079 SCSL-2003-05-PT (1442 – 1601)

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

Before: Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Case No: 2003-05-PT

Registrar: Mr. Robin Vincent

Date filed: 9 October 2003

THE PROSECUTOR

Against

ISSA HASSAN SESAY aka ISSA SESAY

PROSECUTION MOTION FOR JOINDER

Office of the Prosecutor:
Mr. Luc Côté
Ms. Brenda J. Hollis
Mr. Robert Petit
Ms. Boi-Tia Stevens

Defence Counsel:
Mr. William Hartzog

I. INTRODUCTION

1. Pursuant to Rule 73 and Rule 48(B) of the Special Court Rules of Procedure and Evidence (hereafter "the Rules"), the Prosecution hereby moves that the Accused Sesay, Kallon, Brima, Gbao, Kamara and Kanu be jointly tried. The requested joinder is in accordance with the language and spirit of Rule 48. It also serves the interests of justice and does not deny the accused persons of any fundamental right. Should the motion for joinder be granted, the Prosecution further moves that the Trial Chamber order that a consolidated indictment be prepared as the indictment on which the joint trial will proceed.

II. BACKGROUND

2. On 7 March 2003, Judge Bankole Thompson approved the indictments against Accused Sesay, Kallon and Brima. On 16 April 2003, Judge Bankole Thompson approved the indictment against Accused Gbao. On 28 May 2003, Judge Pierre Boutet approved the indictment against Accused Kamara. On 16 September 2003, Judge Pierre Boutet approved the indictment against Accused Kanu. The indictment against each Accused charges the Accused with acts of terrorism, collective punishments, extermination, murder, violence to life, health and physical or mental well-being of persons, rape, sexual slavery, child conscription, enslavement, pillage, attacks against humanitarian assistance workers or peacekeepers and taking of hostages. The time period of the indictment against each Accused is between about 1 June 1997 and about 15 September 2000.

3. On 15 and 21 March 2003, Accused Sesay and Kallon each made an initial appearance before Judge Benjamin M. Itoe. Accused Brima made his initial appearance before Judge Itoe on 15, 17 and 21 March 2003. On 25 April 2003, Accused Gbao made his initial appearance before Judge Bankole Thompson. On 4 June 2003, Accused Kamara made his initial appearance before Judge Pierre Boutet. On 23 September 2003, Accused Kanu made his initial appearance also before Judge Pierre Boutet.

4. On 17 April 2003, the Prosecution transmitted to the Registry disclosure material for Accused Kallon, Sesay and Brima, pursuant to Rule 66 (A)(i). On 26 May 2003, 2 June 2003 and 3 June 2003, Defence Counsels for Accused Kallon, Sesay and Brima respectively received the disclosed material. On 26 May 2003, the Prosecution transmitted to the Registry disclosure material pursuant to Rule 66(A)(i) for Accused Gbao. On 4 July 2003, the Prosecution transmitted to the Registry disclosure materials pursuant to Rule 66 (A)(i) for Accused Kamara. On 24 September 2004, the Prosecution filed a motion for protective measures in the Kanu case and a decision on the motion is pending. Disclosure pursuant to Rule 66(A)(i) for Accused Kanu has therefore not yet been effectuated.

5. The Prosecution brings this motion seeking a joint trial of the Accused Sesay, Kallon, Brima, Gbao, Kamara and Kanu.

III. THE LAW

6. Rule 48(B) of the Rules states that "[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 the Trial Chamber pursuant to Rule 73".

7. The term "transaction" is defined in Rule 2(A) 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."

8. Rule 82(B) of the Rules provides that "[t]he Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice".

9. The provisions of Rule 48(B) and the definition of "transaction" contained in Rule 2(A) of the Rules of the Special Court are respectively identical to Rule *48bis* and Rule 2(A) of the Rules of Procedure and Evidence for the International Criminal

Tribunal for Rwanda (ICTR) as amended 23 May 2003. The definition of transaction contained in Rule 2(A) of the Rules of the Special Court is also identical to the definition of transaction contained in Rule 2(A) of the Rules of Procedure and Evidence for the International Criminal Tribunal for Yugoslavia (ICTY) as amended 24 June 2003. The rule which provides for joinder at the ICTY, Rule 48, is also similar in material respect to Rule 48(B) of the Rules of the Special Court.

10. Jurisprudence from the ICTY indicates that the "same transaction" in the context of a joinder is defined within the meaning of Rule 2(A) of the ICTY Rules of Procedure and Evidence and joinder requires proof that (a) there was a common scheme or plan and (b) that the accused committed crimes in the course of it. *See Prosecutor v. Kordic and Cerkez*, IT-95-14/2-PT, Decision on Accused Mario Cerkez's Application for Separate Trial, 7 December 1998, paras. 8 and 10.

11. Consistent with the ICTY interpretation of "transaction", recent jurisprudence from the ICTR also requires proof that there was a common scheme or plan in order to meet the "same transaction" requirement. *See The Prosecutor v. Elizaphan Ntakirutimana et al.*, ICTR-96-10-I, ICTR 96-17-T, Decision on the Prosecutor's Motion to Join the Indictments ICTR 96-10-I and ICTR-96-17-T, 22 February 2001, para. 23.

12. Previous jurisprudence from the ICTR had established guidelines for determining whether the "same transaction" requirement is met. These guidelines require proof that the acts or omissions of the accused which are alleged to form the same transaction 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.

    The Prosecutor v. Ntabakuze et al., ICTR-97-34-I, Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998.

13. In deciding whether a number of acts or events were committed in the course of the same transaction, a Trial Chamber must base its determination upon the factual allegations contained in the indictment. *Id.*

14. The trials of two or more accused may be joined in circumstances where they are "accused of identical crimes committed in the course of the same transaction within the same time frame and in the same locations". *Prosecutor v Krajišnik*; *Prosecutor v Plavši}*, IT-00-39-PT and IT-00-40-PT, Decision on Motion for Joinder, 23 February 2001, para. 4.

15. The decision to grant a motion for joinder is discretionary. *See* Rule 48(B). *See also The Prosecutor v. Bagosora*, ICTR-96-7, Decision on the Prosecutor's Motion for Joinder, 29 June 2000, para.142. In exercising its discretion to grant a joinder the Trial Chamber must weigh the overall interests of justice and the rights of the individual accused. *Id.* The Trial Chamber should take into account a number of factors, including those listed in Rule 82(B) of the Rules, as well as, *inter alia*, the promotion of judicial economy, the avoidance of duplication of evidence and minimizing hardship to the witnesses. *Prosecutor v. Kvocka et al.*, IT-98-30-T and IT-95-4-PT, Decision on Prosecution Motion to Join Trials, 14 April 2000.

16. The rationale for joinder of offenders was aptly stated as follows:

> [t]here 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.

Prosecutor v. Delalic, Mucic and Delic, IT-96-21-T, Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him, 1 July 1998, para. 35.

17. The Prosecution is cognizant of the authority of the Special Court to develop its own jurisprudence, free from a slavish and uncritical emulation of the principles and

doctrines of the ad hoc tribunals. However, the Prosecution submits that the extensive body of jurisprudence on the subject of joinder from the ad hoc tribunals should serve as persuasive authority to the Court in that the requirements for joinder are guided by legal principles which are not affected by the uniqueness of the Special Court.

IV. ARGUMENT

A. THE CIRCUMSTANCES OF THIS CASE MEET THE REQUIREMENTS FOR JOINDER

18. The Prosecution submits that the requirements for joinder under the Rules of the Special Court are clearly met by the circumstances of this case. The crimes alleged against the Accused Sesay, Brima, Kallon, Gbao, Kamara and Kanu are crimes which formed part of a common scheme to gain effective control of the territory and population of Sierra Leone, as alleged in each of their indictments.

19. The indictments against the Accused Sesay, Brima, Kallon, Gbao, Kamara and Kanu are almost identical. The material facts alleged in all the indictments are the same, except for personal particulars. The offences charged are exactly the same. Except for the indictments against Kamara and Kanu, the time period and locations alleged in the indictment against each Accused are the same. The indictments against Accused Kamara and Accused Kanu contain two additional locations for Counts 3-5, and one additional location for Counts 6-8, 9-10, 12 and 13, due to evidence obtained from additional investigation. These locations are of equal relevance to the indictments against the other Accused, and though not specifically mentioned in those indictments are covered by the general language of the indictments.

20. Further, the Accused are commonly alleged to have been members of the senior leadership of the Revolutionary United Front (RUF) and/or the Armed Forces Revolutionary Council (AFRC), and of the RUF and AFRC alliance during the relevant time period. Each Accused is alleged to be liable for the crimes charged, in part, because of the individual authority and control derived from his participation in a superior body, organization, or entity within the RUF or AFRC or the RUF/AFRC

alliance, by virtue of having acted in concert with other senior leaders and/or perpetrators in those factions, bodies, organizations, entities, and by virtue of participating in a common criminal plan, purpose or design (joint criminal enterprise) to secure effective control of the territory and population and resources of the Republic of Sierra Leone.

21. In addition, the facts of this case also meet the guidelines for granting joinder established by the ICTR jurisprudence and bear similarity with cases which have qualified for joinder under these ICTR guidelines. For instance, in the Nyiramahasuhuko case where the Prosecution sought a joint trial of six accused persons who were commonly alleged to be officials in the government, who were alleged to have participated in crimes during the same period of time and who were alleged to have conspired with each other and participated in a national plan to exterminate the civilian population, the Court held that the "same transaction" requirement for a joinder had been met; the allegation that the accused persons held official positions in the government was held to satisfy the first requirement; the specification in the indictments of the dates and locations of the alleged crimes was held to meet the second requirement; and the allegation that the accused persons participated in a national plan to exterminate Tutsi members of the civilian population was held to meet the third requirement. *See The Prosecutor v. Nyiramasuhuko et al*, ICTR-97-21-I, ICTR-97-29A and B-I, ICTR-96-15-T, ICTR-96-8-T, Decision on the Prosecutor's Motion for Joinder of Trials, 5 October 1999, paras. 10-12.

22. In the instant case, the accused persons are all alleged to have been members of the senior leadership of the RUF and/or AFRC, and of the RUF/AFRC alliance, thus meeting the first requirement of the test. The indictments indicate that the alleged crimes occurred between about 1 June 1997 and 15 September 2000 and in locations such as Kono, Bo, Bombali and Kailahun Districts and Freetown, thus the alleged crimes are determined in space and time. Finally, the indictments allege that each Accused person shared a common plan, purpose or design (joint criminal enterprise) with the AFRC and the RUF to gain political power and control over the territory of

Sierra Leone and that the alleged crimes were actions within the joint criminal enterprise, thus meeting the third requirement of a common scheme.

B. A JOINT TRIAL WOULD SERVE THE INTERESTS OF JUSTICE

23. The interests of justice are best served by trying together these five Accused. Given the similarity in the facts of the case against each Accused, a joint trial would reduce the risk of contradictions, inconsistencies or discrepancies in decisions rendered in separate trials. *See The Prosecutor v. Kayishema*, ICTR-95-1-T, Decision on the Joinder of the Accused and Setting the Date for Trial, 6 November 1996. There is a fundamental and essential public interest in ensuring consistency in verdicts, and nothing could be more destructive of the pursuit of justice than to have inconsistent results in separate trials based on the same facts. *Prosecutor v. Brdanin et al.*, IT-99-36, Decision on Motions by Momir Talic for a Separate Trial and for Leave to file a Reply, 9 March 2000, para. 31.

24. Separate trials could lead to other severe practical difficulties were the judgement in a first trial to be appealed with subsequent trials yet to start or in progress. A situation could arise where the same factual issues are being considered simultaneously by a Trial Chamber and by the Appeals Chamber. Likewise, were Trial Chambers in separate trials to reach different decisions on the same questions of law the weight to attach to the decision from any one particular Trial Chamber could become an issue.

25. Further, as the indictments are identical, the majority of the evidence that will be tendered by the Prosecution against each Accused will invariably overlap, and typically be the same. If the trials are not joined the same evidence will be presented multiple times in separate trials. A joint trial would avoid duplication of the evidence. *See Prosecutor v. Kvocka et al., supra.*

26. One of the primary considerations for a joint trail should be the impact of separate trials on witnesses. As stated, the criminal liability of each accused person was incurred in part, by his individual participation in a joint criminal enterprise. The Prosecutor therefore intends to lead essentially the same evidence against each accused person, particularly the district-based evidence of crimes. Therefore, with the

possible exception of strictly biographical witnesses, potentially all the witnesses, numbering over 160, whose statements have been disclosed, could be called upon to testify in all 6 trials should the Accused be tried separately. Clearly this is not an efficient administration of justice.

27. Further, because the Prosecution witnesses to be called to testify are common to all accused persons, should the accused persons be tried individually, these witnesses would have to reappear on several occasions and give testimony on the same facts, thus putting the witnesses under extreme mental suffering by having to recall and explain some of the most painful experiences imaginable. Separate trials would require these witnesses to relive their painful experiences multiple times, and would also force them to disrupt their lives multiple times to provide the same evidence to the Court. A joint trial will minimize re-traumatization of these victims and witnesses and would better protect their mental and physical well-being. *See Kayishema, supra.* It would also eliminate the need for witnesses living outside of Freetown, to make several journeys to Freetown, the seat of the Court, to give testimony.

28. A joint trial would also alleviate concerns regarding the physical security of witnesses related to their testimony. Despite measures granted by the Chamber in accordance with the Rules, the Prosecution submits that the risk associated with a single appearance before the Chamber can only be greater as the witness is forced to reappear in separate trials. A joint trial lessens the likelihood of exposure of the witnesses by eliminating the need for repeated contact, travel and absences from the community. *See Kvocka et al., supra.* It would also reduce the overall time the witnesses spend in the witness protection program.

29. The Prosecution further submits that a joint trial would most efficiently use scarce Court resources. By nature international trials involve vast amount of human and material resources. Given that the mandate of the Special Court is limited in duration, time is also a limited resource, on which even a single trial will make heavy demands, given the complexity of cases before the Special Court. Judicial

economy is a factor to be considered in granting a motion for a joint trial of several accused persons. *See Kvocka et al., supra.*

C. A JOINT TRIAL WOULD NOT DENY THE ACCUSED OF ANY FUNDAMENTAL RIGHT

30. In the present case, joinder is not precluded by Rule 82(B).

31. The Prosecution submits that a joint trial would not deprive any of these Accused of any fundamental right that would otherwise be accorded in a separate trial nor of the right to a fair trial guaranteed by Article 17 of the Statute of the Special Court. Indeed, a joint trial would more fully protect each Accused's right to be tried without undue delay, as required by Article 17(4)(c). Currently, there is only one Trial Chamber and the Prosecution understands that in the future there will be a maximum of one additional Trial Chamber. Separate trials would therefore almost certainly delay the trial of some of these Accused for an extended period of time. Joinder, on the other hand, will result in a shorter and more consolidated overall timetable.

32. In addition, the Prosecution submits that a joint trial of the Accused would not result in a conflict of interest leading to serious prejudice to the Accused. Trials before the Special Court will be held before professional judges, not before lay juries. The risks of confusion of evidence associated with jury trials are deemed to be minimized in a trial by professional judges who are "able to ponder independently without prejudice to each and every case which will be brought before them". *See The Prosecutor Against Augustine Gbao,* SCSL-2003-09-I, Order on the Urgent Request for Direction on the Time to Respond to and/or an Extension on Time for the Filing of a Response to the Prosecution Motions, 16 May 2003, page 2. *See also Prosecutor v. Delalic, et al.,* IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 20, stating that "the trials before the International Tribunal are conducted before professional judges, who by virtue of their training and experience are able to consider each piece of evidence which has been admitted and determine its appropriate weight." Therefore, the Trial

Chamber would be able to appropriately and impartially evaluate the evidence adduced at trial, even in the context of potential conflicts of interest, such as conflicting defences. The Prosecution submits that conflicts of interests of any kind can be effectively dealt with by ensuring that each Accused is represented by independent, competent counsel.

33. Finally, the Prosecution submits that joinder of cases would be consistent with the evolving international jurisprudence, as reflected in decisions rendered by the international ad hoc tribunals. *See* the decisions cited above.

34. The Prosecution submits that the interests of justice and the requirements for a fair trial in accordance with Article 17 of the Statute are best served by a joint trial of Accused Sesay, Brima, Kallon, Gbao, Kamara and Kanu in a joint trial.

V. CONCLUSION

35. For all the reasons discussed above, the Trial Chamber should grant the Prosecution motion and order that the Accused Sesay, Brima, Kallon, Gbao, Kamara and Kanu be jointly tried. The Prosecution further requests that the Trial Chamber order that a single, consolidated indictment be prepared as the indictment on which the joint trial shall proceed and further order the Registry to assign a new case number to the consolidated indictment.

Done in Freetown on this 8th day of October 2003
For the Prosecution,

Luc Côté
Chief of Prosecution

Robert Petit
Senior Trial Counsel

PROSECUTION BOOK OF AUTHOURITIES

PROSECUTION INDEX OF AUTHORITIES

1. Rule 48(B), Rule 2 and Rule 82(B) of the Rules of Procedure and Evidence for the Special Court for Sierra Leone

2. Rule 48 and Rule 2 of the Rules of Procedure and Evidence for the International Criminal Tribunal for Yugoslavia (ICTY)

3. Rule 48*bis* and Rule 2 of the Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda (ICTR)

4. *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-PT, Decision on Accused Mario Cerkez's Application for Separate Trial, 7 December 1998.

5. *The Prosecutor v. Elizaphan Ntakirutimana et al.*, ICTR-96-10-I, ICTR 96-17-T, Decision on the Prosecutor's Motion to Join the Indictments ICTR 96-10-I and ICTR-96-17-T, 22 February 2001.

6. *The Prosecutor v. Ntabakuze et al.*, ICTR-97-34-I, Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998.

7. *Prosecutor v Krajišnik*; *Prosecutor v Plavši}*, IT-00-39-PT and IT-00-40-PT, Decision on Motion for Joinder, 23 February 2001.

8. *The Prosecutor v. Bagosora et al.*, ICTR-96-7, Decision on the Prosecutor's Motion for Joinder, 29 June 2000.

9. *Prosecutor v. Kvocka et al.*, IT-98-30-T and IT-95-4-PT, Decision on Prosecution Motion to Join Trials, 14 April 2000.

10. *Prosecutor v. Delalic, Mucic and Delic*, IT-96-21-T, Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges Against him, 1 July 1998.

11. *The Prosecutor v. Nyiramasuhuko et al*, ICTR-97-21-I, ICTR-97-29A and B-I, ICTR-96-15-T, ICTR-96-8-T, Decision on the Prosecutor's Motion for Joinder of Trials, 5 October 1999.

