpreted narrowly, and that to do otherwise would violate the rights of his client. He argues that Rule 48 does not allow persons who are not indicted together to be tried together.

26. Bagosora's Counsel submits that it is misguided to believe that Rule 48 is a sufficient basis to grant joinder in this case when the Plenary of the Tribunal deemed it necessary to draft Rule 48 bis.

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27. Counsel for Bagosora asks the Trial Chamber to consider that in most jurisdictions there is a separation between judicial and legislative branches which he argues does not exist in the case of the Tribunal where the Judges have the power to amend the Rules. Bagosora's Counsel also asks the Trial Chamber to consider the fact that the Plenary can amend the Rules with the Prosecutor present, in the absence of Defence Counsel.

28. With respect to whether the Separate Opinion of Judge Shahabudeen, in the Kanyabashi Appeal is persuasive, Bagosora's Counsel submits that the issue of Rule 48 was never put before the Appeals Chamber, but that the Appeals Chamber decided to rule on it of its own accord. He also notes that the separate opinion of Judge Shahabudeen is the separate opinion of only one of five judges and therefore should not be considered persuasive by this Trial Chamber.

29. Bagosora's Counsel argues that to grant joinder in this case would disregard the decision of Judge Khan in Prosecutor v. Bagosora and 28 Others, Case ICTR-98-37-I (Dismissal of the Indictment) (31 March 1998) (the "Bagosora and 28 Others Decision") in which Judge Khan stated that the Bagosora trial would be adjourned until a decision was rendered in that motion. Counsel argues that the Trial Chamber decision was rendered 10 March 1998, the appeal was then dismissed by the Appeals Chamber on 8 June 1998 (Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against ThJoneste Bagosora and 28 Others) and the order has never taken effect in that the Bagosora trial had not yet commenced. Counsel for Bagosora states that any continued delay in the commencement of the Bagosora trial would be in contradiction of that order.

30. Bagosora's Counsel submits that paragraph 6.64 of the Bagosora indictment names a number of persons who are not present at this hearing, as well as the four accused, as adopting a strategy that resulted in massacres being perpetrated. Counsel argues that if the persons not present are charged and arrested, there will be a further joinder motion to include them in these proceedings.

(iii) *The Facts*

31. Bagosora's Counsel contends that the Prosecutor has failed to adduce any evidence of a common transaction between his client and the other accused, nor has she produced any evidence of a common criminal conspiracy.

32. The Defence argues that the Prosecutor must have *prima facie* evidence with respect to the allegations she makes in support of joinder, including documentary and other evidentiary material in support of those allegations.

33. Bagosora's Counsel argues that there are insufficient facts to support joinder beyond the allegations of the Prosecutor. He argues that there is no evidence adduced to support a *prima facie* case for joinder. Counsel submits that evidence in support of joinder, beyond the mere allegations of the Prosecutor before the Trial Chamber, is necessary.

34. Additionally, Counsel submits that the factual basis for joinder presented by the Prosecutor does not stand up to a critical analysis of those facts.

35. In response to the Prosecutor's submission that during a meeting in Kigali, Bagosora took over military control of Rwanda after 6 April 1994 in order to ensure political control, Bagosora's Counsel submits that Kabiligi was not in Rwanda at that time, and Nsengiyumva was in Gisenyi, not Kigali, so that allegations of such a meeting cannot be justified.

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36. Counsel refers to a commission set up in 1991, including the four accused and others, which the Prosecutor refers to in support of the allegation of involvement by all accused in a conspiracy. Defence Counsel argues that since a number of others who, according to the Prosecutor, formed part of this commission which was allegedly preparing a genocide, have not been prosecuted, involvement in the commission cannot establish *prima facie* evidence of participation in a conspiracy.

37. Counsel also refers to the allegations of the accused's involvement in the murder of the former Prime Minister, Agathe Uwilingiyimana, and argues that the facts and disclosure to date do not support the allegations that the murder formed part of a conspiracy in which the accused participated.

38. Counsel summarizes that his position with respect to the factual basis for joinder is that the Prosecutor's allegations do not stand up to scrutiny, and that the necessary *prima facie* evidence supporting the facts alleged by the Prosecutor, which he argues is necessary, does not exist.

(iv) Interests of Justice and Rights of the Accused

39. Bagosora's Counsel argues that it is not in the interests of justice that joinder be granted.

40. Bagosora's Counsel asks the Trial Chamber to consider criteria to assess whether any delay arising from joinder would be undue. Those criteria include: the complexity of the case; the attitude of the accused; whether the accused used any delaying tactics; and, the gravity of the charges.

41. Counsel notes that he submitted only one motion as Bagosora's Counsel, and that motion has been decided. He advised the Trial Chamber that he is prepared to start trial immediately.

42. He submits that if joinder is granted in this case, many other accused, some of whom have not yet been arrested, could be joined as well, thus further delaying Bagosora's trial.

43. He also asks the Trial Chamber to note that the Prosecutor has not given a date when it expects a joint trial to commence.

Counsel for Kabiligi

44. Kabiligi's Counsel adopted the arguments of Bagosora's Counsel and also made additional submissions.

45. He argues for a strict interpretation of Rule 48 of the Rules. He submits in order for Rule 48 to apply, the accused would have had to be charged together in one indictment. He also argues that Rule 48 bis cannot apply to this motion, as it cannot be applied retroactively.

46. Counsel refers to the Kayishema Decision, in which it was held that in order to establish the existence of a same transaction, it was necessary to establish firstly, acts which show the existence of a criminal offence specifically determined in time and space, and secondly, evidence of a common plan, strategy or scheme in which the accused acted together and in concert.

47. Counsel refers to the argument raised at the hearing of the motion to amend the indictment against Kabiligi and Ntabakuze that there existed a charging policy at the Tribunal known to the Prosecutor and the Trial Chambers, but not to the Defence. Counsel argues that this allegation is a challenge which should be taken up by the Tribunal, and which challenges the impartiality of the Tribunal.

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48. Kabiligi's Counsel refers to the Nyiramasuhuko Joinder Decision and notes that before the Errata was filed, the decision stated that Trial Chamber II intentionally granted an amendment to the indictment to include a charge of conspiracy as a basis for the joinder request. Counsel urges this Trial Chamber not to follow the Nyiramasuhuko Joinder Decision.

(i) *Factual Basis*

49. Counsel argues that the Prosecutor has produced no evidentiary material in support of joinder. Although the Prosecutor relies on allegations in paragraphs 4.2 to 4.4, 5.1, 5.11, 5.12, 6.2, 6.3, 6.18, 6.30, 6.31, 6.46, 6.49, 6.50 and 6.51, there is no evidentiary basis for these allegations. It is his position that the allegations made by the Prosecutor in support of joinder are not binding on the Tribunal.

50. Counsel reviewed the indictment against his client and refers the Trial Chamber to the paragraphs dealing with his client. He notes that the paragraphs on which the conspiracy charge is based make no mention of Kabiligi. He reviewed in detail the allegations in paragraphs 5.5, 5.10, 5.16, 5.22, 5.25, 5.26, 5.28, and lastly 5.61 and 5.67 which speak of meetings on 6 and 7 April 1994 at which time it is acknowledged by the Prosecutor that Kabiligi was in Egypt. He notes that paragraph 5.2 speaks of the origins of the accused and he notes that Kabiligi is not from the same region as Habyarimana. He also disputes the likelihood of the meetings alleged by the Prosecutor in paragraph 6.49, between retired officers and battalion commanders.

51. Counsel also denies that the Prosecutor produced any evidence in support of the alleged hierarchical link between the accused. He notes the only document produced by the Prosecutor in support of this allegation is one containing a typed list of names to which Bagosora's name has been added in handwriting. Counsel questioned how the Prosecutor was "able to put with her hand the name of Colonel Bagosora in a document to be put before your Court" and contended that this was a "sacrilege, because it is indeed a case of falsification of a document." Counsel later confirmed that he had no intention of accusing the Prosecutor of falsifying the document. He then advised Trial Chamber that he does not know who falsified the document, but that at a later date he will ask that the document be thrown out.

52. Counsel argues that the Prosecutor has not shown any specific material act by the accused linked to an element of the crime. He contends that the Prosecutor has shown no link between any such acts and specific facts capable of determination in space and time. He also argues that there has been no evidence of a common plan, scheme or strategy.

53. Counsel's position is that the civil law requires a nexus for joinder. The required nexus is that a decision on one matter would necessarily have an impact or effect on other matters, based on objective elements. In this case, if the Prosecutor were able to prove conspiracy, complicity or a common criminal transaction, then there would be an objective element which would justify joinder.

54. Counsel contends that if the joinder is to be based on the accuseds' membership in the Rwandan Armed Forces, that reasoning is flawed because Bagosora was a retired soldier in 1994.

55. Counsel notes that the Prosecutor made reference to the Nuremberg trials, however he argues that the reference is not relevant to the present case. The basis for trying twenty-four accused together was a specific instrument that made it possible for the Nuremberg Tribunal to charge organizations, and to charge individuals on the basis of their membership in organizations. This Tribunal does not have jurisdiction to prosecute organizations, nor does it have jurisdiction to prosecute individuals on the basis of their membership in organizations.

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(ii) Interests of Justice

56. Kabiligi's Counsel argues that there would be no risk to potential witnesses in attending at Arusha several times to give evidence.

(iii) Prejudice

57. Counsel submits that joinder could lead to a conflict of interest in defence strategies and the presentation of the case by Defence Counsel. He refers to the decision of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") in *Prosecutor v. Kovacevic*, IT-97-24 (Decision on the Prosecution Motion for Joinder of Accused and Concurrent Presentation of Evidence) (14 May 1998) in support of this argument.

58. Counsel argues that in this case, joinder would lead to confusion, amalgamation and possible conflict of interest between his client and the other accused. He contends that joinder would make a full and unfettered defence difficult. He also argues that it would be difficult to produce all the testimony for his client without being compelled to take into account the interests of the other accused.

59. Counsel also argues that joinder would lead to a prolongation of the proceedings.

60. Counsel notes that the accused are not at the same stage in the proceedings and questions what will happen when others named in the indictment, who have not yet been apprehended, are arrested. He states that he does not believe that the Prosecutor will not move to join these others once they are arrested.

61. Lastly Counsel argues that the Prosecutor is attempting to use the joinder process to achieve what has already been denied by Judge Khan in the *Bagosora and 28 Others* Decision.

*Counsel for Nsengiyumva**(i) Delay*

62. Counsel for Nsengiyumva's first objection to this motion is on the basis of delay. He argues that in September 1997, the defence filed a motion seeking to set a trial date. At that time, the Prosecutor promised the court that it would bring a motion for joinder by November 1997 and thus the trial date was adjourned. Counsel submits that although a trial date of 9 February 1998 had been set for his client, on 5 February 1998, the Prosecutor filed a motion for an adjournment on the basis that she intended to file a joint indictment. The Prosecutor brought a motion to join Nsengiyumva with 28 others in one indictment, which was denied by both Judge Khan and the Appeals Chamber.