12. *The Prosecutor v. Kayishema*, ICTR-95-1-T, Decision on the Joinder of the Accused and Setting the Date for Trial, 6 November 1996.

13. *Prosecutor v. Brdanin et al*, IT-99-36, Decision on Motions by Momir Talic for a Separate Trial and for Leave to file a Reply, 9 March 2000.

14. Article 17 of the Statute for the Special Court for Sierra Leone

15. *The Prosecutor Against Augustine Gbao,* SCSL-2003-09-I, Order on the Urgent Request for Direction on the Time to Respond to and/or an Extension on Time for the Filing of a Response to the Prosecution Motions, 16 May 2003.

16. *Prosecutor v. Delalic, Mucic and Delic*, IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998.

PROSECUTION AUTHORITIES

1. Rule 48(B), Rule 2 and Rule 82(B) of the Rules of Procedure and Evidence for the Special Court for Sierra Leone

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN, SIERRA LEONE

RULES OF PROCEDURE AND EVIDENCE

TABLE OF CONTENTS

Part I - GENERAL PROVISIONS

Rule 1: Entry into Force

These Rules of Procedure and Evidence as first amended on 7 March 2003, are applicable pursuant to Article 14 of the Statute of the Special Court for Sierra Leone, and entered into force on 12 April 2002.

Rule 2: Definitions

(A) In the Rules, unless the context otherwise requires, the following terms shall mean:

Accused: A person against whom one or more counts in an indictment have been approved in accordance with Rule 47;

Agreement: The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone signed in Freetown on 16 January 2002;

Arrest: The act of apprehending and taking a suspect or an accused into custody;

Council of Judges: the Council of Judges as referred to in Rule 23;

Defence Office: The Office established by the Registrar for the purpose of ensuring the rights of suspects and accused in accordance with the Statute and Rules of Procedure and Evidence;

The Deputy Prosecutor: The Deputy Prosecutor appointed pursuant to Article 3 of the Agreement;

Designated Judge: a Judge designated for a certain period of time pursuant to Rule 28;

Detention Facility: the Detention Facility of the Special Court shall include all premises where suspects or accused are detained in accordance with these Rules and with the Rules of Detention;

Investigation: All activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after approval of an indictment;

Management Committee: the Committee established pursuant to Article 7 of the Agreement;

Party: The Prosecutor or the accused;

Principal Defender: The Principal Defender as appointed by the Registrar;

Pre-Hearing Judge: A Judge of the Appeals Chamber responsible for the pre-hearing proceedings of an appeal as designated pursuant to Rule 109;

President: The President of the Special Court as referred to in Article 12 of the Statute;

Prosecutor: The Prosecutor appointed pursuant to Article 3 of the Agreement;

Public Holiday: A Public Holiday shall be an official public holiday of the Republic of Sierra Leone or of the United Nations;

Regulations: The provisions framed by the Prosecutor pursuant to Rule 37 (A) for the purpose of directing the functions of the Office of the Prosecutor;

Rules: The Rules referred to in Rule 1;

Rules of Detention: Rules Governing the Detention of Persons Awaiting Trial or Appeal or otherwise Detained by the Special Court;

Special Court: The Special Court for Sierra Leone established by the Agreement between the United Nations and the Government of Sierra Leone of 16 January 2002 and consisting of the following organs: the Chambers, the Prosecutor and the Registry;

Statute: The Statute of the Special Court annexed to the Agreement;

(i) The Judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the proceedings in accordance with these Rules.; and

(ii) The suspect shall have the status of an accused.

(I) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently submitting an amended indictment including that count.

Rule 48: Joinder of Accused or Trials

(A) Persons accused of the same or different crimes committed in the course of the same transaction may be jointly indicted and tried.

(B) Persons 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.

Rule 49: Joinder of Crimes

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

Rule 50: Amendment of Indictment

(A) The Prosecutor may amend an indictment, without prior leave, at any time before its approval, but thereafter, until the initial appearance of the accused pursuant to Rule 61, only with leave of the Designated Judge who reviewed it but, in exceptional circumstances, by leave of another Judge. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 52 apply to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already made his initial appearance in accordance with Rule 61, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of fourteen days from the date of the initial appearance on the new charges in which to file preliminary motions relating to the new charges.

Rule 51: Withdrawal of Indictment

(A) The Prosecutor may withdraw an indictment at any time before its approval pursuant to Rule 47.

(B) The Trial Chamber may order the removal of an accused from the proceedings and continue the proceedings in his absence if he has persisted in disruptive conduct following a warning that he may be removed. In the event of removal, where possible, provision should be made for the accused to follow the proceedings by video link.

Rule 81: Records of Proceedings and Preservation of Evidence

(A) The Registrar shall cause to be made and preserve a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings.

(B) The Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non disclosure no longer exist.

(C) The Registrar shall retain and preserve all physical evidence offered during the proceedings.

(D) Photography, video-recording or audio-recording of the trial, otherwise than by the Registry, may be authorised at the discretion of the Trial Chamber.

Section 2: Case Presentation

Rule 82: Joint and Separate Trials

(A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.

(B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

Rule 83: Instruments of Restraint

Instruments of restraint, such as handcuffs, shall not be used except as a precaution against escape during transfer or for security reasons, and shall be removed when the accused appears before a Judge or a Chamber unless otherwise ordered by the Chamber.

Rule 84: Opening Statements

At the opening of his case, each party may make an opening statement confined to the evidence he intends to present in support of his case. The Trial Chamber may limit the length of those statements in the interests of justice.

PROSECUTION AUTHORITIES

2. Rule 48 and Rule 2 of the Rules of Procedure and Evidence for the International Criminal Tribunal for Yugoslavia (ICTY)

RULES OF PROCEDURE AND EVIDENCE

(ADOPTED 11 FEBRUARY 1994)
(AS AMENDED 5 MAY 1994)
(AS FURTHER AMENDED 4 OCTOBER 1994)
(AS AMENDED 30 JANUARY 1995)
(AS AMENDED 3 MAY 1995)
(AS FURTHER AMENDED 15 JUNE 1995)
(AS AMENDED 6 OCTOBER 1995)
(AS FURTHER AMENDED 18 JANUARY 1996)
(AS AMENDED 23 APRIL 1996)
(AS AMENDED 25 JUNE AND 5 JULY 1996)
(AS AMENDED 3 DECEMBER 1996)
(AS FURTHER AMENDED 25 JULY 1997)
(AS REVISED 20 OCTOBER AND 12 NOVEMBER 1997)
(AS AMENDED 9 & 10 JULY 1998)
(AS AMENDED 4 DECEMBER 1998)
(AS AMENDED 23 FEBRUARY 1999)
(AS AMENDED 2 JULY 1999)
(AS AMENDED 17 NOVEMBER 1999)
(AS AMENDED 14 JULY 2000)
(AS AMENDED 1 AND 13 DECEMBER 2000)
(AS AMENDED 12 APRIL 2001)
(AS AMENDED 12 JULY 2001)
(AS AMENDED 13 DECEMBER 2001)
(INCORPORATING IT/32/REV. 22/CORR.1)
(AS AMENDED 23 APRIL 2002)
(AS AMENDED 11 AND 12 JULY 2002)
(AS AMENDED 10 OCTOBER 2002)
(AS AMENDED 12 DECEMBER 2002)

(IT/32/REV.26)

CONTENTS

Rule 2
Definitions

(A) In the Rules, unless the context otherwise requires, the following terms shall mean:

Rules:
The Rules of Procedure and Evidence in force;

Statute:
The Statute of the Tribunal adopted by Security Council resolution 827 of 25 May 1993;

Tribunal:
The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by Security Council resolution 827 of 25 May 1993.

* * *

Accused:
A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47;

Ad litem Judge:
A Judge appointed pursuant to Article 13 *ter* of the Statute;

Arrest:
The act of taking a suspect or an accused into custody pursuant to a warrant of arrest or under Rule 40;

Bureau:
A body composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers;

Defence:
The accused, and/or the accused's counsel;

Investigation:
All activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after an indictment is confirmed;

Parties:
The Prosecutor and the Defence;

Permanent Judge:
A Judge elected or appointed pursuant to Article 13 *bis* of the Statute;

President:
The President of the Tribunal;

Prosecutor:
The Prosecutor appointed pursuant to Article 16 of the Statute;

Regulations:
The provisions framed by the Prosecutor pursuant to Sub-rule 37 (A) for the purpose of directing the functions of the Office of the Prosecutor;

State:
(i) A State Member or non-Member of the United Nations;
(ii) an entity recognised by the constitution of Bosnia and Herzegovina, namely, the Federation of Bosnia and

Herzegovina and the Republic Srpska; or
(iii) a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not;

Suspect:
A person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction;

Transaction:
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;

Victim:
A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.

(B) In the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa.

Rule 48
Joinder of Accused

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

PROSECUTION AUTHORITIES

3. Rule 48*bis* and Rule 2 of the Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda (ICTR)

RULES OF PROCEDURE AND EVIDENCE

Adopted on 29 June 1995; as amended on
12 January 1996
15 May 1996
4 July 1996
5 June 1997
8 June 1998
1 July 1999
21 February 2000
26 June 2000
3 November 2000
31 May 2001
6 July 2002 and
27 May 2003

TABLE OF CONTENTS

Part One
GENERAL PROVISIONS

Rule 1: Entry into Force

These Rules of Procedure and Evidence, adopted pursuant to Article 14 of the Statute of the Tribunal, shall come into force on 29 June 1995.

Rule 2: Definitions

(A) In the Rules, unless the context otherwise requires, the following terms shall mean:

Rules: The Rules referred to in Rule 1;

Statute: The Statute of the Tribunal adopted by Security Council resolution 955 of 8 November 1994;

Tribunal: The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by Security Council resolution 955 of 8 November 1994;

Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47;

Arrest: The act of apprehending and taking a suspect or an accused into custody pursuant to a warrant of arrest or under Rule 40;

Bureau: A body composed of the President, the Vice-President and the more senior Presiding Judge of the Trial Chambers;

Investigation: All activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after confirmation of an indictment;

Transaction: 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;

Party: The Prosecutor or the accused;

President: The President of the Tribunal;

Prosecutor: The Prosecutor designated pursuant to Article 15 of the Statute;

Regulations: The provisions framed by the Prosecutor pursuant to Rule 37 (A) for the purpose of directing the functions of the Office of the Prosecutor;

Suspect: A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction;

Victim: A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.

(B) In the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa.

Rule 3: Languages

(A) The working languages of the Tribunal shall be English and French.

(B) The accused or suspect shall have the right to use his own language.

(C) Counsel for the accused may apply to a Judge or a Chamber for leave to use a language other than the two working ones or the language of the accused. If such leave is granted, the expenses of interpretation and translation shall be borne by the Tribunal to the extent, if any, determined by the President, taking into account the rights of the Defence and the interests of justice.

(D) Any other person appearing before the Tribunal, who does not have sufficient knowledge of either of the two working languages, may use his own language.

(E) The Registrar shall make any necessary arrangements for interpretation and translation of the working languages.

Rule 4: Sittings Away from the Seat of the Tribunal

A Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice.

Rule 5: Non-Compliance with Rules

(A) Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party.

(B) Where such an objection is raised otherwise than at the earliest opportunity, the Trial Chamber may in its discretion grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to the objecting party.

Rule 48 *bis*: Joinder of Trials

Persons 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.

Rule 49: Joinder of Crimes

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

Rule 50: Amendment of Indictment

(A) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 53 *bis* apply mutatis mutandis to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges.

Rule 51: Withdrawal of Indictment

(A) The Prosecutor may withdraw an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance an indictment may only be withdrawn by leave granted by a Trial Chamber pursuant to Rule 73.

(B) The withdrawal of the indictment shall be promptly notified to the suspect or the accused and to the counsel of the suspect or accused.

Rule 52: Public Character of Indictment

Subject to Rule 53, upon confirmation by a Judge of a Trial Chamber, the indictment shall be made public.

PROSECUTION AUTHORITIES

4. *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-PT, Decision on Accused Mario Cerkez's Application for Separate Trial, 7 December 1998.

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding

Judge Mohamed Bennouna

Judge Patrick Robinson

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 7 December 1998

PROSECUTOR

v.

DARIO KORDIC
MARIO CERKEZ

DECISION ON ACCUSED MARIO CERKEZ'S APPLICATION FOR SEPARATE TRIAL

The Office of the Prosecutor

Mr. Geoffrey Nice
Ms. Susan Somers
Mr. Patrick Lopez-Terres
Mr. Kenneth Scott

Defence Counsel

Mr. Mitko Naumovski, Mr. David F. Geneson, and Mr. Turner T. Smith, Jr., for Dario Kordic
Mr. Bozidar Kovacic, for Mario Cerkez

I. INTRODUCTION

1. Pending before this Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ("the International Tribunal") is the "Accused Mario Cerkez's Application for a Separate Trial" filed by Defence Counsel for Mario Cerkez ("the Defence") on 23 July 1998 ("the Application"). On 18 August 1998 the Office of the Prosecutor ("the Prosecution") filed a Response ("the Response"). The Defence filed a Reply on 31 August 1998 ("the Reply").

This motion was originally filed before Trial Chamber I, consisting of Judge Claude Jorda, Presiding, Judge Fouad Riad, and Judge Almiro Rodrigues. Oral argument on the motion was presented at a closed session status conference on 2 September 1998: the transcript was made available to this Trial Chamber and was considered in reaching this decision.

On 17 November 1998, by an Order of the President of the International Tribunal, Gabrielle Kirk McDonald, this case was assigned to the current Trial Chamber, composed of Judge Richard May, Presiding, Judge Mohamed Bennouna, and Judge Patrick Robinson. A closed session status conference was held on 26 November 1998 before Judge Richard May and Judge Mohamed Bennouna, Judge Robinson being unavoidably absent.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties,

HEREBY ISSUES ITS WRITTEN DECISION.

II. SUBMISSIONS

2. The Application for a separate trial is based on the general grounds: (a) that the Prosecution has not sufficiently alleged that the acts of the defendants were part of the same transaction under Rule 48 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules"); and (b) that a joint trial will not lead to efficiency and may lead to delay and prejudice to the accused.

3. In amplification of this argument the Defence submits that no facts are alleged which support the existence of a common "scheme, strategy or plan"; these words connote some form of agreement or close coordination between the actors. Such a definition is consistent with domestic laws of conspiracy and Article 187 of the Criminal Code of Croatia. There is no allegation that Dario Kordic and Mario Cerkez were associated through such an agreement or close coordination, nor is there an allegation that Mario Cerkez was under the command of Dario Kordic; in fact, it is alleged that Mario Cerkez was under the command of Tihomir Blaskic. The mere allegation is that Dario Kordic and Mario Cerkez were both members of the Croatian Defence Council ("HVO") and strove to further its aims and objectives. Shared political affiliation is wholly inadequate to allege the existence of a common "scheme, strategy or plan".

4. The Defence further argues that the Trial Chamber should order severance in the interests of justice, under Rule 82 (B). The subject-matter of the trials of Dario Kordic and Mario Cerkez involves little overlap. The Prosecution evidence differs in regard to each accused. Whereas Dario Kordic is charged as a high-ranking political and military leader, Mario Cerkez is charged merely as an HVO Brigade commander in a single municipality involved in small-scale and local operational decisions. (Dario Kordic is charged with offences in a wider geographical area and over a greater length of time: 28 months as opposed to 16 in the case of Mario Cerkez). Trying both together would result in a significantly longer trial. Evidence brought against Dario Kordic could have a negative spill-over effect and unfairly magnify the responsibilities and activities of Mario Cerkez. For all these reasons, the Defence requests a separate trial for Mario Cerkez.

5. The Prosecution argues that the Trial Chamber should deny the Defence request for the following reasons:

a. The crimes alleged were a part of a common scheme, strategy or plan, i.e., "to attack the Muslim civilian population in the . . . Lasva Valley . . . generally and specifically . . . in Vitez and Busovaca and . . . Zenica";
b. the confirming Judge recognised that the accused were properly joined and that the case was appropriate for joint trial;
c. the allegations in the indictment reveal that the culpability of Dario Kordic and that of Mario Cerkez arise out of the same plan or series of events, i.e., a campaign of persecution and ethnic cleansing;
d. as an HVO commander, Mario Cerkez implemented the HVO goals and objectives and took part in the persecution campaign, whereas Dario Kordic played a central role in developing and executing the campaign;
e. there is no need for accused who are part of a plan to be in direct communication with each other; this would run counter to parallel jurisprudence from domestic jurisdictions on the law of conspiracy. The essential requirement is that a plan existed and criminal acts were performed pursuant to it. No matter how small the part of the accused, he is still part of the plan and should be tried together with those whose culpability also arises from the plan;
f. it is in the interests of justice that there should be a joint trial; the interests of justice do not relate merely to the accused, but to the administration of justice, which includes the interests of the International Tribunal and of the Prosecution;
g. witnesses called in previous trials may not be willing to give evidence if called twice and, in any event, there is greater hardship in giving evidence several times.

III. APPLICABLE LAW

6. Rule 48 deals with joinder of accused:

> Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

For example, in a Decision on 15 May 1998 in *Prosecutor v. Kupreskic et al.*[1], Trial Chamber II ruled that the crimes charged in the indictment against six co-accused "consist of the attack on the Muslim population of Ahmici . . . , and are thus part of the same transaction".

7. In a Decision on Motions for Separate Trial in *Prosecutor v. Delalic et al.*[2], filed 25 September 1996, Trial Chamber II held that Rule 48 was to be read in the light of the definition of "transaction" in Rule 2, as well as Rule 82 (B). Rule 2 reads:

> Transaction: 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.

Rule 82 (B) states:

> The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

IV. ANALYSIS

8. The accused are properly joined in the same indictment since they are accused of crimes committed in the course of the same transaction under Rule 48, i.e., a number of acts occurring as a number of events at different locations and being part of a common strategy or plan (Rule 2). The alleged common scheme, strategy or plan is set out in the indictment, i.e., to control various municipalities and territories by means of the ethnic cleansing or subjugation of the Muslim population in a campaign of persecution from about November 1991 to approximately March 1994 (Amended Indictment, filed 2 October 1998, paras. 24-35).

9. The alleged crimes of the accused Mario Cerkez in pursuance of the above plan are also set out in the indictment. His alleged role was to implement as an HVO commander by military means the above campaign which his co-accused Dario Kordic allegedly had a central role in developing and executing (Amended Indictment, paras. 25-27).

10. To justify joinder what has to be proved is that (a) there was a common scheme or plan, and (b) that the accused committed crimes during the course of it. It does not matter what part the particular accused played provided that he participated in a common plan. It is not necessary to prove a conspiracy between the accused in the sense of direct coordination or agreement. The transaction referred to in Rule 48 does not reflect the law of conspiracy found in some national jurisdictions.

11. The fact that evidence will be brought relating to one accused (and not to another) is a common feature of joint trials. On the basis of the submissions and the allegations in the indictment the Trial Chamber is of the view that this in itself will not cause serious prejudice to Mario Cerkez. Separate trials would probably have to be held consecutively and would therefore take considerably longer than a joint trial. If the accused were tried separately, it is likely that the trial of the first accused would substantially delay the trial of the second accused. The Trial Chamber does not consider, on the basis of the submissions of the accused and the allegations in the indictment, that there is a conflict of interests. Accordingly, no risk of serious prejudice arises as might cause a Trial Chamber to order separate trials under Rule 82 (B); nor do the interests of justice require separate trials. Indeed, the Trial Chamber considers that it is in the interests of justice, of which judicial economy in the administration of justice under the Statute of the Tribunal is an element, that these accused, charged as they are with offences arising from the same course of conduct, should be tried together.

12. The Trial Chamber is reinforced in its view that separate trials are not necessary in this case by the fact that the confirming Judge did not question the appropriateness of joint trials and confirmed the current joint indictment.

V. DISPOSITION

For the foregoing reasons

PURSUANT TO Rule 48 and Rule 82 (B) of the Rules,

THE TRIAL CHAMBER REFUSES the Application of the accused Mario Cerkez for a separate trial.

Done in English and French, the English text being authoritative.

Richard May

Presiding Judge

Dated this seventh day of December 1998

At The Hague

The Netherlands

[Seal of the Tribunal]

1. Decision on Defence Motions for Separate Trials, *Prosecutor v. Kupreskic et al.,* Case No. IT-95-16-PT, T. Ch. II, 15 May 1998.

2. Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, T. Ch. II, 25 Sept. 1996.

PROSECUTION AUTHORITIES

5. *The Prosecutor v. Elizaphan Ntakirutimana et al.*, ICTR-96-10-I, ICTR 96-17-T, Decision on the Prosecutor's Motion to Join the Indictments ICTR 96-10-I and ICTR-96-17-T, 22 February 2001.

TRIAL CHAMBER I

Original: English

Before:
Judge Asoka de Zoysa Gunawardana, Presiding
Judge Navanethem Pillay
Judge Erik Møse

Registry: Ms Aminatta N'gum

Date of Decision: 22 February 2001

THE PROSECUTOR
v.
ELIZAPHAN NTAKIRUTIMANA
GERARD NTAKIRUTIMANA
CHARLES SIKUBWABO

ICTR-96-10-I
ICTR 96-17-T

DECISION ON THE PROSECUTOR'S MOTION TO JOIN THE INDICTMENTS ICTR 96-10-I and ICTR 96-17-T

Office of the Prosecutor:
Ms Carla Del Ponte
Mr Charles Adeogun-Phillips

Counsel for the Elizaphan Ntakirutimana:
Mr Ramsey Clark

Counsel for the Gerard Ntakirutimana:
Mr Edward Medvene

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

SITTING as Trial Chamber I, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Navanethem Pillay and Judge Erik MØse;

CONSIDERING the indictment, ICTR-96-10-I, as amended on 27 March 2000 and on 6 October 2000, in the case of Prosecutor v. Elizaphan Ntakirutimana, Gerard Ntakirutimana, and Charles Sikubwabo (hereinafter "the Mugonero indictment");

CONSIDERING the indictment, ICTR-96-17-T, as amended on 7 July 1998, in the case of Prosecutor v. Elizaphan Ntakirutimana, and Gerard Ntakirutimana (hereinafter "the Bisesero indictment");

CONSIDERING the Prosecution's oral motion, argued on 2 November 2000, to join the indictments ICTR-96-10-I and ICTR-96-17-T, pursuant to Rule 48*bis* of the Rules of Procedure and Evidence (hereinafter "the Rules");

CONSIDERING the brief in opposition filed jointly by the Defence for Elizaphan Ntakirutimana and Gerard Ntakirutimana, on 8 December 2000;

NOTING that counsel did not appear for Charles Sikubwabo, who is still at large;

THE Trial Chamber hereby decides the motion.

THE FACTS

1. The Mugonero indictment, ICTR-96-10-I, charges Elizaphan Ntakirutimana, Gerard Ntakirutimana, and Charles Sikubwabo for events that occurred at the Mugonero Church Complex, Gishyita Commune, Kibuye, on or about 16 April 1994. Elizaphan Ntakirutimana and Gerard Ntakirutimana are also charged jointly in the Bisesero indictment, ICTR-96-17-T, for events that occurred in the area of Bisesero, Kibuye, in April to June 1994. Charles Sikubwabo, who is still at large, is charged, along with others, in another separate indictment, ICTR-95-1-I, for events that occurred in the area of Bisesero, and at Mubuga Church, Kibuye, in April to June 1994.

THE MOTION

2. On 2 November 2000 the Prosecution orally requested leave to join the Mugonero and Bisesero indictments, pursuant to Rule 48*bis*. The Prosecution submitted that the Motion is well founded under the common law 'same transaction' test and civil law test of "connexité". According to the Prosecution, joinder of the two indictments is well founded since the offences in both sites were committed in furtherance of a common scheme or plan and, therefore, a common transaction in relation to the alleged massacres in Mugonero and Bisesero can be inferred. The joinder would enable the Prosecution to lead the whole of the evidence, available against the accused, in regard to their culpability in respect of the alleged genocide.

3. The Defence asked the Trial Chamber to deny the motion.

DELIBERATIONS

Preliminary Matters

The application of Rule 48bis in light of Rule 6(C)

4. The Defence submitted that the application of Rule 48*bis* to join the Mugonero and Bisesero indictments is prevented under Rule 6(C), since such a joinder would prejudice the rights of the accused. Rule 6(C) states, "An amendment shall enter into force immediately, but shall not operate to

prejudice the rights of the accused in any pending case."

5. Rule 48*bis*, upon which the Prosecution relied in the present motion, was adopted during the Sixth Plenary Session, held from 31 May to 4 June 1999. Cases ICTR 96-10-I and ICTR-96-17-T, were pending cases at that time. Therefore, the Trial Chamber must consider whether the application of Rule 48*bis* prejudices the rights of the accused at the time when the motion was filed.

6. The Defence submitted that an application of the Rule 48*bis* would prejudice the accused because, without it, the Prosecution has no other basis on which to seek joinder. The Chamber recalls that Rule 48*bis* is merely a clarification of Rule 48, see *Prosecutor v Natagerura and Prosecutor v Bagambiki, Imanishimwe and Munyakazi,* (Decision on Prosecutor's Motion for Joinder, dated 11 October 1999, at para 27), wherein Trial Chamber III stated "[a]t the 1999 Plenary Session, the Tribunal added Rule 48*bis* to the Rules. This was merely a clarification of Rule 48." The Chamber is of the view that Rule 48*bis* did not create a new means by which to seek joinder. Therefore, no prejudice would be caused to the accused on the ground that the Prosecution would have no other basis on which to seek joinder. Nevertheless the Chamber will discuss the issue of prejudice on the other grounds raised by the Defence. In order to establish prejudice under Rule 6(C), the Defence must demonstrate a specific prejudice to the rights of the accused, at the time when the motion was filed, due to the application of Rule 48*bis*. Since the application for joinder of the two trials was made subsequent to the adoption of Rule 48*bis*, the Rules relevant at the time of the application would apply.

7. The Defence submitted that much of the evidence that will be used by the Prosecution in support of the Bisesero indictment will not be relevant to a determination of guilt or innocence under the Mugonero indictment. Further that the Bisesero indictment contains a much broader conspiracy than the Mugonero indictment. According to the Defence, these factors may adversely prejudice the evidence in respect of the Mugonero indictment. In this regard, the Chamber notes that the procedure followed by the ICTR is not a jury trial system and that the safeguards from evidential prejudice employed in jury trials, are not necessarily required in cases where professional judges are adjudicating the facts. In *Prosecutor v. Delalic, et al* IT-96-1-T (Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998) the Trial Chamber stated that:

> "(...) the trials before the International Tribunal are conducted before professional judges, who by virtue of their training and experience are able to consider each piece of evidence which has been admitted and determine its appropriate weight."

The Chamber agrees with the said approach articulated by the Chamber in *Prosecutor v. Delalic, et al,* and does not find that the rights of the accused will be prejudiced for the reasons stated above, if the two indictments are tried together.

8. The Defence further submitted that proceedings on both indictments in a single trial would force the accused to offer two separate defences and, therefore, prejudices the ability of the accused to offer a coherent defence. The Chamber does not accept that, having to defend allegations relating to Mugonero and Bisesero in one trial would affect the ability of the accused to offer a coherent Defence. The strength of the defence on each indictment will depend on the probity of the evidence.

9. For the above reasons, the Trial Chamber is of the view that the accused will not suffer prejudice due to the application of Rule 48*bis* in the present motion. Therefore, Rule 48*bis* may be applied to the present case.

Law of the case, estoppel and/or res judicata

10. The Defence further submitted that the Chamber has already ruled that the acts allegedly committed at the Mugonero Complex and at Bisesero should *not* be treated as being committed as part of the same transaction. The Prosecution has not offered any new justifications for the proposed joinder. Thus, according to the Defence, the Chamber is barred by the 'law of the case', by estoppel and/or by *res judicata*, from ruling on this matter again.

11. The Chamber notes that the determination of 'same transaction', for the purposes of joinder, is a factual issue. As such, if a Chamber has already determined the factual issue, even if such determination was in pursuit of a different application or a different Rule, then the Chamber will not revisit the issue again, subject to fresh grounds being argued. Therefore, the question for the Chamber in the instant case, is whether the matter has already been determined.

12. The Defence contended that the matter was determined in 1997, by Trial Chamber I, in *Prosecutor v. Kayishema, et al,* in its Decision on the Motion of the Prosecutor to Sever, and to Join in a Superseding Indictment and to Amend the Superseding Indictment, dated 27 March 1997. In that instance, the Prosecution had requested joinder of accused; namely, Gerard Ntakirutimana (in relation to the Mugonero and Bisesero indictments) with Clement Kayishema and Obed Ruzindana, on the ground that all three accused had committed acts in the course of the same transaction, in Kibuye Prefecture. Trial Chamber I in that case rejected the application on the basis that the same transaction test had not been satisfied.[1]

13. The Chamber is of the view that, the decision of 27 March 1997 is not dispositive of the factual issue currently before this Chamber. That decision addressed the issue of same transaction in the context of Kibuye generally, and determined whether Gerard Ntakirutimana, Clement Kayishema and Obed Ruzindana acted in concert, or participated in a common scheme in Kibuye. However, in the present case the issue is quite different; namely, whether the alleged acts of Gerard and Elizaphan Ntakirutimana at the Mugonero Complex were part of the same transaction as their alleged acts in Bisesero.

14. The Defence further contended that the issue has already been determined by the Chamber in the present case, in its decision, dated 6 October 2000, on the Prosecutor's Request for Leave to File an Amended Indictment. In that instance, the Prosecution had requested amendments to the Mugonero indictment, *inter alia*, to consolidate the factual allegations and incorporate the charges contained in the Bisesero indictment and in the indictment ICTR-95-1-I, into the Mugonero indictment. In its response, the Defence submitted that despite the motion being moved under the Rules governing amendment of an indictment, the Prosecution's request was, in fact, a request for joinder. Consequently, the Defence added, the Prosecution must show that the acts to be joined were committed in the course of the same transaction, which it has failed to do. In its decision of 6 October 2000, the Chamber denied the Prosecution's request to consolidate the said factual allegations and charges in the three indictments, into the Mugonero indictment. The Defence now argues that, in its decision of 6 October 2000, the Chamber implicitly ruled that the alleged acts of Gerard and Elizaphan Ntakirutimana at Mugonero and in Bisesero, were not committed as part of the same transaction.

15. The Chamber does not accept the above submission by the Defence. In its motion for leave to file an amended indictment, dated 7 April 2000, the Prosecution requested, *inter alia*, to consolidate the factual allegations and incorporate the charges contained in *two* other confirmed indictments into the Mugonero indictment. In support of its motion to amend, the Prosecution stated that the amendments were necessary to reflect the totality of the accused's conduct, because the evidence implicates the accused, together with others, in a broad conspiracy at a national level. At no time did the Prosecution make the argument that the said acts were committed as part of the same transaction. Furthermore, the said motion to amend requested consolidation of matters from a third indictment, ICTR-95-1-I,

containing specific acts and a separate conspiracy, that are not part of the present motion for joinder. The Chamber dismissed the motion to amend having considered *all* the matters raised in the Prosecution's motion and in the Defence's response thereto. Nowhere in its decision of 6 October 2000, did the Chamber hold that the alleged acts of the accused, pursuant to the Mugonero and Bisesero indictments, were not committed in furtherance of the same transaction.

16. Therefore, the Chamber is of the view that the Chamber is bound to consider the question whether the acts alleged to have been committed by the accused in Mugonero and Bisesero were part of the same transaction.

Legal basis for joinder

The rules and jurisprudence

17. According to Rule 48*bis*, The Prosecutor may join confirmed indictments of persons accused of the same or different crimes committed in the course of the same transaction, for purpose of a joint trial, with leave granted by a Trial Chamber, pursuant to Rule 73. The criteria envisaged there for a joint trial is that the offences should have been committed in the course of the same transaction. 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." 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), 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.

18. In *Prosecutor v. Ntabakuze, Kabiligi*, Case ICTR-97-34-I, at p. 2 (Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998), 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.*

Trial Chamber II further stated (at p. 2) that "these guidelines are not intended to be a rigid insurmountable three prong test." The above mentioned guidelines have been followed by the Tribunal in several decisions on joinder.

Same transaction

19. In the present case, the Prosecution submitted that many of those who survived the massacre at the Mugonero Complex in April 1994 (i.e. the acts charged in the Mugonero indictment) fled to an area known as Bisesero where, throughout April to June 1994, they were pursued and again attacked by the accused (i.e. the acts charged in the Bisesero indictment). According to the Prosecution, the accused were instrumental in the plan to kill the Tutsi at the Mugonero Complex, which plan continued in Bisesero.

20. The Defence argued that the Prosecution has failed to show that the accused acted in the course of the same transaction. The Defence pointed out that the attack at Mugonero took place on a single day in a specific place, whereas the attacks in Bisesero were conducted over a long period, in a large area. Further that only a small percentage of the survivors from the Mugonero attack fled to Bisesero and there is no allegation that, in Bisesero, the accused targeted those survivors in particular rather than the Tutsi as a whole. According to the Defence, the attacks in Bisesero involved defendants who were not involved in the Mugonero attack; the Mugonero attack allegedly being conducted by Church officials, compared to political figures in Bisesero. The Defence noted that the Prosecution has charged Dr Ntakirutimana with superior responsibility in relation to the attack at Mugonero but not in relation to those at Bisesero. Thus, according to the Defence, there was no common scheme, strategy or plan to connect the alleged acts at Mugonero and Bisesero.

21. The Chamber is of the view that the acts of the accused may form part of the same transaction notwithstanding that they were carried out in different areas and over different periods, providing that there is a sufficient nexus between the acts committed in the two areas. In the instant case, the Prosecution's allegation that the accused formed a strategy or plan to kill the Tutsi who had gathered at the Mugonero Complex up to 16 April 1994 and, in furtherance of this strategy or plan, pursued some of the survivors to Bisesero, is reflected in the indictments. The concise statement of facts in the Mugonero indictment details the allegations concerning the attack at the Mugonero Complex. The said indictment alleges specifically "[d]uring the months that followed the attack on the Complex, Elizaphan Ntakirutimana, Gerard Ntakirutimana & Charles Sikubwabo, searched for an [sic] attacked Tutsi survivors and others . . . ." Similarly, the Bisesero indictment details the allegations concerning the events at the Mugonero Complex and goes on to allege "[m]any of those who survived the massacre at Mugonero Complex fled to the surrounding areas, one of which was the area known as Bisesero." The Bisesero indictment then goes on to detail the allegations in the area of Bisesero. Thus, under each separate indictment, the Prosecution has alleged in relation to the accused that the acts committed at the Mugonero Complex were closely linked to the acts that followed in the area of Bisesero.

22. The Prosecution submitted that the evidence supports the allegations already stated in the indictments. In this regard the Prosecution asserted that its witnesses would testify that the Ntakirutimanas actively pursued refugees from the Mugonero Complex to a church in Bisesero where they had fled. According to the Prosecution, 16 of the 18 witnesses are common to both indictments, being survivors of the Mugonero Complex massacre who had fled to a church in Bisesero.

23. The Defence argued that the acts committed at Mugonero and Bisesero varied with regard to the victims (only a percentage of the survivors from the Mugonero massacre fled to Bisesero and, in Bisesero, the accused allegedly attacked refugees who had not fled from Mugonero); the fact that Dr Ntakirutimana is charged as a superior at Mugonero but not at Bisesero; and, the fact that a larger number of defendants, with political rather Church backgrounds, were involved in Bisesero. The Chamber notes that to satisfy the requirement of 'same transaction' for the purposes of joinder, the Prosecution must show that there exists a *common* scheme, strategy or plan. There is no requirement that the scheme, strategy or plan be identical. A strategy or plan may change, or be adapted, but so long

as it remains common in nature and purpose it will satisfy the requirements of Rule 48*bis*. Considering the circumstances of the events in Kibuye in 1994, variations in strategy or plan between crime sites were not unlikely, particularly when the acts are alleged to have occurred in a large area and over a long period, such as those in Bisesero. It is appropriate for the Chamber to apply a definition of same transaction that is flexible enough to suit the reality of the events, and which does not serve to artificially separate evidence that should properly be considered together. Therefore, the Chamber finds that the variations, cited by the Defence, between the alleged crimes committed at the Mugonero Complex and at Bisesero, do not negate the assertion that they were committed as part of the same transaction.

24. Having considered the allegations outlined in the two indictments, along with the submissions of the parties, the Trial Chamber is of the view that the acts, as alleged under the Mugonero and Bisesero indictments, were part of a common scheme, strategy or plan, committed in the course of the same transaction.

The interests of justice

25. The decision whether to grant joinder lies within the discretion of the Tribunal. In the exercise of its discretion, the Chamber has weighed the overall interests of justice with the rights of the accused.

26. The Defence argued that joinder would result in prejudice to the accused and is unfair since the Ntakirutimanas are Church officials, rather than those who are charged or have already been found to have committed genocide in the area of Bisesero, who were political figures. The Defence submitted that joint trials would thus lead to prejudice of the evidence in the trial under the Mugonero indictment. The Chamber is not convinced that the accused would suffer prejudice for this reason. As stated above, the ICTR's procedure, which utilises professional Judges rather than a lay jury, is able to address any potential evidential prejudice during its determination of evidence.