63. Counsel disagrees with the Prosecutor's contention that she is not responsible for the accused's period of custody in Cameroon.

64. The Defence argues that the fact that the Prosecutor filed the Motion while the accused's motion to strike the initial indictment was pending, and the Prosecutor's failure to comply with a decision of Trial Chamber I, in *Prosecutor v. Nsengiyumva*, Case ICTR-96-12-I (Decision on the Defence Motion to Strike Out the Indictment) (24 May 1999) (the "Nsengiyumva Decision"), to make certain amendments to the initial indictment, render this motion a nullity.

(ii) Evidence

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65. The Defence also opposes the Motion on the basis of an alleged lack of evidence in support of the Motion. In particular the Defence argues that there is no evidence in support of the allegation of a conspiracy between the accused. He alleges there is no evidence in support of either the military or personal relationships alleged by the Prosecutor. It is Counsel's position that the Trial Chamber cannot rely on allegations contained in the indictments as the basis for joinder.

66. Counsel argues that there is no evidence that any offence arose from the identification of the "enemy" as alleged in the Motion. He argues that there is no evidence that Nsengiyumva was involved in the distribution of arms. He argues that any evidence that the accused was a member of a commission is not relevant to the motion as there is no offence in having formed part of a commission. He argues that although the Motion speaks of massacres, there is no evidence linking Nsengiyumva to those massacres. He submits that evidence of being part of a military structure is not evidence of an offence. He argues that allegations of a superior-subordinate relationship are not supported by evidence and allegations of personal relationships are irrelevant. He also submits that allegations with respect to a phone call from Bagosora to Nsengiyumva on or about 7 April 1994, after which the killings commenced, are "ridiculous" and "unbelievable."

67. Counsel notes that the Prosecutor has not given the names of any of the political figures allegedly killed, and contends that the Prosecutor's allegations are vague and do not involve his client.

68. The Defence argues that any allegations made by the Prosecutor must be in the form of an affidavit, pursuant to Article 27 of the Directive for the Registry which requires parties to file an affidavit when requesting the Trial Chamber to make a determination on a question of fact in dispute.

69. Counsel notes that of the eleven counts against Nsengiyumva, only one mentions any of the other three accused.

(iii) The Law

70. Counsel refers to the decision of *D.P.P. v. Merriman*, [1973] A.C. 584 (House of Lords), as support for the proposition that joinder can only occur where the accused have been charged together in one count.

71. Counsel notes that if joinder is granted there would be over forty counts to be dealt with in one trial. He relies on the decision of *D.P.P. v. Arthur*, [1943] Criminal Appeal Reports 43 (House of Lords) ("Arthur's Case"), as support for his position that such a trial would be unwieldy. He refers to Arthur's Case in arguing that the accused would be prejudiced as regards each of the charges by the evidence which is being given upon the other charges.

72. He also refers to the decision of *R. v. Shaw*, [1942] 2 All E.R. 342 ("Shaw's Case"), in which case the court found that it would be unreasonable to expect a jury to grasp and retain evidence in its entirety concerning separate acts of individual accused.

73. Counsel notes the decision of *Kotteakos v. United States* (1946), 328 U.S. 750, 66 S.Ct. 1239 in which the Supreme Court of the United States held that the rights of an accused can be substantially prejudiced by joinder where the only nexus among them lies in the fact that one man participated in all the conspiracies. He argues that in the present case, there is no evidence to support the allegation that the accused jointly committed any offence and thus there is an absence of a nexus.

(iv) Prejudice

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74. Counsel argues that there are substantial and significant differences in the defence strategy of each of the accused, and that his client's defence will be prejudiced if these cases are tried together.

75. Lastly, Counsel advises the court that he fully adopts the arguments of Counsel for Kabiligi and Bagosora.

Counsel for Ntabakuze

76. Ntabakuze's Counsel made a number of preliminary arguments. His first argument, as set out in his "Motion to Declare the Indictment Void ab initio," is that the Trial Chamber lacks the jurisdiction to hear the Motion because the indictments on which the Motion is based are null and void. He also argues that the indictments, as amended, are not valid because the new counts were never confirmed.

77. The second preliminary point argued by Ntabakuze's Counsel, included in his "Motion Objecting to a Lack of Jurisdiction," is that the Trial Chamber lacks jurisdiction to hear the Motion because the indictment contains matters that are outside the temporal jurisdiction of the Tribunal as set out in Article 7 of the Statute.

78. Counsel's third preliminary objection to the Motion, as set out in Ntabakuze's "Motion Objecting to a Lack of Jurisdiction," is that the Trial Chamber lacks jurisdiction to hear the Motion because the indictment makes allegations dealing with the Rwandan Armed Forces, as an institution, while Article 5 of the Statute only gives the Tribunal jurisdiction over natural persons.

79. Counsel argues that joinder of cases involving conspiracy charges would result in the evidence of one accused being admitted against all four accused, and thus prejudice the accused.