27. The Chamber is of the view that in the present case, a joinder of the Mugonero and Bisesero indictments would enable the parties to make a more consistent and detailed presentation of evidence. It would also allow for better protection for the witnesses by limiting their travel to the Tribunal. This is particularly true since 16 out of a total of 18 Prosecution witnesses, will be common.

28. The Trial Chamber is of the opinion that 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.

FOR ALL THE ABOVE REASONS
THE TRIBUNAL

Grants the Prosecutor's request for leave to join the indictments ICTR-96-10-I and ICTR 96-17-T.

Done this 22nd day of February 2001

Asoka de Zoysa Gunawardana	Erik Møse	Navanethem Pillay
Presiding Judge	Judge	Judge

[1] In doing so, the Chamber pointed out that, "of the five massacre sites at issue in the motion, only one, in reality, that of Bisesero, is allegedly common to all three accused for massacres allegedly committed over a period of four months, from April to July 1994; this does not demonstrate in any way that during this entire period, the accused acted in concert, or even participated in a common scheme."

PROSECUTION AUTHORITIES

6. *The Prosecutor v. Ntabakuze et al.*, ICTR-97-34-I, Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998.

UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

OR:ENG.

Before: Judge William H. Sekule, Presiding Judge
Judge Yakov A. Ostrovsky
Judge Tafazzal H. Khan

Registry: Mr. John Kiyeyeu

THE PROSECUTOR
VERSUS
ALOYS NTABAKUZE
GRATIEN KABILIGI
Case No. ICTR-97-34-I

DECISION ON THE DEFENCE MOTION REQUESTING AN ORDER FOR SEPARATE TRIALS

For the Office of the Prosecutor:

Mr. William Egbe

For Aloys Ntabakuze:

Ms. Simonette Rakotondramanitra

For Gratien Kabiligi:

Mr. Jean Yaovi Degli

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Yakov A. Ostrovsky and Judge Tafazzal H. Khan (the "Trial Chamber");

CONSIDERING THAT a joint indictment was issued against Aloys Ntabakuze and Gratien Kabiligi and confirmed on 15 October 1997, by Judge Aspegren, pursuant to rule 47 of the Rules, on the basis that there was sufficient evidence to provide reasonable grounds for indicting them for Genocide, Crimes Against Humanity, Complicity in Genocide, Violations of Article 3 Common to the 1949 Geneva Conventions and the Additional Protocol II of 1977 thereto, as alleged in the indictment;

BEING SEIZED NOW OF defence Motions filed on 23 February 1998, based on rule 72 of the Rules of Procedure and Evidence ("the Rules") requesting the Trial Chamber to order for the separation of trials;

CONSIDERING THAT on 11 May 1998, the Prosecution filed a consolidated reply in which it responded on the issue of separate trials for both Aloys Ntabakuze and Gratien Kabiligi;

TAKING INTO CONSIDERATION the provisions of rules 48 and 82(B) of the Rules which address the issues of joinder of accused and separation of trials respectively;

HAVING HEARD the arguments of the parties on 14 May 1998, the Trial Chamber hereby submits a combined Decision on the issue of separate trials for both Aloys Ntabakuze and Gratien Kabiligi.

PLEADINGS BY THE PARTIES

The Defence Submitted:

(i) that the requirements of rule 48 of the Rules were not satisfied because the Prosecutor had failed to demonstrate the *same transaction*;

(ii) that a joint trial of both accused could lead to unnecessary delays and serious prejudice to the accused; and

(iii) that having separate trials would be in the interests of justice since it would favour a clear appreciation of the case against each accused.

The Prosecutor Submitted:

(i) that pursuant to the Rules, the *scheme, strategy or plan* need not be criminal in nature since rules 48 and 2 of the Rules simply refer to the *same transaction* and to *acts and omissions* respectively;

(ii) there existed a *common scheme, strategy or plan* to consolidate power by the Hutus. Given that Aloys Ntabakuze, as a Commander of the Para-Commando Battalion, was under the direct command of Gratien Kabiligi it is evident that the relevant crimes alleged in the indictment were committed as part of the *same transaction*.

(iii) that no prejudice would result from a joint trial of the accused because witnesses who will be called by the Prosecutor are likely to be the same. In any event, in the case of separation

of the trials, there would be considerable duplication of witness testimonies;

(iv) that in the final analysis, a joint trial will be in the interest of justice.

DELIBERATIONS

We have considered the party's submissions and make the following observations:

Same Transaction:
Rule 48 of the Rules permits the joinder of accused if they have been charged with the same crime or with different crimes committed *in the course of the same transaction.* We have also noted the definition of *same transaction* in rule 2 of the Rules which refers to "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."

The issue of the interpretation of '*same transaction*' has been raised by the Defence for Kabiligi (Defence Motion at p.6) and the Prosecutor (Prosecutor's Reply at p.5). In *Prosecutor v. Clement Kayishema and Obed Ruzindana* the Trial Chamber's Decision on the Motion of the Prosecutor to Sever, to Join in a Superseding Indictment and to Amend the Superseding Indictment, dated 27 March 1997, (the "Joinder Decision") opined;

> "that involvement in the 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 in concert."

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.*

In determining whether the same transaction exists for the purposes of joinder, the Trial Chamber will consider the facts and evidence as a whole using the above guidelines for direction. However, these guidelines are not intended to be a rigid, insurmountable three prong test. For the purpose 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.

The Prosecutor's allegations which, at this stage, suggest the existence of same transaction include: Gratien Kabiligi and Aloys Ntabakuze had command over military groups; Gratien Kabiligi had military responsibility over Aloys Ntabakuze; the two attended, or were briefed on the substance of, weekly security meetings which discussed, *inter alia*, the massacres of Tutsis; military personnel

under the command of both the accused committed criminal acts; neither of the two accused took steps to punish persons under their control who were responsible for these criminal acts. The Defence failed to refute these factual allegations.

The Prosecutor's allegations which, at this stage, illustrate criminal acts determined in time and space include: the killing of civilians at roadblocks set up in Kigali by troops under the command of the accused; Aloys Ntabakuze's incitement of troops under his command to avenge the death of President Habyarimana; Gratien Kabiligi's incitement of Interahamwe militia to kill Tutsis; Gratien Kabiligi's order to kill a Tutsi soldier and his family; Gratien Kabiligi's order to kill Tutsi's taking refuge in St. Andre School in Kigali. The Defence also failed to refute these factual allegations.

Taking into consideration all these facts, for the purposes of this procedural Decision, the Trial Chamber is of the opinion that there is a reasonable showing that the two accused had a common scheme, strategy, or plan. Accordingly, there is a sufficient showing to satisfy the requirement of *same transaction.*

Interests of Justice / Prejudice to Accused:
The Trial Chamber has considered the Prosecutor's submission that she is likely to produce the same witnesses and adduce the same evidence against the two accused. Indeed, separate trials may cause unnecessary pressure on survivors and other witnesses who may be called upon to testify. In these circumstances, we find that a joint trial may, in fact, further judicial efficiency and enhance the accused right to be tried without undue delay.

The Defence have not shown that a joint trial would prejudice the accused or that it would not be in the interests of justice.

Therefore, considering the concise statement of facts attached to the indictment as well as the party's motions, we hold that the joinder of the two accused in one indictment is proper and is within the scope of rule 48 of the Rules.

FOR ALL ABOVE REASONS, THIS TRIAL CHAMBER

DENIES the Defence request for separate trials.

DISMISSES the Defence motions of Gratien Kabiligi and Aloys Ntabakuze so far as they relate to a request for separate trials.

Arusha, 30 September 1998

William H. Sekule Presiding Judge	Yakov A. Ostrovsky Judge	Tafazzal H. Khan Judge

Seal of the Tribunal

PROSECUTION AUTHORITIES

7. *Prosecutor v Krajišnik*; *Prosecutor v Plavši}*, IT-00-39-PT and IT-00-40-PT, Decision on Motion for Joinder, 23 February 2001.

IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar:
Mr. Hans Holthuis

Decision of:
23 February 2001

PROSECUTOR

v.

MOMCILO KRAJISNIK

PROSECUTOR

v.

BILJANA PLAVSIC

DECISION ON MOTION FOR JOINDER

Office of the Prosecutor:

Ms. Brenda J. Hollis

Counsel for the Accused:

Mr. Goran Neskovic for Momcilo Krajisnik
Ms. Jasminka Jovisevic for Biljana Plavsic

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal"),

BEING SEISED of the "Prosecution's Motion for Joinder of Accused" filed by the Office of the Prosecutor ("Prosecution") in *Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39 and in *Prosecutor v. Biljana Plavsic*, Case No. IT-00-40, on 23 January 2001, requesting an order for a joint trial of the two accused,

NOTING the confidential "Motion of the Defendant Mr. Momcilo Krajisnik in Opposition to Prosecution's Motion for Joinder of Accused, of 23 January 2001, and for Reservation of Rights", filed on 5 February 2001 and the confidential "Defence's Response to the Prosecution's Motion for Joinder of Accused" filed by the defence for Biljana Plavsic on 12 February 2001,

CONSIDERING that Momcilo Krajisnik and Biljana Plavsic are accused of identical crimes committed in the course of the same transaction within the same time frame and in the same locations,

CONSIDERING that a joint trial would accelerate the trial of one of the accused, Biljana Plavsic, without prejudice to her or to the rights of the other accused, avoid duplication of evidence, minimise hardship caused to witnesses in travelling to the seat of the International Tribunal in order to testify, and is generally in the interests of judicial economy,

CONSIDERING that the Defence has not made out a case of any conflict of interests within the meaning of Rule 82 (B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"),

CONSIDERING therefore that the interests of justice and a fair trial would be best served by a joint trial in this case,

PURSUANT TO Articles 20 and 21, paragraph 4 (c), of the Statute and Rules 48 and 82 of the Rules,

HEREBY ORDERS that the trial of Biljana Plavsic be joined to the trial of Momcilo Krajisnik, and that the Prosecution submit within 14 days of this decision a consolidated indictment on which the joint trial will proceed,

AND FURTHER REQUESTS the Registry to determine and assign to the joined cases a new case number; all documents filed in those joined cases shall bear this new number as from the day of this decision.

Done in English and French, the English text being authoritative.

_____

Richard May
Presiding

Dated twenty-third day of February 2001
At The Hague
The Netherlands

[Seal of the Tribunal]

PROSECUTION AUTHORITIES

8. *The Prosecutor v. Bagosora et al.*, ICTR-96-7, Decision on the Prosecutor's Motion for Joinder, 29 June 2000.

ICTR-97-41-I
29-6-2000
(3425-3388)

3425
~~1496~~

UNITED NATIONS NATIONS UNIES

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:
Raphaël Constant
Counsel for Gratien Kabiligi:
Jean Yaovi Degli
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 [Nsgeniymva'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;

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;

HAVING HEARD 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*" 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 to5.14, 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 *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 that 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*.

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 Théoneste 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.

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 Bagasora'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.

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.

(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, ammalgamation 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

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

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 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 Indictment Void *Ab Initio*, (13 April

2000). The Trial Chamber rejects Mr. Monterosso's submissions that is does not have jurisdiction to hear the Prosecutor's motion for joinder.

(ii) Preliminary Objection filed by Nsengiyumva

91. Nysengiyumva'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 jurisidiction 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

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 Cyangugu 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 esentially 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:

> 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 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.

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 École 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.

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 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 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 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

PROSECUTION AUTHORITIES

9. *Prosecutor v. Kvocka et al.,* IT-98-30-T and IT-95-4-PT, Decision on Prosecution Motion to Join Trials, 14 April 2000.

1535

IN THE TRIAL CHAMBER

Before:
Judge Almiro Rodrigues, Presiding
Judge Fouad Riad
Judge Patricia Wald

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
14 April 2000

THE PROSECUTOR

v.

MIROSLAV KVOCKA
MILOJICA KOS
MLADO RADIC
ZORAN ZIGIC
DRAGOLJUB PRCAC

DECISION ON PROSECUTION MOTION TO JOIN TRIALS

The Office of the Prosecutor:

Ms. Brenda Hollis
Mr. Michael Keegan
Mr. Kapila Waidyaratne

Defence Counsels:

Mr. Krstan Simic for Miroslav Kvocka
Mr. Zarko Nikolic for Milojica Kos
Mr. Toma Fila for Mladjo Radic
Mr. Simo Tosic for Zoran Zigic
Mr. Jovan Simic for Dragoljub Prcac

TRIAL CHAMBER I of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Tribunal");

BEING SEIZED of the Prosecutor's oral motion dated 6 March 2000 that Dragoljub Prcac be tried

jointly with Miroslav Kvocka, Milojica Kos, Mladjo Radic and Zoran Zigic;

NOTING the Trial Chamber's decision dated 8 March 2000 that, as agreed by the Defense of all the accused, the case IT-98-30 be suspended until 2 May 2000 in order to give Mr. Prcac time to prepare his defense and be ready to be tried jointly with Miroslav Kvocka, Milojica Kos, Mladjo Radic and Zoran Zigic (case number IT-98-30);

NOTING that the Defense agreed to the joinder during the Status Conference held on 22 March 2000 providing that the case would be ready for trial on 2 May 2000;

NOTING the Trial Chamber's finding during the pre-trial conference held on 12 April 2000 that the case was ready to go to trial and the accused willing to have his trial joined; the subsequent oral order that Dragoljub Prcac shall be tried jointly with Miroslav Kvocka, Milojica Kos, Mladjo Radic and Zoran Zigic;

CONSIDERING that Dragoljub Prcac, Miroslav Kvocka, Milojica Kos, Mladjo Radic and Zoran Zigic are accused of crimes committed in the course of the same transaction, in the Omarska camp between 31 May 1992 and 31 December 1992; that the trial of the accused Kvocka, Kos, Radic et Zigic commenced on 28 February 2000 with the testimonies of the accused Kvocka and Radic and was suspended at the end of those testimonies; that those testimonies were listed as exhibits in the Prosecution's dossier;

CONSIDERING that a joint trial would accelerate trial of one of the accused without prejudice to his or other accused's rights of defense, avoid duplication of evidence, minimize hardship caused to witnesses, and is generally in the interest of judicial economy; that therefore the interests of justice would be best served by a joint trial in this case;

PURSUANT to articles 20 and 21 (4) (c) of the Statute and Rules 48 and 82 of the Rules of Procedure and Evidence;

HEREBY ORDERS that the trial of Dragoljub Prcac be joined to that of Miroslav Kvocka, Milojica Kos, Mladjo Radic and Zoran Zigic;

FURTHER REQUEST the Registry to determine and assign to the joined cases a new case number; all documents filed in those joined cases shall bear this new number at the day of this decision.

Done in English and French, the English text being authoritative.

_____
Almiro Rodrigues
Presiding Judge

Dated this fourteenth day of April 2000,
At The Hague
The Netherlands.

[Seal of the Tribunal]

PROSECUTION AUTHORITIES

10. *Prosecutor v. Delalic, Mucic and Delic*, IT-96-21-T, Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges Against him, 1 July 1998.

IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding

Judge Elizabeth Odio Benito

Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 1 July 1998

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON THE MOTION BY DEFENDANT DELALIC REQUESTING PROCEDURES FOR FINAL DETERMINATION OF THE CHARGES AGAINST HIM

The Office of the Prosecutor:

Mr. Grant Niemann

Ms. Teresa McHenry

Mr. Giuliano Turone

Counsel for the Accused:

Ms. Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic

Mr. Zeljko Olujic, Mr. Tomislav Kuzmanovic, for Zdravko Mucic

Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic

Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Landzo

I. INTRODUCTION

1. Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is a "Motion by the Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him" ("Motion" or "Application") ("Official Record at Registry Page ("RP") D6407 - D6413) filed on 2 June 1998. The Office of the Prosecutor ("Prosecution") filed a response to the Motion on 8 June 1998 ("Prosecution Motion to Exclude Presentation of Evidence Immediately After the Close of Delalic Defence" ("Prosecution Response"), RP D6572 - D6575). The background to the Motion is the following.

2. Applicant, Zejnil Delalic, is the first accused person in the present case. The three other accused persons are Zdravko Mucic a/k/a Pavo, Hazim Delic and Esad Landzo a/k/a/ Zenga. They were jointly indicted on 19 March 1996 and their trial is still ongoing.

3. The Prosecution has closed its case against all the accused persons. The first accused, Zejnil Delalic, has called witnesses in his own defence but has not given evidence before the Trial Chamber. The Trial Chamber has ordered the first accused to close his case but he has not yet done so. His application for leave to appeal against this decision was refused by the Appeals Chamber in a decision filed on 15 June 1998 ("Decision on the Application for Leave to Appeal Pursuant to Rule 73 by the Accused Zejnil Delalic", *Case No. IT-96-21-73.4*, RP A15 - A18). At the present time witnesses have appeared before the Trial Chamber on behalf of the second and third accused. The fourth accused is expected to call his witnesses in due course. None of the three other accused has given evidence before the Trial Chamber. However, none of the three co-accused persons has indicated their intention not to give evidence, if and when the first accused closes his case.

4. In the Motion the first accused is now seeking an order of the Trial Chamber:

> (i) (a) For the Prosecution to indicate its intention whether or not to call rebuttal evidence against the first accused, and if so, to do this immediately after the close of the defence of the first accused; (b) that the first accused may then present any rejoinder evidence and, (c) that the Trial Chamber may then order evidence (if any) in regard to the *first accused*;
>
> (ii) That following upon (i) above, the Prosecution and the Defence present final arguments in regard to the determination of the guilt or innocence of the *first accused*, and;
>
> (iii) For the Trial Chamber then to proceed to final determination of the charges against the *first accused*.

5. The Trial Chamber heard oral arguments on the Motion on 9 June 1998, whereupon it reserved its decision to a later date.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. Applicable Provisions

The relevant provisions of the Statute of the International Tribunal ("Statute") and the Rules of Procedure and Evidence ("Rules") are reproduced hereunder.

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

Article 21

Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

[...]

(c) to be tried without undue delay;

[...]

Rule 48

Joinder of Accused

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Rule 49

Joinder of Crimes

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

Rule 54

General Rule

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Rule 72

Preliminary Motions

(A) Preliminary motions, being motions which

(i) challenge jurisdiction

(ii) allege defects in the form of the indictment

(iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B), or

(iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 45 (C)

shall be in writing and be brought not later than sixty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A) and shall be disposed of before the commencement of the opening statements provided for in Rule 84.

(B) Decisions on preliminary motions are without interlocutory appeal save

(i) in the case of motions challenging jurisdiction, where an appeal by either party lies as of right;

(ii) in other cases where leave to appeal is, upon good cause being shown, granted by a bench of three Judges of the Appeals Chamber.

(C) Applications for leave to appeal under Sub-rule (B) (ii) shall be filed within seven days of filing of the impugned decision.

Rule 82

Joint and Separate Trials

(A) In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.

(B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

Rule 83

Instruments of Restraint

Instruments of restraint, such as handcuffs, shall not be used except as a precaution against escape during transfer or for security reasons, and shall be removed when the accused appears before a Chamber.

Rule 84

Opening Statements

Before presentation of evidence by the Prosecutor, each party may make an opening statement. The defence may, however, elect to make its statement after the conclusion of the Prosecutor's presentation of evidence and before the presentation of evidence for the defence.

Rule 85

Presentation of Evidence

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

(i) evidence for the prosecution;

(ii) evidence for the defence;

(iii) prosecution evidence in rebuttal;

(iv) defence evidence in rejoinder;

(v) evidence ordered by the Trial Chamber pursuant to Rule 98.

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.

(C) If the accused so desires, the accused may appear as a witness in his or her own defence.

Rule 86

Closing Arguments

After the presentation of all the evidence, the Prosecutor may present an initial argument, to which the defence may reply. The Prosecutor may present a rebuttal argument to which the defence may present a rejoinder.

Rule 87

Deliberations

(A) When both parties have completed their presentation of the case, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.

(B) The Trial Chamber shall vote separately on each charge contained in the indictment. If two or more accused are tried together under Rule 48, separate findings shall be made as to each accused.

B. Pleadings

Applicant - Zejnil Delalic, first accused

6. In the Motion the applicant states that the defence of the first accused will soon be closed. It is submitted that the sequence of evidence at trial shall be presented in accordance with Sub-rule 85(A)(i), (ii), (iii), (iv), (v) and Rule 98 of the Rules. Accordingly it is argued that at the close of evidence for Mr.

Delalic, the Trial Chamber can, and should, order the Prosecution to declare whether it intends to call rebuttal evidence against the first accused. If the Prosecution so intends it could then be ordered to present such evidence immediately. The Trial Chamber may also exercise its right to call evidence.

7. It is submitted that on the conclusion of the evidence in compliance with the procedure outlined above, the parties would have completed the presentation of their cases and the Trial Chamber would be in a position to declare the hearing closed, and to call for closing arguments, pursuant to Rule 86, in respect of the charges in which the first accused stands charged.

8. It is further argued that Rules 87 and 88 enable the Trial Chamber, after closing arguments, to proceed with deliberation and render final judgement in respect of the charges against the first accused. Relying on a construction of Sub-rule 87(B) which provides for separate findings in a multiple defendant trial, it is submitted that there is no rule that such a finding may not be made at any time during the trial. Sub-rule 87(A) is cited in support of the submission that this is possible:

> When both parties have completed their presentation of the case, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. [. . .]

9. Articles 20 and 21 of the Statute are suggested as the basis for the proposed procedure. It is submitted that such a procedure would achieve an expeditious trial in respect of the first accused and that it would also obviate any violation of the rights of the accused under Article 21(4)(c). It is pointed out that the present trial proceedings commenced more than a year ago, that the presentation of evidence for the Prosecution lasted for nearly a year, and that a large part of the evidence of the Prosecution did not implicate the first accused. It is submitted that to require the first accused to wait for the presentation of the evidence of the other three accused would constitute a breach of his rights under Articles 20 and 21 of the Statute.

10. It is declared that the first accused intends to waive the benefit that may accrue to him from the defence of the other accused if the separate determination of his case is granted. It is requested that the Prosecution should not attempt to lead evidence against the first accused during the presentation of the evidence of the co-accused. Sub-rule 82(A) is relied upon for this request.

11. Finally, it is submitted that the procedure suggested would result in a saving in costs of the trial both in terms of expense and in time.

12. In her oral argument before the Trial Chamber in reply to the Prosecution Response, Ms. Residovic for the first accused stressed the fact that the application of the first accused was not intended to operate as a request for separate trial. Counsel submitted that where there is a conflict of interest in the defence, the defendant is entitled to a separate trial at any stage of the proceedings, but declared that no such application has been made. It was stated that such a request was not considered to be necessary since all the conditions necessary for the application of Rule 85 have been satisfied. The applicant is therefore relying on Sub-rule 82(A) to be accorded all the rights of a separate trial.

13. Accordingly, it was submitted that the procedural sequence to be observed is evidence of the Prosecution, evidence of the first accused, rebuttal evidence of the Prosecution, rejoinder by the defence, any evidence by the Trial Chamber, and final arguments by the parties. The Trial Chamber should then, after deliberation, proceed to a final decision in respect of Mr. Delalic.

14. The accusation that adopting the procedure suggested will result in unnecessary delay and duplication of the presentation of the cases in the further course of the proceedings was rejected. In

contrast, it was argued that this procedure should be followed in the interests of justice and to ensure observance of the first accused's fundamental right to a speedy and fair trial. It was said that it would also result in economy in terms of proceedings in the confining of the interrogation of every witness by cross-examination, and that this would result in savings in respect of attorneys.

15. Counsel rejected the criticism by the Prosecution that the application actually prevents the court from hearing additional witnesses. The defence has presented all its evidence and cannot prevent the Prosecution from presenting its own evidence. The first accused has not violated the rights of any of the co-accused, because as the first accused had exercised the right to cross-examine all the Prosecution witnesses and witnesses for the co-accused, the Prosecution and co-accused are entitled to cross-examine witnesses for the first accused.

16. It was submitted by Ms. Residovic on the construction of Article 20 and Rule 82, that the Prosecution does not have the right to introduce any other evidence to affect the case of the first accused through the presentation of the evidence of the co-accused after the first accused had closed his case. It was submitted that if this is not observed the right of the first accused to fair trial would have been violated.

17. Counsel further rejected the objection of the Prosecution founded on the difficulty of the Trial Chamber to evaluate the evidence of witnesses to the prejudice of the co-accused. It was submitted that the Trial Chamber consists of professional judges and that this is not a jury trial. The argument that the evaluation of the evidence in respect of the first accused would create prejudice against the other co-accused was said not to be applicable. It was submitted that the Judges of the Trial Chamber are perfectly capable of evaluating evidence in respect of and against each of the accused persons.

18. As an example of expeditious trial, counsel pointed out that in four months and four days the Prosecution in its 44 court days heard 25 witnesses. In contrast, the Defence of the first accused in its period of two months and 26 court days heard 15 witnesses. It was submitted that the Defence of the first accused has adhered to the instruction of the Trial Chamber in respect of expedition and the avoidance of duplication of witnesses and testimony. The first accused was said to be entitled to the relief sought. The first accused is not seeking a separate trial. The first accused only seeks enforcement of his right under Rule 82 of the Rules.

The Prosecution.

19. In its response to the Motion, the Prosecution relies, pursuant to the Rules, on the principles of fairness and efficiency and the decision of this Trial Chamber dated 25 September 1996, denying the accused's prior motion for a separate trial (Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic ("Decision of 25 September 1996"), RP D1409 - D1415).

20. It is submitted that the Motion is in essence an application for a separate trial. It is noted that an application for separate trial was denied in the Decision of 25 September 1996, and submitted that no changed circumstance warrants a review of this Decision. It is further argued that the effect of granting the Motion would mean duplication of resources, delay in the trial of other accused, and prevent the Trial Chamber from hearing additional relevant evidence.

21. It is submitted that evidence presented by witnesses is relevant to all the accused persons, and that defence attorneys for the co-accused frequently cross-examined defence witnesses for the first accused. With very rare exceptions, counsel for the first accused cross-examined every Prosecution witness.

Almost all the documentary or other physical evidence introduced by the Prosecution is relevant to the first accused and all the other accused. Hence, considering the case of the first accused in isolation will restrict consideration of the credibility of almost every witness, and the assessment of every document, to the determination of the guilt or innocence of the first accused. The same exercise will then be repeated in the case of each accused. Such a duplication is unnecessary and would result in significant delay to the other accused persons.

22. It is further submitted that if the case against the first accused is thus concluded, the Prosecution might wish to seek to call rebuttal evidence. Otherwise, the necessity to call rebuttal evidence might be obviated by the testimony of other witnesses who testify in the case of the other accused. It is possible that rebuttal witnesses for the first accused might be required for the rebuttal case against other co-accused, after the conclusion of their case. It is noted that this would result in multiple use of the same witnesses, when a single appearance at the conclusion of the case of all the accused persons would be sufficient.

23. Similarly, it is argued that the address at the conclusion of the case of the first accused, would contain issues common to all the accused. The granting of the Motion would result in the repetition of the same address possibly on three other occasions. This would cause unnecessary delay in each of the other trials.

24. It is further submitted that allowing this procedure would result in every accused person seeking to be similarly treated; thereby making a mockery of the basic notion of joint trials.

25. In his oral argument, Mr. Niemann for the Prosecution reiterated the submission that the application is, in essence, one for a separate trial presented in another way. Counsel denied that at this stage the first accused still had a right for separate trial after the proceedings had started under Rule 85. A joint trial having started, the Prosecution can present the evidence jointly in reaction to all accused and has done so. Similarly, the same procedure will be adopted in rebuttal and submissions.

26. Mr. Niemann further submitted that a joint trial is ordered in the public interest. This interest outweighs the interests of the Defence in having a separate trial. Again, the mere fact that the accused will suffer prejudice is not sufficient for the granting of a separate trial.

27. In considering prejudice, Mr. Niemann pointed out that Rule 82 uses the words "serious prejudice". With respect to the legal position in the United Kingdom, it was said that the prejudice that there has to be demonstrated is "dangerous prejudice".

C. Discussion

28. It is necessary to observe that the applicant is the first accused in these proceedings. The first accused is at the threshold of closing his defence. His application seeks an order from this Trial Chamber to conclude his defence of the charges against him, in all its stages, and for judgement and sentence, if any, to be delivered before the second accused should embark on his defence. By this the first accused is calling upon the Prosecution to indicate whether any rebuttal evidence would be called, so that he would decide on calling evidence on rejoinder. He is also asking for the final address on his defence by the Prosecution, and himself, and the deliberation on his case, judgement and sentence, if any, by the Trial Chamber.

29. It is relevant and important to refer to the fact that the first accused is jointly tried with the three other accused persons. The first accused has previously applied by a Motion filed on 5 June 1996 for a separate trial (Motion for a Separate Trial, RP D1-8/418 *bis*). In its Decision of 25 September 1996 the Trial Chamber dismissed the Motion. The reason given by the Trial Chamber for refusing to make the order pursuant to Sub-rule 82(B) was as follows:

> . . . the accused have been properly joined and no showing of a conflict of interests has been made nor any prejudice to the interests of justice [. . .]. (Decision of 25 September 1996, at para. 10)

The first accused is, therefore, now asking for what amounts to a separate trial from the rest of the accused at this stage of the proceedings. The application is unique in that the accused is seeking only separate consideration at the conclusion of presentation of evidence for his defence.

General Principles

30. The principles governing the joinder for trial of accused persons charged with committing offences in the same transaction, are prescribed by Rule 48 of the Rules. This provides simply as follows:

> Persons accused of the same or different crimes committed in the course of the *same transaction* may be jointly charged and tried. (Emphasis added)

The provision is very lucidly stated and requires very little, if any, construction of the words used. Only the phrase "*same transaction*" requires construction. The word "transaction" has been defined in Rule 2 as follows:

> 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.

31. This Trial Chamber, in construing Rule 48, has held that the word "transaction" should be read in the light of its definition in Rule 2 of the Rules and Rule 82(B) (see Decision of 25 September 1996, at paras. 1 and 2). We adopt this construction. In the opinion of the Trial Chamber the acts alleged were part of the same transaction. This is also clearly stated in paragraphs 13 and 14 of the Indictment, which provide as follows:

> 13. All of the victims referred to in the charges contained in this indictment were at all relevant times detainees in *Celebici camp* and were persons protected by the Geneva Conventions of 1949.
>
> 14. All acts described in the paragraphs below occurred in the Celebici camp in the Konjic municipality. (Emphasis added)

Thus all the acts complained of in the charges occurred in the course of the same transaction in the Celebici camp, and may be lawfully joined in the same indictment.

32. In its Decision of 25 September 1996 the Trial Chamber held that there is no provision for separate trial of distinct issues arising in the one indictment. However, there is provision for separate trial of accused persons joined in an indictment if the accused would comply with the provisions of Sub-rule 82 (B) and the procedure prescribed in Rule 72.

Conditions Governing Applications for Separate Trial of

Accused Persons Jointly Indicted

33. The considerations for severance for separate trial of accused persons jointly indicted are governed by the Rules. Applications for the severance of crimes joined in one indictment or for separate trials of persons so joined under Sub-rule 82(B) may be made by preliminary motion brought within sixty days after the initial appearance of the accused and in any case before the hearing on the merits (Sub-rule 72 (A)(iii)). All the motions for separate trial filed by the accused persons in the same Indictment were denied. The time for objecting to a wrongful joinder is clearly after the initial appearance and before commencement of the hearing on the merits (see Sub-rule 72(A)(iii)). Rule 48 is unequivocal that persons jointly indicted may be jointly tried. The provisions of Sub-rule 82(B) enable severance in appropriate cases.

Grounds for Separate Trials

34. Sub-rule 82(B), which provides for separate trial of accused persons jointly indicted, prescribes the conditions for severance. These are that the Trial Chamber may consider separate trial of persons jointly charged if (i) it considers it necessary in order to avoid conflict of interests that might cause *serious prejudice to an accused*, or (ii) to protect the interests of justice. It is obvious from the use of the conjunctive word '*or*' that either condition, if satisfied, will be sufficient to enable the Trial Chamber to make the order. Accordingly, if an accused, applying for a separate severance from a joint trial, is able to satisfy the Trial Chamber that conflicts of interests in the defence of the accused persons might cause *serious prejudice to his defence* or *that it is necessary in order to protect the interests of justice*, separate trial will be imperative.

Rationale for Joinder of Offenders

35. 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 jointly irrespective of the attendant inevitable minimum prejudices. The provisions of Sub-rule 82(B) seems to give a wide discretion to the Trial Chamber in the determination of whether an accused jointly charged should be granted separate trial. This is because both the pre-conditions of causing serious prejudice to the accused, and the protection of the interests of justice, involve the exercise of judicial discretion.

36. It is obvious from the formulation of the reasons for granting separate trial in Sub-rule 82(B) that the overriding principle is the question of justice. Thus the Trial Chamber may, *proprio motu,* order a separate trial if satisfied that any of the accused persons in a joint trial may be *seriously prejudiced* from the conflict of interests arising from such a joint trial. The inevitability of some prejudice is recognised. What the interests of justice frown at is the effect of serious prejudice on the results of the trial as a whole. Separate trials may be ordered where evidence admissible against one of the accused would be inadmissible against the others, or where a separate trial would enable the Prosecution to call an accomplice.

D. Findings.

37. The Applicant in this case submits that he is not seeking severance or a separate trial within the meaning of Sub-Rule 82(B). The first accused is only interested in the enforcement of his rights under Sub-rule 82(A) which provides that the first accused is to be accorded the same rights as if he were being tried separately. Counsel for the first accused, by this contention, relies on the provisions of Articles 20 and 21 of the Statute and Rule 85 of the Rules. This submission provokes the interpretation of the scope of the meaning of Sub-rule 82(A).

Construction of the Provisions of Sub-rule 82(A) and Rules 83, 84, 86 and 87

38. The first accused is seeking an order that he be allowed to conclude his evidence, make closing arguments, and have deliberation by the Trial Chamber, judgement and possibly sentence before the second accused should start his defence. It is contended that this procedure can be read into Sub-rule 82 (A). A careful reading and interpretation of Sub-rule 82(A) and Rules 86 and 87 demonstrates that there was no intention in the provisions to sever a joint trial at any stage unless the conditions in Sub-rule 82 (B) have been satisfied.

39. It is relevant to point out that the purport of Sub-rule 82(A) is to vest in the accused in a joint trial all the rights of a single accused on trial before a Trial Chamber. Accordingly, the accused jointly tried does not lose any of the protection under Articles 20 and 21 of the Statute, or his rights under Rules 83, 84, 85, 86 and 87 of the Rules.

40. It is pertinent to refer to Rule 83 which provides for the removal of handcuffs and any instrument of restraint when the accused is before the Trial Chamber. The Defence is, under Rule 84, entitled to make an opening speech after the Prosecution. The order for presentation of evidence remains the same as in Rule 85, as with the closing arguments after the presentation of all the evidence (Rule 86).

41. It is in Rule 86 that a seeming difficulty arises with respect to the meaning of the joint trial of accused persons. But this difficulty disappears when subjected to the definition of Sub-rule 2(B) applicable to all the Rules which says that "[I]n the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa". If so construed an accused person in a joint trial, though vested individually with all the rights of an accused person in a single trial, is subject to the collective rights of the group in the overall interests of justice for ensuring an expeditious and fair trial.

42. Accordingly, an accused in a joint trial will make his opening statements before the presentation of evidence and his closing arguments after the presentation *of all the evidence* (Rule 86). The presentation of *all the evidence* in Rule 86 in a joint trial means *all evidence on the part of the Prosecution and the Defence of each accused, as a whole*. It is not confined to all the evidence of each accused person in the Defence. When Rule 87 refers to *both parties* completing their presentation of the case *it means the Prosecution and all the accused persons as a Defence in a joint accused trial*. The Presiding Judge shall declare the hearing closed and the Trial Chamber shall deliberate in private. It is not intended in a multiple accused trial to close the case for each accused person by conducting a separate closing address for this purpose (Rule 87). *The trial is a joint trial of all the accused persons on the indictment which has not been severed.*

43. Counsel has submitted that because separate findings shall be made as to each accused in accordance with Rule 87 in a joint trial, this suggests that the joint trial may be severed at any stage of the trial. Such interpretation ignores the fundamental rationale of a joint trial which is to ensure as nearly as possible that the same verdict and the same treatment shall be returned against all those concerned in the joint

trial on the indictment of the offences. It is also to avoid inconsistencies which might arise from trying joint offences as separate offences. The contention that Sub-rule 87(B) does not forbid a separate trial during a joint trial is erroneous. There is nothing to suggest that it approves of a separate trial. A separate *finding* on each accused in a joint trial is not inconsistent with a joint trial. A separate finding relates merely to an issue in the trial.