80. The last objection raised by Counsel for Ntabakuze is that the Chamber lacks jurisdiction to hear this motion because there is no provision in the Rules which allows for joinder at this stage of the proceedings. He argues that Rule 48 only allows for joinder if the accused are charged together. He contends that if Rule 48 had been meant to apply to situations where the accused were charged separately, Rule 48 bis would not have been drafted. These arguments are set out in Ntabakuze's "Motion Seeking to Have Rule 48 bis Declared Ultra Vires, Unlawful, Contrary to the Rules of Procedure and Evidence, and Inapplicable to the Accused" and Ntabakuze's "Motion for a Declaratory Ruling in Order to Determine the Law Applicable to the Prosecutor's Motion for Joinder filed on 28 October 1999, Prior to Hearing Said Motion."

PROSECUTOR'S REPLY

81. The Prosecutor notes that despite numerous references by Defence Counsel to Judge Khan's Bagosora and 28 Others Decision, in that decision Judge Khan stated that the appropriate procedure is one of joinder.

82. The Prosecutor states that she is ready to start trial upon the determination of joinder.

83. The Prosecutor argues that with respect to the evidence, joinder can be determined on the Statement of Facts and the charges contained in the indictments. The question the Trial Chamber should ask itself is whether the factual allegations indicate the existence of a "same transaction." Whether or not these allegations can be proven is a matter for trial.

84. With respect to the concerns raised by Counsel that the Tribunal is the drafter of its own Rules, the

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Prosecutor notes that this is also the case with the International Court of Justice and the European Human Rights Commission.

85. The Prosecutor asks the Trial Chamber to apply the Vienna Convention on the Law of Treaties to its interpretation of Rule 48. Article 31(1) states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The Prosecutor asks the Trial Chamber to find that Rule 48 can be the basis for joinder in these circumstances. Otherwise, there would be no possibility for joinder if new facts came to light after the initial indictment.

86. On the issue of a nexus between the accused, the Prosecutor clarified that Bagosora was the Director of the Office of the Minister of Defence in 1994. This position is the second in charge of the Ministry of Defence. Below the Director, in terms of military hierarchy, are the Chief of Staff of the Army and the Chief of Staff of the Gendarmerie. In the army, the position directly below the Chief of Staff is the Commander of Military Operations; a position held by Kabiligi. Directly below Kabiligi are a number of positions, including the Commander of the Para-Commando Battalion, Ntabakuze, and the Commander of the Gisenyi Region, Nsengiyumva.

87. With respect to what will happen if others named in the indictments are arrested, the Prosecutor refers to the Cyangugu Joinder Decision which determined that such an issue can be considered at the appropriate time.

88. The Prosecutor concludes by noting that a motion for joinder is not the proper forum for matters of evidence.

DELIBERATIONS

Preliminary Matters

(i) Preliminary Motions by Ntabakuze

89. The Trial Chamber finds no merit in the oral motion raised by Counsel for Ntabakuze, that the Trial Chamber lacks jurisdiction to hear the Motion because it is not accompanied by an affidavit. The Trial Chamber notes that in support of this motion, the Prosecutor relies on the allegations contained in the indictments. It is not necessary at this time for the Prosecutor to prove the truth of these allegations, nor is it necessary for the Prosecutor to provide evidence in affidavit format to establish a basis for joinder. We are not considering proof of evidence to maintain joinder. What we are considering is whether there is a sufficient basis for joinder. It appears as if the respective Counsels for the various accused have misconstrued the nature of the proceedings. This is not the time for proof. If there is proof, that will come at the Trial. That issue will have to be adjudicated on at that time. This position was also adopted by the ICTY in *Prosecutor v. Kordic*, IT-95-14/2 (Decision on the Defence Motion to Strike the Indictment for Vagueness) (2 March 1999).

90. With respect to Ntabakuze's motion for a declaratory ruling in order to determine the law applicable to the Prosecutor's motion, Ntabakuze's motion seeking to have Rule 48 bis declared ultra vires, Ntabakuze's motion to declare the indictment void ab initio, and Ntabakuze's motion objecting to lack of jurisdiction, the Trial Chamber has ruled on those motions in separate decisions as follows: Decision on Ntabakuze's Motion for a Declaratory Ruling in Order to Determine the Law Applicable to the Prosecutor's Motion for Joinder Filed on 28 October 1999, Prior to Hearing the Said Motion, (4 May 2000); Decision on Ntabakuze's Motion Seeking to have Rule 48 bis Declared Ultra Vires, Unlawful, Contrary to the Rules of Procedure and Evidence and Inapplicable to the Accused, (4 May 2000); and Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the

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Indictment Void Ab Initio, (13 April 2000). The Trial Chamber rejects Mr. Monterosso's submissions that it does not have jurisdiction to hear the Prosecutor's motion for joinder.

(ii) Preliminary Objection filed by Nsengiyumva

91. Nsengiyumva's objection to the composition of the Trial Chamber, filed on 23 September 1998, has been rendered moot by the Kanyabashi Appeal, in which Defence Counsel's submission that the recomposition of the Trial Chamber negated the jurisdiction of the Trial Chamber was rejected.

92. Thus, the question of the composition of the Trial Chamber has become moot and the Trial Chamber will not consider further Nsengiyumva's objection.

(iii) Submissions made by Counsel

93. Mr. Degli, Counsel for Kabiligi, in making his submissions, in some respects crossed the bounds of propriety. We expressed our views on this during the hearing but in our view it is important that it be stressed so as to avoid a repetition of such conduct in the future. A certain measure of decorum is to be expected from Counsel. Counsel should bear in mind that he is an officer of the court and as such should conduct himself accordingly.

94. With respect to Mr. Degli's submissions about a charging policy in existence between the Trial Chamber and the Office of the Prosecutor, this Chamber has already made clear that it is not aware of any such policy. The Prosecutor is quite at liberty to have her own policy. This matter has been dealt with previously and it is not proper for Counsel to continue to raise it. The Trial Chamber has already expressed its view on this matter. We hope that this matter will now be put to rest.