44. It is also contended by the applicant that the requirement of separate findings, under Sub-rule 87(B) in respect of the accused in a joint trial, supports the concept of separate trial. The Trial Chamber is of the opinion that the interpretation is erroneous. Sub-rule 87(B) cannot be so construed. The rationale for the Rule is that each accused, having been charged with a distinct offence, even if the same, in different counts, ought to be considered separately in accordance with the supporting evidence. The accused persons have been jointly tried. Findings as to guilt or not are particular to the individual accused. This is why Rule 87, though providing for deliberation in respect of the trial, speaks of voting separately on each charge, and separate findings in respect of each accused tried together under Rule 48. The provisions of Sub-rule 87(B) speak of joint trial.

45. The submission of Counsel to the first accused, of the intention to waive any benefits that would accrue to him arising from a joint trial, is clearly indicative of the awareness that the joint trial of the accused person seeking separate trial is still in progress. If Counsel wishes to have a separate trial, *then it is mandatory to establish the essential requirements of conflict of interest in the trial seriously prejudicial to the interests of such accused, or overall public interest and interests of justice*. These are the preconditions for severance in a joint trial.

46. Counsel to the first accused recounts the advantages to the trial of economy of judicial time and savings in financial expenditure if the case of the first accused is finally disposed of before the presentation of the evidence of the co-accused. It is pointed out that the first accused being required to wait for the presentation of the evidence of the other three co-accused will constitute a breach of his rights under Articles 20 and 21. The Trial Chamber agrees entirely with the position taken by the Prosecution on these submissions. It cannot seriously be suggested that there would be any difference from holding a separate trial if, as the first accused advocates, the three co-accused from this stage of the proceedings have to wait for the conclusion of evidence, addresses, deliberation, judgement and possible sentence in his case, before going through the same procedure themselves. The evaluation of the evidence and the credibility of the witnesses, will be confined and restricted to the evidence against the first accused. So will it be in respect of the others. On the other hand, in a joint trial, evidence at the trial concerns all the co-accused and evaluation of such evidence is not necessarily restricted to the evidence of the one accused whose evidence is in issue. The Trial Chamber is of the opinion that the assessment of the credibility of the witnesses and the assessment of almost every document, the deliberation on the guilt of all the accused persons, which should be done only once at the conclusion of the closing addresses of the accused persons, will be repeated in respect of each accused person if the contention of the first accused were to be the correct legal position. We do not consider this to be the law.

47. The Trial Chamber accepts the contention of the Prosecution that the possibility of it calling rebuttal evidence, with the possibility of the accused calling evidence in rejoinder or the Trial Chamber calling evidence *proprio motu,* is better considered when all the accused persons have closed their cases. This is the close of the case for the Defence. Otherwise, the Trial Chamber will be confronted with unnecessary multiplication of evidence, repetition resulting in significant, avoidable delay to the trial. The procedure suggested is likely to affect the rebuttal evidence, if any, to be called. This is because the same rebuttal witness to the evidence of the first accused could also be a rebuttal witness to the evidence of another accused. This will result in the undesirable situation where the same witness will be required for the rebuttal of the evidence of another accused. A witness whose testimony requires rebuttal will be required to testify as many times as there are accused persons testimony to rebut. Finally, the comparison of the

court days spent by the Prosecution and the days already spent on the witnesses for the first accused, considered on the basis of the period to be spent on each accused's witnesses, demonstrates how much delay a separate trial, at this stage of the proceedings, will cause.

48. Counsel to the first accused relies on the provisions of Articles 20 and 21 of the Statute for the contention that, even in a joint trial, the Trial Chamber should allow the first accused to conclude his case unto the delivery of judgement, otherwise his right to an expeditious and fair trial would be violated. It is important to appreciate that the provisions of Article 20 vest in the Trial Chamber, *not the accused person*, the responsibility to *"ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused . . .".* In a joint trial, with multiple accused persons, the responsibility of the Trial Chamber, in accordance with this provision, is with respect to the rights of all the accused persons. Each of the accused persons in a joint trial is entitled to the rights under Article 21(4)(c), *namely the right to be tried without undue delay*. It is, therefore, necessary to protect the equal competing rights of the accused persons in a joint trial to an expeditious and fair trial by a strict application of the Rules. As there is no rule prohibiting severance at this stage, so there is none permitting it.

49. The rationale for a joint trial of accused persons is to ensure that persons jointly indicted should be jointly tried. Apart from the savings in financial expenditure and judicial time, it is in the interests of the public and overall interests of justice that the same verdict and the same treatment should be returned against all the persons concerned in the offences arising from the same transaction. A joint trial avoids or at least ameliorates the discrepancies and inconsistencies inevitable from the separate trial of joint offenders.

50. This application is not for a separate trial of an accused person jointly indicted and tried. It is thus designated, for lack of a better description. The trial of the first accused would have been concluded when the relief sought would be considered. But since this is a joint trial, the conclusion of which is subject to the closing of the case of the other three accused persons jointly indicted, the Defence case cannot be closed. The provisions of Sub-rule 82(A) cannot be construed to enable a separate trial of accused jointly indicted and tried. The provisions of Sub-rule 82(B) which is the only provision enabling such a separate trial have not been satisfied. The Trial Chamber has not been given any reason why it should, in the interests of justice, exercise its discretion to grant a separate trial at this stage of the joint trial.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**

PURSUANT TO RULE 54,

HEREBY DENIES the Motion.

Done in both English and French, the English version being authoritative.

Adolphus G.
Karibi-Whyte

Presiding Judge

Dated this first day of July 1998

At The Hague,

The Netherlands.

[Seal of the
Tribunal]

PROSECUTION AUTHORITIES

11. *The Prosecutor v. Nyiramasuhuko et al*, ICTR-97-21-I, ICTR-97-29A and B-I, ICTR-96-15-T, ICTR-96-8-T, Decision on the Prosecutor's Motion for Joinder of Trials, 5 October 1999.

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER II

Original : English

Before: Judge Navanethem Pillay, Presiding
Judge William H. Sekule
Judge Mehmet Güney

Registrar: John Kiyeyeu

Decision date: 5 October 1999

THE PROSECUTOR vs. Pauline NYIRAMASUHUKO and Arsene Shalom NTAHOBALI Case no. ICTR-97-21-I

THE PROSECUTOR vs. Sylvain NSABIMANA and Alphonse NTEZIRYAYO Case no. ICTR-97-29A and B-I

THE PROSECUTOR vs. Joseph KANYABASHI Case no. ICTR-96-15-T

THE PROSECUTOR vs. Elie NDAYAMBAJE Case no. ICTR-96-8-T

DECISION ON THE PROSECUTOR'S MOTION FOR JOINDER OF TRIALS

Office of the Prosecutor:
Mr. Frederic Ossogo, Mr. Robert Petit, Mr. Mathias Marcussen

Counsel for the Accused:Ms. F. Poitte (Counsel for A. S Nthahobali), Ms. N. Bergevin (Counsel for P. Nyiramasuhuko), Mr. C. Tchakounte Patie, (Counsel for S. Nsabimana), Mr. Titinga F. Pacere (Counsel for A. Nteziryayo), Mr. M. Boyer (Counsel for J. Kanyabashi), Ms. V. Laurent (Counsel for E. Ndayambaje).

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: AMINATTA L.R. N'GUM
SIGNATURE: DATE: 05/10/99

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("THE TRIBUNAL")

SITTING as Trial Chamber II of the International Criminal Tribunal for Rwanda (the "Tribunal") composed of Judge Navanethem Pillay, presiding, Judge William H. Sekule, and Judge Mehmet Güney;

BEING SEIZED OF a motion filed by the Prosecutor on 17 August 1998 for Joinder of the trials of the Accused in the *Prosecutor vs. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali* (Case No. ICTR-97-21-I), *The Prosecutor vs. Sylvain Nsabimana and Alphonse Nteziryayo* (Case No. ICTR-97-29A and B-I), *The Prosecutor vs. Joseph Kanyabashi* (Case No. ICTR-96-15-T), and *The Prosecutor vs. Elie Ndajambaje* (Case No. ICTR-96-8-T);

CONSIDERING THAT on 18 September 1998 the Defence filed a response challenging the jurisdiction of the Chamber;

NOTING THAT on 24 September 1998 theTribunal was seized of the Prosecutor's Motion for Amendment of the Indictment and heard the Defence objection to juridiction;

CONSIDERING THAT on 25 September 1998 Defence for Joseph Kanyabashi filed a notice of Appeal of the Chamber's decision on his objection based on lack of jurisdiction, whereupon the Trial Chamber suspended the hearing of the Motion for Joinder until the objection based on jurisdiction was disposed of by the Appeals Chamber.

WHEREAS on 3 June 1999, the Appeals Chamber decided that the Motion for Joinder was not subject to Rule 50, and hence that any Chamber had jurisdiction to hear the motion.

NOTING THAT the Prosecutor filed a motion seeking leave to amend the Indictment pursuant to Rule 50, this motion was supported by Annex A, the proposed Amended Indictments, and Annex B, the material in support of the motions to amend the Indictments.

CONSIDERING THAT between 9 August 1999 and 13 August 1999, Trial Chambers I and II granted leave to amend the Indictments and all accused persons made initial appearances where they pleaded not guilty to both old and additional charges;

HAVING HEARD the Parties at the hearing on 13 August 1999 on the Motion for Joinder;

NOTING THAT the Indictments have been delivered to all Accused on 13 August 1999 and they were granted extended time, until 31 August 1999, to file additional Briefs on the matter;

CONSIDERING ALSO THAT on 25 August 1999, the Prosecutor disclosed materials from Annex B, *albeit*, in redacted form;

WHEREAS the Defence filed supplementary Briefs by 31 August 1999 and the Prosecution filed its final Brief on 7 September 1999.

ARGUMENTS BY THE PARTIES

1. The Prosecution argues that:

1.1 Joinder within the Discretion of the Trial Chamber:

Joinder of the Accused in one trial is a matter within the discretion of the Trial Chamber, which should be guided by the overall interests of justice. It is in the public's interest of efficient administration of justice to join the proposed six cases, which are all in their initial stages. In fact, the Indictments have just been amended and the Accused have all pleaded not guilty to the additional charges at the Initial Appearance.

1.2 Motion for Joinder is not Premature:

The Motion for Joinder is not premature, pursuant to Rule 66(A) and Rule 72 of the Rules. Firstly, the present Motion is not predicated on Rule 66(A), which relates to the time limits for disclosure of materials to the Defence by the Prosecutor. Secondly, the

Trial Chamber will consider the Motion for Joinder only after its decisions on Amended Indictments and not on the basis of unconfirmed Indictments.

Rule 72, which defines the time limits for bringing a motion, concerns procedural issues of Preliminary Motions and not substantive issues of Joinder Motions. Thus the Defence is not entitled to time limit provisions under this Rule before a Motion for Joinder is heard. Accordingly, should the Trial Chamber grant the Motion for Joint Trial, the Defence will then have adequate opportunity to raise Preliminary Motions , pursuant to Rule 72.

1.3 **Adequate Notice:**

Materials disclosed by the Prosecution, pursuant to Rule 66 (A) of the Rules, provide adequate notice to the Accused of the nature of the charges against them. Such materials include copies of the amended Indictments, delivered more than a year ago, and the redaction of Annex B, disclosed on 25 August 1999.

Contrary to the argument of the Defense, the Prosecutor has submitted Annex B solely as a document to support Amendment of Indictments and not as material to substantiate the Motion for Joinder of Trials.

1.4 **The Charge of Conspiracy against the Accused:**

The Trial Chamber confirmed the charge of Conspiracy to Commit Genocide against all of the Accused currently appearing before the Tribunal in this motion. The Joinder of the Accused is proper because all the alleged criminal acts charged against each of the six Accused, including the Conspiracy to Commit Genocide, were undertaken in furtherance of a single, commonly charged enterprise. In support of this submission, the Prosecution cited *R. v Miller and Others*, Winchester Summer Assizes, {1995} 2 ER 667, 36 Cr App Rep 169 (*See* Prosecutor's 17 August 1998 Brief, Pages 9 &10, Paragraph 20), where

Judge Devlin held that where a charge of conspiracy exists and where there is evidence to show that the alleged conspirators engaged in a common enterprise, "The cases must be rare in which fellow conspirators can properly in the interest of justice be granted separate trial."

1.5 **The Same Transaction and "Connexite":**

In accordance with Rule 48, which provides "Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried", read in the light of the definition of "transaction" in Rule 2 (A), joinder is proper. The acts which were alleged to have been committed in the instant case are part of the same transaction or the same series of acts or transactions.

Under the rules governing the Tribunal, the French civil law notion of "connexite" does not constitute a standard for deciding whether cases can or should be joined. Rather Rule 48 of the Rules provides the basis for Joinder. Nonetheless, the Prosecution's Motion for Joinder satisfies the requirements for the test of "connexite". For example, in regard to the element of time and place, most of the crimes alleged against the accused occurred between 1 January and 31 December 1994 in the Ngoma, Ndora, and Muganza Communes in the Butare Prefecture. In regard to the element of design and agreement, the Accused, all who are charged with Conspiracy to Commit Genocide and other common offences, have a special nexus with Butare. The issue of causality is also met because the Accused allegedly acted jointly and severally in orchestrating the genocide in Butare Prefecture and throughout Rwanda.

1.6 **Article 19 and Article 20(4) (c) of the Statute:**

Joinder of the Accused will satisfy the statutory provisions of both Article 19, which guarantees the right to a fair and expeditious trial, and Article 20(4)(c) , which ensures the

right to be tried without undue delay. The proposed Joinder will neither infringe upon the rights of each Accused to a fair and equitable trial nor cause an appreciable delay in the court proceedings. Rather it will facilitate the expeditious management of multiple cases, promote judicial economy, conserve prosecutorial resources, and provide better protection of the victims' and witnesses' physical and mental safety by eliminating the need for them to make several journeys and to repeat the same testimony.

2. The Defence

Limine Litis arguments relating to the Prematurity of the Motion for Joinder :

2.1 The Defence argues that The Motion for a Joint Trial of the six Accused is premature at this stage of the proceedings, since there are still unconfirmed proposed Amended Indictments against the Accused. To avoid confusion and impropriety, the Chamber should not consider the proposed Joinder prior to its decision granting leave to amend the Indictments.

The Defence contends that the Prosecution has breached Rule 66 of the Rules ("Disclosure of Materials by the Prosecutor") and has prejudiced the rights of the Accused, as provided in Articles 19 and 20 of the Statute, by failing to provide Annex B to the Accused at the time of filing the Motion or even during the course of the hearing. Only when the Prosecution has complied with Rule 66 (A)(i) will the Accused be able to exercise their full rights and challenge the validity of the new Indictment by showing that the supporting material does not contain evidence of conspiracy or that there has been no new evidence since the July 1997 NAKI operation.

Since preliminary motions may only be brought within 60 days following disclosure by the Prosecution to the Defence of all the material envisaged by Rule 66(A)(i) of the Rules

(i.e., within 30 days of the initial appearance by the Accused), the Chamber lacks jurisdiction to hear the Motion for Joinder at this time.

Further, Joinder at this stage of the proceedings would constitute a violation of Rule 72 of the Rules, which provides that the Accused must be afforded an opportunity to file preliminary motions. A hearing on the proposed Motion for Joinder cannot take place before the expiration of the time limit provided under Rule 72 .

Regarding Issues on the Merits of the Motion for Joint Trials:

2.2 **Violation of Article 27(2)(iii) of the Directive for the Registry and Lack of Jurisdiction:**

According to the Defence for J. Kanyabashi, the Prosecution has produced no prima facie evidence to justify the Motion for a Joint Trial and has violated Article 27(2)(iii) of the Directive for the Registry, which provides that " a party who wishes the Chamber to make any determination on a question of fact in dispute should not make unsworn assertions of fact orally before the Chamber, but should, in his or her Motion, state contentious facts under oath, in an affidavit, affirmation or other solemn declaration." In the absence of any factual basis to support the Prosecutor' s allegations against the Accused, the Trial Chamber lacks jurisdiction to hear the Joinder Motion.

2.3 **Failure to Provide Prima Facie Evidence to Support the Charge of Conspiracy to Commit Genocide:**

The Prosecution has not provided sufficient *prima facie* evidence to support the charge against the Accused of Conspiracy to Commit Genocide. There is no evidence presented that the Accused acted in concert in furtherance of a common illegal act, that the Accused knew one another, or that a common plan or strategy existed

2.4 **No "Connexite":**

The Prosecution has established no 'connexite' of facts between the alleged illegal transactions or series of transactions of the Accused to support the Motion for Joint Trial. Joinder cannot be justified, within the context of Rule 48 of the Rules ("Joinder of the Accused"), solely on the basis of similarities among charges included in the Indictments of the Accused. The Prosecution must therefore provide more information to show the close connections, logically and temporally, between the alleged criminal acts of the Accused.

2.5 **Article 19 and Article 20(4)(c) of the Statute:**

The non-disclosure of Annex B by the Prosecutor prejudices the rights of the accused as guaranteed by Articles 19 and 20 of the Statute, since they are unable to contest the joint trial motion. The right to a fair trial includes a right to be heard which is dependent upon the disclosure of materials supporting the joint trial motion. The Prosecutor is in breach of the *audi alteram partem* rule.

Joinder of the Motion at this stage in the proceedings will violate the rights of the Accused, provided under Articles 19 and 20, including the right to a fair and expeditious trial, the right to adequate notice, the right to adequate time to prepare one's defence, and the right to be tried without undue delay. The haste with which the Trial Chamber was seized with the Prosecutor's Joinder Motion places the Accused in a position of inequality in relation to the Prosecutor before the Chamber. Should the Motion for Joinder be allowed, the Accused will be denied the right to challenge the Joinder Motion, and thereby their very right to a fair trial based upon their presumption of innocence.

2.6 **Inapplicability of Rule 48 bis:**

The Prosecutor's Motion for Joint Trial was filed in August 1998 prior to the adoption of Rule 48 *bis* of the Rules on 1 July 1999. As such, Joinder of the Accused in One Trial is

improper because Rule 48 *bis* is inapplicable by virtue of its non-retroactivity. Moreover, Rule 48 of the Rules is not pertinent to Joinder of Accused. Rule 48 must be strictly interpreted, with no reference to Rule 48 *bis*, in order to preserve the rights of the Accused, including the presumption of innocence.

AFTER HAVING DELIBERATED

The Tribunal issues its decision:

With regard to non disclosure of supporting materials and prematurity of the Motion for Joinder:

3. The Prosecution maintains that the Defence received timely disclosure of supporting materials on 25 August 1999. While the Trial Chamber acknowledges the importance of timely disclosure, it notes that at this stage of the proceedings disclosure is not in issue. In fact, even if the Prosecutor had not disclosed such materials, the rights of the Accused would not have been violated, under Rule 66 (A)(i) of the Rules. This Rule refers to the disclosure of material in support of an Indictment when confirmation is sought. It does not refer to the disclosure of material in support of a Motion for Joinder.