95. Counsel for Nsengiyumva alleges that the Prosecutor filed the Motion while a decision was pending on an application to strike out the initial indictment. However, this is not an issue properly before this Trial Chamber, so we will not deal with it further. This matter was previously dealt with by Trial Chamber I in the Nsengiyumva Decision.

96. Counsel for the Defence have also raised issues with respect to the confirmation and amendment of the indictments. The Trial Chamber rejects all such arguments. No issue concerning the validity of the indictments can now be raised. This issue has already been determined. It cannot now be reopened, nor will any further challenges with respect to the indictments be tolerated.

97. Counsel for Nsengiyumva, Mr. Ogetto, submitted that once a person is indicted, he is under the jurisdiction of the Tribunal, no matter what country he is in. We do not share that view. It is important that a clear distinction be made between the Tribunal having jurisdiction to do a particular act as distinct from a suspect or accused being in the custody of the Tribunal. These two issues should not be confused. A suspect or an accused is not in the custody of the Tribunal until such a person is transferred to the seat of the Tribunal or has arrived at the seat of the Tribunal, at which point such a person is under the control of the Tribunal.

98. Any comparisons by Nsengiyumva's Counsel of this Tribunal with administrative tribunals are not appropriate. Superior courts exercise supervisory jurisdiction over those bodies. A decision dealing with inferior or administrative tribunals is of little use to us because those bodies do not equate with an international tribunal.

(iv) Documents filed by Counsel for Kabiligi and Nsengiyumva

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99. It is to be noted that when Counsel for Kabiligi and Nsengiyumva filed their briefs, they combined their responses to the Prosecutor's motion to Amend the Indictments, and the Motion for joinder in one document. The amended indictment was previously dealt with and a decision was rendered with respect to same by Trial Chamber I on 2 September 1999 with respect to Nsengiyumva, and by Trial Chamber III on 9 October 1999 with respect to Kabiligi. The matter now pending is the Motion for joinder which is being dealt with at this time.

Legal Basis for Joinder

(i) Rule 48 as a Basis for Joinder

100. Rule 48 provides for joinder of accused persons. The Trial Chamber finds that it can decide this Motion on the basis of Rule 48, as interpreted in the Kanyabashi Appeal and the Cyanguu Joinder Decision.

101. The application of Rule 48 to join accused who have been separately indicted receives support in the Separate and Dissenting Opinion of Judge Shahabuddeen in the Kanyabashi Appeal (at pp. 14-17).

102. It is also to be noted that in this decision, Judge Shahabuddeen confirms that the Appeals Chamber has accepted the above interpretation of Rule 48 in the following statement:

One interpretation of the Rule [48] is that persons who satisfy the stated test may be "jointly ... tried" only if they have been "jointly charged...", thus reflecting the traditional common law rule relating to joinder *stricto sensu*. Another interpretation [of Rule 48] is that the provision also embraces the possibility that such persons may be "jointly ... tried" even if they have not been "jointly charged...", thus reflecting the principle of consolidation. The Prosecution has proceeded on the basis of this latter and wider interpretation, Trial Chamber I has implicitly accepted it, and the Appeals Chamber has now effectively adopted it. The former interpretation is attractive; but not sufficiently so to justify non-acceptance of the adoption of the latter by the Appeals Chamber, and more particularly so in view of the inherent authority on the basis of which courts in some jurisdictions order consolidation.

(ii) Joinder in Common Law and Civil Law Jurisdictions

103. In common law jurisdictions, questions of joinder lie entirely within the discretion of the court, which has inherent power to formulate its own rules. The case of *R. v. Assim*, [1966] 2 All ER 881, supports this view. (See paragraph 104, below.)

104. The Trial Chamber notes Lord Morris' speech in *Director of Public Prosecutions v. Doot & Others*, (1973) A.C. 807 (House of Lords), in which he said:

My Lords, as was pointed out in *Reg. v. Assim* [1966] 2 Q.B. 249, questions of joinder, whether of offence or of offenders, are considerably matters of practice on which the court unless restrained by statute has inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. Here is essentially a field in which rules of fairness and of convenience should be evolved and where there should be no fetter to the fashioning of such rules.

105. In the Joint and Separate Opinion of Judge McDonald and Judge Vohrah in the Kanyabashi Appeal, the Judges observed at paragraph 32 as follows:

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It is well accepted in some common law jurisdictions that joining accused in one indictment where the "same transaction" test is met can be initiated by the prosecutor or by an order of the court if justice so requires. The public interest clearly dictates that joint offences may be tried together.

106. In civil law jurisdictions joinder may be granted if *connexité* exists between the crimes with which the accused are charged, even at the initiative of the court. Joinder may occur regardless of whether the accused are indicted together in one indictment or separately.

(iii) Conclusion on the Legal Basis for Joinder

107. It is clear from the foregoing that under the interpretation of Rule 48 advanced in the Kanyabashi Appeal, accused persons can be jointly tried, even if they were not jointly charged. Further, joinder of indictments is possible under both civil and common law systems.

108. Taking into account the jurisprudence of the Tribunal and that of national jurisdictions, it is therefore clear that where the public interest dictates joint offences may be tried together. In appropriate circumstances the Trial Chamber may so order quite apart from the provision of the Rules allowing for joinder, which do not restrain the Trial Chamber from granting joinder, but rather, under Rule 48, permit joinder. The question of joinder is also one of practice. If the allegations contained in the indictment support the existence of a common transaction amongst the accused, and if no material prejudice arises to the accused as a result of joinder, joinder may be granted.