Indeed, the current proceedings fall within the ambit of Rule 66 A)(ii), which provides that "the Prosecutor shall disclose to the Defense, no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial." In the case at bar non disclosure has neither prejudiced the rights of the Accused nor prevented them from arguing their case. All of the Accused have received the said material and may file preliminary motions, in timely manner, pursuant to Rule 72 (B) of the Rules. Furthermore, the Trial Chamber considers that at this stage of the proceedings, it

is not necessary to rely on Annex B, since it is not a matter of evaluating evidence but of assessing whether or not there is sufficient factual and legal basis to support the joint trial. With regard to the argument that the motion for joint trial is premature and that the Trial Chamber must wait until the expiration of the 60-day time limit to hear the motion, pursuant to Rule 72(A) of the Rules, the Trial Chamber holds that a joint trial will not prejudice the Accused and that the Defense could still bring the preliminary motions, under Rule 72 (B) (iii) of the Rules, for defects in the form of the Indictment or for severance of crimes, or could even file a motion for severance of the proceedings, pursuant to Rule 82 B) of the Rules, thereby avoiding any conflict of interest that could cause prejudice to the Accused, and safeguarding the interests of justice.

With regard to the lack of *prima facie* evidence to support the joint trial and the retroactive application of Rule 48 *bis*:

4. The Trial Chamber is not called upon at this stage in the proceedings to judge the merits of the charges against the Accused. Rather the Chamber's task is only to determine whether, on the basis of legal and factual assessment, there exists a justification for holding a Joint Trial of the Accused.

5. Under Rule 48 *bis*, the "Prosecutor may join confirmed Indictments of persons accused of the same or different crimes committed in the course of the same transaction, for purposes of a joint trial, with leave granted by a Trial Chamber..." The Defence argues that Rule 48 does not provide for joinder of Accused whose indictments have already been confirmed. The Trial Chamber notes that the present Motion for Joint Trial filed on 17 August 1998 preceded the adoption of Rule 48 *bis*. In fact, it appears that the Defense has a misconception of the applicability of Rule 48 *bis* in the instant case: firstly, because the present motion is for Joinder of Trials and not for Joinder of

Indictments; secondly, this Motion has not been filed under Rule 48 *bis*. It is the view of the Chamber that Rule 48 *bis* is inapplicable to this case. As the Defence maintains, Rule 48 *bis* is inapplicable by virtue of its non-retroactivity, and it is essentially a clarification of the existing Rule 48 which covers the issue of Joint Trial. Therefore the pertinent Rule applicable to the present Motion for a Joint Trial is Rule 48.

6. Considering the provisions of Rule 48 on Joinder of Accused, the Rule states that "persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried." In the instant case, this Rule enables the Prosecutor to consolidate the trials of the accused into one. The procedure proposed by the Prosecutor is not prejudicial to the accused, since in "joint trials each accused shall be accorded the same rights as if he were being tried separately" pursuant to Rule 82 (A). This approach receives support from Judge Shahabudeen's obiter dictum in his dissenting opinion of 3 June 1999 in the case of *Joseph Kanyabashi vs .The Prosecutor*, Case No. ICTR-96 -15-A, which pertains to an Interlocutory Appeal on the Jurisdiction of Trial Chamber I. Here Judge Shahabudeen presented two interpretations of this Rule. One interpretation relates to joinder *stricto sensu*, that is, where the accused may be "jointly tried", if "jointly charged". The other endorses the view that Rule 48 embraces the possibility of '"jointly trying" the accused even if not "jointly charged". In *Kanyabashi* the Prosecutor argues the second view. The Chamber acknowledges the reasoning of Judge Shahabudeen's interpretation of Rule 48 and agrees that people charged separately could indeed be jointly tried if facts are based on the same transaction. Further, the Chamber holds that in the instant case, joinder of the Accused in one trial is proper. It is in the interests of justice that the same verdict and the same treatment be rendered to all the Accused with respect to the offences committed in the same transaction.

With regard to the lack of *prima facie* evidence to support the requirement of " same transaction":

7. Contrary to the arguments of the Defence, the issue before the Chamber is not that of similar charges in the Indictments but that of the requirement that the accused were engaged in the same criminal transaction. The Trial Chamber defines "same transaction" to mean that Accused can be jointly tried with others if their acts fall within the scope of Rule 48. The Chamber recognizes earlier decisions of the Tribunal on this issue. *See* the Decision of Trial Chamber I, relating to three Accused in *The Prosecutor vs Clement Kayishema,* Case No. ICTR-95-1-T, *Gerard Ntakirutimana,* Case Nos. ICTR-95-1-T and ICTR-96-17-T, and *Obed Ruzindana,* Case Nos. ICTR-95-1-T and ICTR-96-10-T, which relates to the Prosecutor's motion to sever and join the accused in a superseding Indictment as well as to Amend the superseding indictment. In response to the proposed motion, Trial Chamber I stated that, "...involvement in the same transaction must be connected to specific material elements which demonstrate on the one hand the evidence 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 the accused therefore acted together in concert."

8. Trial Chamber II interpreted Rule 48 differently in its decision of 30 September 1998 in the *Prosecutor vs. Aloys Ntabakuze and Gratien Kabiligi*, Case No. ICTR-97-34-I. In this case, Trial Chamber II observed that "Pursuant to Rule 48 of the Rules, it is permissible to join those accused who have been charged with the same or different crimes committed in the course of the same transaction." The Chamber further proposed the following guidelines to be used for interpreting Rule 48:

1. The acts of the Accused must 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 to which the acts of the accused are connected must be capable of specific determination in time and space;

3. The criminal acts to which the acts of the accused are connected must illustrate the existence of a common scheme, strategy or plan.

9. Trial Chamber II decided that in determining whether the same transaction exists for the purposes of joint trial, it would consider the totality of the facts and evidence, using the above guidelines for direction. However, the Trial Chamber stated that these guidelines are not intended as a rigid, insurmountable three-prong test.

10. The Trial Chamber agrees with the reasoning in *Kabiligi et al.* It is in conformity with Rule 2 of the Rules, which defines " 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." The Trial Chamber notes that the three-prong test prescribed in *Kabiligi* more appropriately covers the scope envisaged by Rule 2 than does the interpretation of this Rule in *Kayishema, Ntakirutimana* and *Ruzindana*. The guidelines stipulated in *Kabiligi* can be applied to the instant case.

The first prong of the test is satisfied insofar as most of the Accused, according to their Indictments, held official positions in the Government. Pauline Nyiramasuhuko was a Minister in both the Agathe Uwilingimana Government and the Interim Government headed by Jean Kambanda, while Nsabimana and Nteziryayo were Prefects in the Butare

Prefecture. Kanyabashi and Ndayambaje were Bourgmestres in the Butare Communes of Ngoma and Muganza, respectively.

11. The second prong of the Kabiligi test is satisfied because the criminal acts connecting all the accused can be specifically determined both 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.

12. Further, the Indictments against the Accused indicate that the third prong of the test has been satisfied. In each Indictment the Prosecutor alleges that there existed a national plan to exterminate the Tutsi. It is alleged, in Paragraph 5.1 of the concise statement of facts, that from the late 1990s to July 1994, *inter alia,* members of the Government, political leaders and other personalities conspired among themselves and worked out a plan with intent to exterminate the civilian population and eliminate members of the opposition. It is further alleged that all the accused included in the joint trial motion elaborated, adhered to and executed the said plan with the aim of exterminating the Tutsi. Among the most common facts alleged are the role the accused played in the incitement of people to exterminate the Tutsi, the training of militiamen and the distribution of weapons. The third prong, namely the existence of a common strategy or plan, may be considered in light of Rule 2 of the Statute, which defines same transaction as " a number of events, at the same or different locations and being part of a common scheme, strategy or plan". This definition corresponds to the acts the Accused are alleged to have committed, such as Genocide and Conspiracy to Commit Genocide.

13. Regarding the conspiracy Charges, the Prosecutor has based its request for a joint trial on the Charge of Conspiracy to commit Genocide, arguing that the charge involves all accused persons who participated in a common transaction. The Prosecutor contends that the Accused acted jointly and severally in pursuit of their common scheme. In the *Bagambiki et al* case (Case No ICTR-97-36-T) of 30 September 1998, Trial Chamber II observed that "it is quite impossible to establish when and where the initial agreement was made or when or where the other conspirators were recruited" and that "participation in a conspiracy is infinitely variable as it could be active or passive." The Trial Chamber agrees with this decision. However, in view of the present stage of the proceedings, the Chamber will not, at this time, address the issue of whether or not a conspiracy actually existed. This is a substantive issue of the forthcoming Trial on the merits.

It is the opinion of this Trial Chamber, therefore, that in the instant case, there is sufficient showing of "same transaction". Therefore, it is the view of the Trial Chamber that there exists both factual and legal basis for the holding of a joint trial and there is no need, in our view, for an enquiry into whether there is *prima facie* evidence in support of a joint trial. On the basis of the separate Indictments, it is clear that sufficient elements of each charge have been established to show probability that the Accused participated in a common scheme, strategy or plan with one another or that they conspired to Commit Genocide.

Although the additional charge of Conspiracy has been allowed in the amended Indictment, the Prosecutor will have to convince the Trial Chamber in due course that this charge will hold in law and in fact. The Chamber has intentionally allowed the Conspiracy Charge, which provides the basis for the Joint Trial of the Accused.

For the purposes of a joinder, in the absence of evidence to the contrary, in *Prosecutor v. Aloys Ntabakuze and Gratien Kabiligi,* Trial Chamber II relied upon the Prosecutor's factual allegations submitted in the Indictment and related documents. It held that the Joinder of two

accused in one Indictment was proper within the scope of Rule 48 and that the Defense had not shown that a joint trial would prejudice the accused or that it would not be in the interests of justice.

With regard to the Chamber's lack of juridiction to rule on the Joinder Motion.

14. Mr Kanyabashi' s Defence has alleged non compliance of the Prosecutor with the requirement of Article 27(2)(iii) from the Directive for the Registry. The Trial Chamber holds that there is no provision in the Rules of Procedure and Evidence addressing the issue of truthfulness. This is an evidentiary issue to be determined during the course of the Trial on the Merits. Moreover, it is not the practice of the Tribunal to require Parties to make a solemn declaration of veracity in the form of an affidavit when submitting a brief. Furthermore, within the ambit of joinder, the Trial Chamber is not determining a question of fact, nor assessing the truth of the acts alleged, but is making a determination about whether or not there exists a basis for Joinder.

On the rights of the accused

15. Joinder of the Accused in one trial will not cause undue delay, since none of the trials has started or is about to start. Rather Joinder will promote efficiency and avoid delay in bringing those accused of involvement in one criminal transaction to trial. The wording and significance of Rule 82(A) are particularly relevant here. As stated by the Tribunal for the former Yugoslavia in the case of *The Prosecutor vs Delalic, Mucic, Delic and Landzo*, Case No IT-96-21-73, the intent of this Rule is " to vest in the accused in a Joint Trial all the rights of a single accused on trial before a Trial Chamber. Accordingly the accused jointly tried does not lose any of the protection under Articles 20 and 21 of the

Statute".[1] Therefore, the proceedings will be in accordance with Articles 19 and 20 of the Statute.

The Trial Chamber acknowledges that the right of each accused to be presumed innocent will not be violated, since in any criminal proceeding, whether the accused is tried jointly or separately, it is the Prosecutor' s burden to prove guilt beyond a reasonable doubt.

On the protection of victims and witnesses

16. The Tribunal considers that the argument raised by the Prosecutor relating to the need to protect victims and witnesses is of utmost importance and particularly relevant and, as such, cannot be entirely subordinated to the rights of the accused. There must, however, be a balance between these rights and the protection of the witnesses. To this end, the Trial Chamber holds the same view as Trial Chamber I in its Decision of 6 November 1996 in the case of *The Prosecutor v. Kayishema,* Case No ICTR-95-1-T, that "the requested joinder would allow for a better administration of justice by ensuring [...] a better protection of the victims' and witnesses' physical and mental safety, and by eliminating the need for them to make several journeys and to repeat their testimony."

17. The Trial Chamber reiterates its commitment to guarantee the rights of the Accused. However, on balance, the Chamber holds that a joint trial is proper in the case at bar. It is in the interest of justice that the same verdict should be rendered against all the Accused involved in the alleged criminal acts arising from the same transaction or series of transactions.

1 Articles 20 and 21 of the ICTY Statute correspond to Articles 19 and 20 of the ICTR Statute, providing for the rights of the Accused.

FOR ALL THE ABOVE REASONS, THE TRIBUNAL

ORDERS the Joint Trial of the six accused: Pauline Nyiramasuhuko, Arsene Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Elie Ndayambaje;

INSTRUCTS the Registrar to notify all parties concerned of this decision.

Arusha, 5 October 1999

Navanethem Pillay
Presiding Judge

William H. Sekule
Judge

Mehmet Güney
Judge

Seal of the Tribunal

PROSECUTION AUTHORITIES

12. *The Prosecutor v. Kayishema*, ICTR-95-1-T, Decision on the Joinder of the Accused and Setting the Date for Trial, 6 November 1996.

UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER 1

OR : FR

Before: Judge Laïty Kama, Presiding Judge
Judge Lennart Aspegren
Judge Yakov A. Ostrovsky

Registry: Ms. Prisca Nyambe
Ms. Cécile Aptel

Decision of: 6 November 1996

THE PROSECUTOR
VERSUS
CLÉMENT KAYISHEMA

Case No. ICTR-95-1-T

DECISION ON THE JOINDER OF THE ACCUSED AND SETTING THE DATE FOR TRIAL

The Office of the Prosecutor:

Mr. Jonah Rahetlah
Ms. Elizabeth Ann Farr
Ms. Brenda Sue Thorton
Mr. Cheickh Mara

The Counsel for the Accused:

Mr. André Ferran

THE TRIBUNAL

Sitting as Trial Chamber 1, composed of Judge Laïty Kama as Presiding Judge, Judge Lennart Aspegren and Judge Yakov A. Ostrovsky;

CONSIDERING the indictment issued by the Prosecutor against Clément Kayishema pursuant to Rule 47 of the Rules of Procedure and Evidence ("The Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that he has committed genocide, conspiracy to commit genocide, crimes against humanity and violations of article 3 common to the 1949 Geneva conventions and Additional Protocol II thereto;

CONSIDERING the decision confirming this indictment, signed by Judge Navanethem Pillay on 28 November 1995;

CONSIDERING the preliminary motion filed on 23 October 1996 by the Defense for postponement of the trial;

CONSIDERING the motion for joinder of the accused filed by the Prosecutor on 5 November 1996;

CONSIDERING the decision of the Tribunal of 29 October 1996, following the initial appearance of Obed Ruzindana;

HAVING THEN HEARD the parties at the hearing held on 5 November 1996,

CONSIDERING the Statute and the Rules of the Tribunal;

AFTER HAVING DELIBERATED:

WHEREAS the Defense filed a motion before the Tribunal for postponement of the trial of Clément Kayishema to a later date, in order to enable it to prepare;

WHEREAS the Prosecutor, who is not opposed to the request by the Defense, also filed a motion for joinder of the trials of Clément Kayishema and of Obed Ruzindana, his co-accused in Case No. ICTR-95-1-T, should the Tribunal decide to grant the aforementioned motion;

WHEREAS the Rules provide for the possibility of joinder of the accused in Rule 48, which states that, "Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried";

WHEREAS the Prosecutor argues in support of her request that Clément Kayishema and Obed Ruzindana are both presently awaiting trial before the Tribunal, that they are charged in the same indictment in Case No. ICTR-95-1-T, that these two individuals are accused of the same crimes of genocide, crimes against humanity and violations of article 3 common to the Geneva Conventions and Additional Protocol II thereto, that these crimes were committed in the course of the same transaction, namely massacres perpetrated in the area of Bisesero, in Kibuye *Préfecture*, during the month of April 1994;

WHEREAS the possibility of a joinder of the accused had already been envisaged by the Tribunal in its decision of 29 October 1996, following the initial appearance of Obed Ruzindana;

WHEREAS, along with the Prosecutor, the Tribunal deems that the requested joinder would allow for a better administration of justice, by ensuring at the same time a more consistent and detailed perception of the evidence presented by the Prosecutor, better protection of the victims' and witnesses' physical and mental safety, and by eliminating the need for them to make several journeys and to repeat their testimony;

WHEREAS the Tribunal also deems that the requested joinder would obviate risks of contradiction in the decision rendered when related and indivisible facts are examined;

FOR THESE REASONS,

THE TRIBUNAL

ORDERS the joinder of the two accused Clément Kayishema and Obed Ruzindana in Case No. ICTR-95-1-T;

DECIDES that the trial date for Clément Kayishema shall consequently be postponed to the trial date set for Obed Ruzindana in Case No. ICTR-95-1-T, that is Thursday 20 February 1997 at 9:30 hours;

INSTRUCTS the Registar to notify all parties concerned of this decision, including the Defense for Obed Ruzindana.

Arusha, 6 November 1996

Laïty Kama	Lennart Aspegren	Yakov A. Ostrovsky
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

PROSECUTION AUTHORITIES

13. *Prosecutor v. Brdanin et al*, IT-99-36, Decision on Motions by Momir Talic for a Separate Trial and for Leave to file a Reply, 9 March 2000.

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Fausto Pocar

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
9 March 2000

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON MOTIONS BY MOMIR TALIC FOR A SEPARATE TRIAL AND FOR LEAVE TO FILE A REPLY

The Office of the Prosecutor:

Ms Joanna Korner
Mr Michael Keegan
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

I Introduction

1. The accused – Radoslav Brdanin ("Brdanin") and Momir Talic ("Talic") – are jointly charged in the amended indictment with a number of crimes alleged to have been committed in the area of Bosnia and Herzegovina now known as *Republika Srpska*. Those crimes may be grouped as follows:

(i) genocide[1] and complicity in genocide;[2]

(ii) persecutions,[3] extermination,[4] deportation[5] and forcible transfer[6] (amounting to inhumane acts), as

crimes against humanity;

(iii) torture, as both a crime against humanity[7] and a grave breach of the Geneva Conventions;[8]

(iv) wilful killing[9] and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity,[10] as grave breaches of the Geneva Conventions; and

(v) wanton destruction of cities, towns or villages or devastation not justified by military necessity[11] and destruction or wilful damage done to institutions dedicated to religion,[12] as violations of the laws or customs of war.