109. The jurisprudence of the Tribunal clearly establishes that the application of Rule 48 and common law practice considerations are appropriate in these circumstances.

110. Defence Counsel failed to take into account the totality of Judge Khan's Bagosora and 28 Others Decision, but relied only on such very limited portions as they considered helpful to them. Furthermore, Judge Khan was dealing with a request to confirm an indictment of twenty-nine accused, some of whom had been previously indicted and made their initial appearances, and others who were still at large. The Prosecutor brought the motion *ex-parte*, with respect to the accused who had already made their initial appearances. Obviously this was too many accused in one indictment. Additionally, the Prosecutor was asking for an unwarranted usurpation of the jurisdiction of the Trial Chambers seized of the Indictments of the accused who had already made their initial appearances and the process requested by the Prosecutor would circumvent the express provisions of the Rules that guarantee the right of the Defence to be heard.

111. Judge Khan stated that if the Prosecutor, in her ongoing investigations, collected information which jointly implicated new suspects and the existing accused, she could pursue this endeavour within the framework of the Rules, so that any judicial decision would be rendered in the presence of the accused. This is the approach the Prosecutor has now taken in the Motion.

Application of Rule 48 bis

112. The Trial Chamber decides this Motion by applying Rule 48. We therefore do not propose to make any ruling on the legal validity of Rule 48 bis as this is not necessary in the circumstances.

113. At this time, the Trial Chamber notes that in Defence Counsel's submissions with respect to Rule 48 bis, he refers to the process by which the Tribunal amends its Rules. The Trial Chamber draws to the attention of Counsel that the Prosecutor does not participate in the decision making process with respect

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to amendments of the Rules. This is done by the Judges alone. Additionally, Defence Counsel expressed concern about the Tribunal having the power to create and amend its Rules. It is the Plenary, consisting of the Judges who make the Rules. This is not an unusual procedure as both the International Court of Justice and the European Human Rights Commission make their own rules.

Legal Criteria for Joinder under Rule 48

114. According to Rule 48, persons accused of the same crime or different crimes committed in the course of the same transaction, may be jointly charged and tried. Rule 2 defines the term "transaction" as "a number of acts or omissions whether occurring as one event or a number of events at the same or different locations and being part of a common scheme, strategy or plan."

115. In *Kayishema*, at page 3, Trial Chamber I held that:

involvement in a same transaction must be connected to specific material elements 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.

116. In the *Kabiligi, Ntabakuze* Motion for Separate Trials, Trial Chamber II considered the issue of joinder under Rule 48 and quoted the above passage from the decision in *Kayishema*. The Trial Chamber stated:

The above interpretation has created argument as to whether the acts or omissions which are alleged to form the same transaction necessary for joinder ("acts of the accused") must be criminal/illegal in themselves or not. This Trial Chamber is of the opinion that the acts of the accused need not be criminal/illegal in themselves. However, the acts of the accused should satisfy the following:

1. Be connected to material elements of a criminal act. For example the acts of the accused may be non-criminal/legal acts in furtherance of future criminal acts;
2. The criminal acts which the acts of the accused are connected to must be capable of specific determination in time and space, and;
3. The criminal acts which the acts of the accused are connected to must illustrate the existence of a common scheme, strategy or plan.

117. Trial Chamber II further stated that "these guidelines are not intended to be a rigid insurmountable three prong test," at page 2 of the decision.

118. On the basis of these precedents, there are a number of elements that must be shown to exist to grant a motion for joinder of accused. There must be acts of the accused, which are connected to an objectively-punishable criminal offence, this offence must be capable of specific determination in time and space, and the acts of the accused must illustrate the existence of a common scheme, strategy or plan, in which the accused was involved.

Factual Basis Required to Support Joinder

119. The Trial Chamber now considers the question of the amount and the cogency of evidence which must be adduced to satisfy this test, before proceeding to consider the application of this test to the instant case.

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120. In the Kabiligi, Ntabakuze Motion for Separate Trials, Trial Chamber II held that “[f]or the purposes of joinder, in the absence of evidence to the contrary, the Trial Chamber shall act upon the Prosecutor’s factual allegations as contained in the indictment and related submissions,” at page 2 of the decision.

121. At this stage of the proceedings, only allegations can be made. These allegations will have to be proved at the trial. This is not the stage of the proceedings where proof is established. We are not having two trials; one at the joinder stage and one at the trial stage.

122. The Trial Chamber notes that Mr. Constant, in particular, treated us to a massive review of the evidence, but with all respect to him, this is not the occasion for that approach. That approach is more suited to the trial than a motion for joinder. This is not the stage at which a thorough review of the evidence is required. We are not at this point in time trying the case.

Factual Basis for Joinder

123. The Trial Chamber has considered the allegations of fact that the Prosecutor has made in the indictments, the Motion and the Brief. The Trial Chamber considers these allegations in light of the above criteria for the application of Rule 48, to determine whether the allegations, if proven, would establish that the crimes with which the accused are charged, were committed in the course of the same transaction.

124. Defence Counsel allege that there is no evidence that the accused are linked to specific material acts and that there is no evidence to support the allegations that the accused jointly committed any offence. Defence Counsel argue that in the absence of any nexus or link, the accused will be prejudiced by joinder.

125. The Trial Chamber observes that in Count 1 of each indictment it is alleged that the accused all conspired to commit genocide.

126. The Trial Chamber notes, that in the concise statement of facts in the Nsengiyumva indictment, it is alleged that Nsengiyumva acted in concert with Bagosora, Ntabakuze and others in planning, preparing and executing a common scheme, strategy or plan to commit the atrocities alleged in the indictment.

127. In the concise statement of facts in the Bagosora indictment it is alleged that Bagosora acted in concert with Kabiligi, Ntabakuze, Nsengiyumva and others in planning, preparing and executing a common scheme, strategy or plan to commit the atrocities alleged in the indictment.

128. In the concise statement of facts in the Kabiligi and Ntabakuze indictment it is alleged that Kabiligi and Ntabakuze acted in concert with Bagosora, Nsengiyumva and others in planning, preparing and executing a common scheme, strategy or plan to commit the atrocities alleged in the indictment.

129. The Trial Chamber notes that the Prosecutor advised in oral submissions and in the Bagosora indictment that Bagosora held the positions of second-in-command of the Icole Supérieure Militaire in Kigali, Commander of Kanombe and Director of the Office of the Minister of Defence while he was in the military. On his retirement from the military he continued to hold the position of the Director of the Office of the Minister of Defence, a position which he held during the time of the alleged attacks against the Tutsi population. The Prosecutor described the alleged hierarchical link between the four accused during the time of the massacres, in its oral submissions and in the indictments.

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130. With respect to the assertions made by Counsel for the Defence negating a hierarchical link between the accused, there is no evidence in support of such allegations, save the statement of Defence Counsel

131. Defence Counsel have argued that involvement in the military is irrelevant to the allegations of conspiracy. The Trial Chamber notes that it is not solely a question of being part of the military, but as such the accused are alleged to have agreed to do certain acts, and to have carried out these acts jointly and in their individual capacity.

132. Counsel have raised the argument that involvement in a commission cannot amount to evidence in support of involvement in a conspiracy because others involved in the same commission have not been charged. This reasoning is flawed. The Prosecutor in her discretion may decide to proceed or not to proceed against a particular individual. The Trial Chamber will concern itself only with those persons against whom charges are laid.

Factual Basis for the Charge of Conspiracy

133. Conspiracy is being considered in the context of Count 1 of the indictments, namely conspiracy to commit genocide.

134. The Trial Chamber has reviewed the various authorities cited by Counsel with respect to the evidence required to establish conspiracy, some of which are not helpful.

135. The Trial Chamber in its previous decisions *Prosecutor v. Nsengiyumva*, ICTR-96-12-I (Decision on the Defence Motions Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment) (13 April 2000) and *Prosecutor v. Ntabakuze*, ICTR-96-43-I (Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void ab Initio) (13 April 2000) dealt in more detail with respect to the conspiracy issue and cited authorities with respect to same. In the circumstances, we do not consider it necessary to repeat the views expressed in those decisions.

136. For the purposes of this decision, a full analysis of the crime of conspiracy is not necessary. The appropriate stage for such an analysis is at trial. It is sufficient to identify the elements of conspiracy in order to determine whether the allegations made out by the Prosecutor, if proven true at trial, will establish a conspiracy amongst the accused. If that is the case, then there is a basis on which this Trial Chamber may grant joinder.

137. As in the *Cyangugu Decision*, the Trial Chamber is of the opinion that to establish the existence of a conspiracy, it is not necessary for the Prosecution to prove that the accused all acted together and at the same time. It is sufficient to establish that the accused had a common purpose or design, that they planned to carry out that purpose or design and that they executed that plan. The ICTY stated in *Prosecutor v. Kordic*, *Prosecutor v. Cerkez*, Case IT-95-14/2 at para. 10 (Decision on Accused Mario Cerkez's Application for Separate Trial) (7 December 1998) that, "[i]t is not necessary to prove a conspiracy between the accused in the sense of direct coordination or agreement."

138. The Trial Chamber notes that all the accused in a conspiracy need not know or be in contact with every other person in the conspiracy. Where there are a series of agreements or relationships all of which are regarded as essential to the pursuit of a single large-scale scheme, the agreements or relationships may be regarded as a link in the overall chain of relationship. The Trial Chamber is of the opinion that the charge of conspiracy, as set out in the Indictments, by its very nature, requires that these

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accused be tried together, provided that the other conditions of joinder are met.

139. The Trial Chamber is of the opinion that the Prosecutor's allegations, if proven, establish a connection between Bagosora, Kabiligi, Ntabakuze and Nsengiyumva in the sense that they participated in the same transaction. Consequently, the Trial Chamber is of the opinion that the submissions of the Prosecution, based on the Indictments, the Motion and the Brief, provide a sufficient basis for concluding that the criteria for joinder as laid down in Rule 2 and Rule 48 are complied with. It remains to be seen whether these allegations will be proven at trial. The Trial Chamber finds that there is a sufficient basis for joinder.

140. Once it is established that a common transaction has occurred, the Trial Chamber must review other relevant considerations.

141. The Trial Chamber therefore must consider the advantages of granting a motion for joinder, and weigh the benefits against the possibility of prejudice to individual accused.

The Interests of Justice

142. The decision whether to grant joinder lies within the discretion of the Tribunal. In the exercise of its discretion, the Trial Chamber must weigh the overall interests of justice and the rights of the individual accused. See *R. v. Assim*, *infra* at paragraph 103.

143. The ICTY, in *Prosecutor v. Delalic, Mucic and Delic*, Case IT-96-21-T, at para. 35 (Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him) (1 July 1998), described the rationale for joinder of offenders as follows:

There are reasons of undoubted public interest why joint offences should be tried jointly. Savings in expense and time are a factor of importance. It is also desirable, and in the interests of transparent justice, that the same verdict and the same treatment should be returned against all the persons jointly tried with respect to the offences committed in the same transaction. It is also to avoid the discrepancies and inconsistencies inevitable from the separate trial of joint offenders. Hence, the principles of administration of criminal justice have always accepted the practice of trying joint offenders irrespective of the attendant inevitable minimum prejudices.

144. In addition to these advantages, joinder allows for a more consistent and detailed presentation of the evidence. It allows for better protection of the victim's and witnesses' physical and mental safety by eliminating the need for them to make several journeys and to repeat their testimony. Lastly, joinder may reduce the risks of contradictions in the decision rendered when related and indivisible facts are examined. See *Prosecutor v. Kayishema*, Case ICTR-95-1-T, at p. 3 (Decision on the Joinder of the Accused and Setting the Date for Trial) (6 November 1996).

Prejudice

145. Counsel for Nsengiyumva referred the Trial Chamber to a number of authorities in support of his argument that joinder would result in prejudice to his client. In this regard the Trial Chamber notes that both Arthur's and Shaw's Case deal with joinder in the context of jury trials and thus the considerations expressed in those decisions are not relevant to the situation before this Tribunal which involves a determination of the issues by judges alone. In a jury trial, where intricate legal issues have to be explained to the jury, the situation may become confusing to them, whereas when the trial is by Judges

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alone, this concern does not arise.

146. From the information adduced there was no specific showing that there would be "contamination" of the evidence against individual accused, nor was any prejudice shown. The Trial Chamber will judge each individual accused solely on the basis of the evidence adduced against each accused. Evidence against one accused is not evidence against another accused. Furthermore, that joint trials are envisioned by the Rules is apparent from Rule 82 which articulates that the rights of the accused in a joint trial are the same as if he were being tried separately.

Delay

147. Before reaching a conclusion the Trial Chamber must also satisfy itself that a joinder would not infringe the right of the accused to trial without undue delay as laid down in Article 20(4)(c) of the Statute and other international human rights instruments. Among relevant criteria according to human rights case law are the complexity of the case, the conduct of the authorities and the conduct of the accused including whether the case has been pursued with sufficient diligence.

148. It is necessary to look at the totality of the situation and the legal reasons for joinder in spite of some amount of delay.

149. In national jurisdictions the same principles have been expressed in similar ways. For instance in the case of *Barker v. Wingo*, 407 U.S. 514 (22 June 1972), the Supreme Court of the United States observed (at p. 530):

A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

150. In *O'Flaherty v. Attorney General of St. Christopher and Nevis and others* (1986) 38 West Indian Reports 146, the court held:

There is no formula as to what constitutes unreasonable delay, there is no inflexible rule, each case has to be looked at in the light of its own circumstances and the balancing of the conduct of the applicant and that of the respondents and the existing facilities.

151. Counsel for the Defence have argued for a firm trial date, however, it is difficult to set a binding date for the start of trial because of the numerous motions filed by some of the Defence Counsel. It is more desirable to dispose of pending motions before trial.

152. The Trial Chamber notes that the accused have spent some time in custody. The Tribunal is not responsible for custody prior to transfer to the Tribunal. After transfer, these cases have been ongoing, with continuous activity. Taking into account that the cases against the accused raise complex issues of law and fact, the Trial Chamber is of the opinion that the proceedings against the accused are in conformity with the Statute and international requirements with regard to undue delay.

153. The Tribunal has no authority over national jurisdictions. The Tribunal cannot direct national authorities to do or not to do a particular act. The Tribunal can only seek the co-operation of national governments. The Tribunal cannot therefore be held responsible for the activities of national

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governments or their courts. If national governments fail to act in a timely and appropriate manner, the only recourse the Tribunal has is to bring the matter to the attention of the Security Council, pursuant to Rule 7 bis of the Rules. Nor can national governments be considered as agents of the Tribunal.

154. The crucial issue in the present context is whether the proposed joinder will delay the hearing of the case of the accused. The Trial Chamber is of the view that a delay, if any, will be minor as compared with the time saved as a whole. Any delay that the joinder of these cases may occasion will not violate human rights standards.

155. Furthermore, while the trial of an individual accused may result in some delay, if joinder is granted the overall time required to try these four accused jointly may be significantly lessened. There are approximately 40 accused presently in custody. Individual trials of each accused would result in some accused being in custody for a considerably long time. In such circumstances the interests of justice and the public interest would not be served.

156. In this context, it also should be noted that the absence of those who are not joined to these indictments and not yet in custody of the Tribunal will not cause any delay in the trial of the other accused, nor will it in any way affect their trial. If these persons are apprehended before the trial of the accused, the existing circumstances at that time will have to be considered. This is an issue for consideration at that time. The Trial Chamber will not now speculate as to the outcome. We are not going to concern ourselves with persons not yet apprehended. If and when such a situation arises, appropriate steps will be taken to deal with the matter.

157. **FOR THESE REASONS**, the Tribunal **GRANTS** the Prosecutor's Motion to join the accused Bagasora, Kabiligi and Ntabakuze, and Nsengiyumva for the purposes of a joint trial.

Arusha, 29 June 2000.

Lloyd George Williams
Presiding Judge

William H. Sekule
Judge

Pavel Dolenc
Judge

Seal of the Tribunal