Each count alleges that each of the accused is responsible both individually pursuant to Article 7(1) of the Tribunal's Statute and as a superior pursuant to Article 7(3). The indictment defines individual responsibility as including the commission of a crime by the accused both personally and by way of aiding and abetting the commission of a crime by others.[13]

II The application

2. Talic has filed a motion seeking a separate trial in relation to the amended indictment ("Motion").[14] The application is made by way of a preliminary motion pursuant to Rule 72 of the Tribunal's Rules of Procedure and Evidence, and within the period permitted by Rule 50(C). He relies upon Rule 82(B), which provides:

> The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

Rule 48 permits persons accused of the same or different crimes committed in the course of the same transaction to be jointly charged and tried.

3. It is argued on behalf of Talic that a joint trial is not justified because neither the witnesses nor the documents will be the same in relation to the prosecution case against each of the accused,[15] that separate trials are required in order to avoid any conflict of interest likely to cause serious prejudice, and that only separate trials would ensure a proper administration of justice.[16] Before referring to the detail of that argument, and in order more fully to understand the nature of the conflict of interest and of the likely prejudice asserted, it is necessary first to identify, as succinctly as possible, the case now pleaded by the prosecution against the two accused jointly.

III The pleaded case

4. The amended indictment alleges that:

(i) In 1992, the Assembly of the Serbian People in Bosnia and Herzegovina adopted a declaration on the Proclamation of the Serbian Republic of Bosnia and Herzegovina, an

entity which eventually became known as *Republika Srpska*.[17]

(ii) The significant Bosnian Muslim and Bosnian Croat populations in the areas claimed for the new Serbian territory were seen as a major problem in the creation of such a territory in those areas, and the removal of nearly all of those populations (or "ethnic cleansing") was part of the overall plan to create the new Serbian territory.[18]

(iii) To achieve this goal, the Bosnian Serb authorities initiated and implemented a course of conduct which included:

(a) the creation of impossible conditions (involving pressure and terror tactics, including summary executions) which would have the effect of encouraging the non-Serbs to leave the area;

(b) the deportation and banishment of those non-Serbs who were reluctant to leave; and

(c) the liquidation of those non-Serbs who remained and who did not fit into the concept of the Serbian state.[19]

(iv) Between April and December 1992, forces under the control of the Bosnian Serb authorities seized possession of those areas deemed to be a risk to the accomplishment of the overall plan to create a Serbian state within Bosnia and Herzegovina. By the end of 1992, the events which took place in these take-overs had resulted in the death of hundreds, and the forced departure of thousands, from the Bosnian Muslim and Bosnian Croat populations from those areas.[20] Those events constitute the crimes with which the two accused are charged jointly to have both individual responsibility and responsibility as a superior.

(v) The forces *immediately* responsible for those events (which are referred to in the indictment collectively as the "Serb forces") comprised the army, the paramilitary, and territorial defence and police units.[21] The Bosnian Serb authorities under whose control the Serb forces acted are not identified in the indictment beyond including the two accused.[22] These authorities had authority and control over:

(a) attacks on non-Serb villages and areas in the Autonomous Region of Krajina ("ARK");

(b) destruction of villages and institutions dedicated to religion;

(c) the seizure and detention of the Bosnian Muslims and Bosnian Croats;

(d) the establishment and operation of detention camps;

(e) the killing and maltreatment of Bosnian Muslims and Bosnian Croats; and

(f) the deportation or forcible transfer of the Bosnian Muslims and Bosnian Croats from the area of the ARK.

The Bosnian Serb authorities also had power to direct a body identified only as "the regional CSB" – which appears to be the Regional Centre for Public Security – and the Public Prosecutor to investigate, arrest and prosecute any persons believed to have committed crimes within the ARK.[23]

(vi) Brdanin was the President of the ARK Crisis Staff, one of the bodies responsible for the co-ordination and execution of most of the operational phase of the plan.[24] As such, he had executive authority in the ARK and was responsible for managing the work of the Crisis Staff and the implementation and co-ordination of Crisis Staff decisions.[25]

(vii) Talic was the Commander of the 5th Corps/1st Krajina Corps, which was deployed in the ARK into, or near, areas predominantly inhabited by Bosnian Muslims and Bosnian Croats.[26] He had authority to direct and control the actions of all forces assigned to the 5th Corps/1st Krajina Corps or within his area of control, and all plans for military engagement and attack plans had to be approved by him in advance. Troops under his command took part in the events which constitute the crimes with which the two accused are charged with responsibility.[27] His approval or consent was required for any significant activity or action by forces under the command or control of the 5th Corps/1st Krajina Corps, all units under his command were required to report their activities to him, and he had power to punish members of those units for any crimes they may have committed.[28] In addition (in municipalities such as Prijedor and Sanski Most within the ARK), he had power to direct and control the actions of the territorial defence units, the police and paramilitary forces,[29] which were immediately responsible for the events which occurred there.[30]

(viii) Talic was also a member of the ARK Crisis Staff,[31] and he and Brdanin, as such members, participated individually or in concert in the operations relating to the conduct of the hostilities and the destruction of the Bosnian Muslim and Bosnian Croat communities in the ARK area. The ARK Crisis Staff worked as a collective body to co-ordinate and implement the overall plan to seize control of and "ethnically cleanse" the area of the ARK. After the dissolution of the ARK Crisis Staff, Brdanin and Talic continued with the implementation of this overall plan.[32]

IV The submissions

5. In support of his argument that a joint trial is not justified, Talic has submitted that, whereas Brdanin is presented as a civilian and politician with broad powers in both these roles who did not exercise any command or "subordinate" functions in respect of Talic, Talic is presented only as a military man and, as such, subject to the military hierarchy. The only link alleged between them, it is said, is their membership of the Crisis Staff. It is submitted that neither the indictment nor the supporting material demonstrates any participation by Talic in the Crisis Staff, and even less any joint action by him with Brdanin. The supporting material for the indictment, it is said, demonstrates that the action of the civilian and military bodies was not co-ordinated (as alleged in the indictment) because, "for many reasons", communication between the two bodies was almost non-existent.[33]

6. In its response to the Motion ("Response"), the prosecution concedes that Brdanin and Talic each

played a different role in the execution of the overall plan to create the new Serbian territory, but points out that proof of the particular events for which each of them is jointly charged with criminal responsibility is the same so far as the case against each of them is concerned, that each of them is charged with the same crimes and that all of the crimes were committed in the course of the same transaction. It also says that the supporting material does show a link in authority between the Crisis Staff and the military, quoting from a Crisis Staff minute (but not of the ARK Crisis Staff) which provides:

> The relationship of the military authorities to the civilian authorities should be

PROSECUTION AUTHORITIES

14. Article 17 of the Statue of the Special Court for Sierra Leone

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA - NEW ENGLAND • FREETOWN, SIERRA LEONE

STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE

CONTENTS

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.
5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

Article 16: The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a three-year term and be eligible for re-appointment.
4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17: Rights of the accused

1. All accused shall be equal before the Special Court.
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
   a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
   b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
   c. To be tried without undue delay;
   d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without

payment by him or her in any such case if he or she does not have sufficient means to pay for it;

e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
g. Not to be compelled to testify against himself or herself or to confess guilt.

Article 18: Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19: Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.
2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20: Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:
   a. A procedural error;
   b. An error on a question of law invalidating the decision;
   c. An error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.
3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

PROSECUTION AUTHORITIES

15. *The Prosecutor Against Augustine Gbao,* SCSL-2003-09-I, Order on the Urgent Request for Direction on the Time to Respond to and/or an Extension on Time for the Filing of a Response to the Prosecution Motions, 16 May 2003.

SPECIAL COURT FOR SIERRA LEONE
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Before: Judge Bankole Thompson

Registry: Mr. Robin Vincent

Decision of: 16th May 2003

THE PROSECUTOR

Against

AUGUSTINE GBAO also known as AUGUSTINE BAO

CASE NO. SCSL-2003-09-I

Order on the Urgent Request for Direction on the Time to Respond to and/ or an Extension on Time for the Filing of a Response to the Prosecution Motions

And

The Suspension of any Ruling on the Issue of Protective Measures that may be Pending before other Proceedings before the Special Court as a Result of Similar Motions Filed to those that have been Filed by the Prosecution in this Case

The Office of the Prosecutor:
Mrs. Brenda Hollis

The Counsel for the Accused:
Mr. Andreas G. O'Shea
Mr. Ben Olden

THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court"),

SITTING AS Judge Bankole Thompson, designated by the President of the Special Court according to Rule 28 of the Rules of Procedure and Evidence ("the Rules");

HAVING RECEIVED the Urgent Request for Direction on the Time to Respond to and/ or an Extension on Time for the Filing of a Response to the Prosecution Motions and the Suspension of any Ruling on the Issue of Protective Measures that may be Pending before other Proceedings before the Special Court as a Result of Similar Motions Filed to those that have been Filed by the Prosecution in this Case of the 12th May 2003 ("the Defence Request");

NOTING the Prosecution's Response to the Urgent Request for Direction on the Time to Respond to and/ or an Extension on Time for the Filing of a Response to the Prosecution Motions and the Suspension of any Ruling on the Issue of Protective Measures that may be Pending before other Proceedings before the Special Court as a Result of Similar Motions Filed to those that have been Filed by the Prosecution in this Case of the 14th May 2003;

CONSIDERING that the Defence Request avers, *inter alia*, that the Counsel for the Accused has not been served with both the Urgent Prosecution Motion to allow Disclosure to the Registry and to Keep Disclosed Material under Seal until Appropriate Protective Measures are in Place of the 7th May 2003 and the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure of the 7th May 2003 ("the Prosecution Motions");

CONSIDERING FURTHER that the Defence Request seeks that the Accused be granted 14 days from the date of receipt of the Prosecution Motions for the filing of a response to such motions and, moreover, that no rulings on protective measures be made at this time in other proceedings before the Special Court;

NOTING, nevertheless, that the Proof of Service of the Court Management clearly indicates that the Team of the Counsel of the Accused has been served with the above mentioned Prosecution Motions through the Assistant of the Counsel for the Accused, Mr. Ben Holden, on the 7th May 2003;

NOTING that pursuant to Rule 7 of the Rules the time-limits for filing a response to the Prosecution Motions has expired;

CONSIDERING that the subject of the Prosecution Motions, and with particular reference to the protective measures for witnesses and victims, albeit of extreme importance, is a common and accepted procedure in international criminal law;

DUE to the materiality of this subject of the Motions to future trial proceedings, the Special Court pursuant to its authority under Rule 7 (A) of the Rules may order an extension of a time limit;

CAUTIONING that the Special Court will not allow any further delays in the future and

that, in particular, an extension of a time limit remains exceptional;

CONSIDERING FURTHER that at this stage of the proceeding against the Accused a joinder with other cases before the Special Court is deemed to be purely hypothetical and without factual basis;

CONSIDERING that issues before the Special Court are conducted before professional judges, who by virtue of their education and experience are able to ponder independently without prejudice to each and every case which will be brought before them;

CONSIDERING that a request that no rulings on protective measures will be made on other proceedings would halt the continuance of the pre-trial stage for the other Accused and that the Trial Chamber has an obligation to all Accused to be tried within a reasonable time;

NOW HEREBY, pursuant to Rule 7 and 54 of the Rules,

REJECTS the request of the Counsel for the Accused to be granted a period of 14 days for filing a submission in response to the Motions;

ORDERS that the Counsel for the Accused be granted a period of 7 days from the moment of receipt of this Order for filing his submissions in response to the Motions;

REJECTS the request of the Counsel for the Accused that no rulings on the issue of protective measures be made in other proceedings before the Special Court until Counsel has been given the opportunity to be heard on this matter.

Done in Freetown, Sierra Leone this 16th day of May 2003

Judge Bankole Thompson
Delegated Judge

Seal of the Special Court for Sierra Leone

SPECIAL COURT FOR SIERRA LEONE
CERTIFIED TRUE COPY OF THE ORIGINAL
SEEN BY ME
DATE 16/05/03

PROSECUTION AUTHORITIES

16. *Prosecutor v. Delalic, Mucic and Delic*, IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998.

IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding

Judge Elizabeth Odio Benito

Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 19 January 1998

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON THE MOTION OF THE PROSECUTION FOR THE ADMISSIBILITY OF EVIDENCE

The Office of the Prosecutor:

Mr. Grant Niemann

Ms. Teresa McHenry

Mr. Giuliano Turone

Counsel for the Accused:

Ms. Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic

Mr. Zeljko Olujic, Mr. Michael Greaves, for Zdravko Mucic

Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic

Mr. John Ackerman, Ms. Cynthia McMurrey, for Esad Landzo

I. INTRODUCTION

1. Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("International Tribunal") is a motion requesting the admission of a number of documents and videotapes into evidence ("Motion") which the Office of the Prosecutor ("Prosecution") orally presented on 31 October 1997. Oral arguments continued on 3, 5 and 6 November 1997. The background to the Motion is the following.

2. On 18 March 1996 members of the Austrian police, in response to a request for co-operation from the Prosecution, carried out searches in a number of locations in Vienna, Austria. Among the localities searched were the premises of the company "Inda-Bau", a firm with which the accused Zejnil Delalic ("Delalic") is alleged by the Prosecution to have close links, and the apartment of the accused Zdravko Mucic ("Mucic"). In the course of this operation a large number of videotapes and twelve folders containing documents were seized at the premises of Inda-Bau. A further four videotapes and certain documents were seized in Mucic's apartment.

3. After having heard the testimony of four officers of the Austrian police appearing as witnesses for the Prosecution on matters relating to this operation, the Trial Chamber, in an oral decision of 12 September 1997, admitted the twelve folders found at the premises of the Inda-Bau company into evidence. In this decision, the Trial Chamber was satisfied that the chain of custody had been established, and admitted the folders but not their contents. In a subsequent decision on 22 October 1997, the Trial Chamber admitted into evidence two of the documents allegedly originally contained in these folders, together with portions of a video-recording allegedly seized at Inda-Bau (exhibits 137, 141 and portions 00.00 - 02. 41 and 11.49 - 16.26 of exhibit 114). These exhibits were admitted on the basis of the evidence given by the Prosecution witness General Pasalic, who in his testimony was able to authenticate the documents and who recognised the contents of the videotape as a recording of an interview given by himself in December 1992.

4. Among the four members of the Austrian police who appeared before the Trial Chamber was District Inspector Thomas Moerbauer, who in his evidence described how he, subsequent to the seizures, had examined and prepared an index of the documents contained in the twelve folders found at Inda-Bau. In the course of his testimony Moerbauer was presented by the Prosecution with a number of documents and asked to verify them as documents originally contained in the twelve folders seized at Inda-Bau.

5. The Prosecution now moves to have the documents presented to Moerbauer, together with a number of videotapes allegedly seized at Inda-Bau and the accused Mucic's apartment, admitted into evidence. These are exhibit numbers 110, 111, 112, 115, 116, 117, 118, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 143, 144, 145, 146 and 147 A-C ("the exhibits").

THE TRIAL CHAMBER, HAVING CONSIDERED the oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. Applicable Provisions

6. It is appropriate to set out in full certain provisions of the Rules of Procedure and Evidence of the International Tribunal ("Rules") which were cited to the Trial Chamber during oral argument.

Rule 89

General Provisions

(A) The Rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

Rule 95

Exclusion of certain evidence

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage the integrity of the proceedings.

B. Pleadings

1. The Prosecution

7. The Prosecution asserts that the exhibits should be admitted into evidence since they are relevant to the charges set out in the Indictment and have probative value. According to the Prosecution, the oral decision of 12 September 1997 confirmed that the chain of custody of the exhibits has been established. Moreover, the Prosecution argues that the exhibits have been recognised by the witness Moerbauer during his testimony as documents and tapes seized in Vienna by the Austrian police.

8. The Prosecution states that in order to establish the relevance and probative value of the exhibits, some showing of reliability is required. In this respect the Prosecution asserts that the contents of the exhibits, together with the place and circumstances in which they were found, provide sufficient indicia of reliability. In the opinion of the Prosecution, the fact that some of the other items which were seized at the Inda-Bau premises have been admitted into evidence already, after authentication by the witness General Pasalic, further adds to the reliability of the exhibits. It is further argued that there exists an

inter-relationship between the exhibits, and that the showing of this inter-relationship proceeds to demonstrate the authenticity and reliability of the documents and tapes now sought to be admitted.

9. The exhibits are, according to the Prosecution, relevant and of probative value to the charges since they directly or indirectly relate to the position held by Delalic, and to a lesser extent Mucic, in the Konjic area in 1992. This is essential to the question of command responsibility with which Delalic and Mucic are charged in the Indictment. Moreover, the Prosecution is of the opinion that all the exhibits corroborate the evidence already received by the Trial Chamber relating to the situation in the Konjic area at the time of the alleged offences.

2. The Defence

10. Counsel for all four accused ("Defence") object to the admission of the exhibits. The Defence argues that the documents and videotapes sought to be admitted are both irrelevant and lack probative value as they are completely unreliable. Moreover, Counsel for Delalic insists that the Prosecution has been unable to demonstrate the origins of the exhibits. Counsel submits that although the witness Moerbauer in his testimony stated that he, in the process of preparing an index of the documents seized at Inda-Bau, put a mark on every individual document, he was during the course of his testimony unable to identify any such mark on the documents now sought to be admitted. Counsel therefore submits that there is no proof that the documents presented to the Trial Chamber are the same as those seized at Inda-Bau. Concerning those videotapes allegedly seized at Inda-Bau which the Prosecution now presents to the Trial Chamber (exhibits 115 and 116), Counsel argues that it is not proven that they were indeed found at the Inda-Bau company. According to the Defence the Prosecution has not explained a discrepancy which exists between the number of tapes initially reported seized and the number subsequently counted in the process of indexing and filing of the tapes.

11. The Defence suggests that the Trial Chamber adopts a clear procedure for the admission of evidence. According to the Defence, what needs to be established is first the authenticity and reliability of the documents. The Defence adopts the view that proof of the authorship of the documents is crucial in this respect, and divides the documents now before the Trial Chamber into three categories. First, there are those which purport to be written by a third person who is not a party to the present proceedings and who has not been called to testify and authenticate the documents. According to the Defence, these documents are in effect hearsay evidence and it is submitted that their admission would be contrary to the right of the accused to have the witnesses against themselves examined. The Defence asserts that since the Prosecution has failed to call the alleged authors of these documents to give evidence in court so that they could be cross-examined, there is no way by which the reliability of the contents of this category of documents can be tested. A second set of documents is those that are purported to be written by one of the accused. The Defence emphasises that the Prosecution never has made any attempt to have the relevant accused authenticate any of these documents, and concludes that there is no proof whatsoever that they were in fact written by the accused. A third type of document presented is those which bear no signature and where there is no clear indication of who the author might be. According to the Defence it is, in view of this lack of evidence of authorship, simply impossible to demonstrate reliability and trustworthiness in relation to this category of documents.

12. The Defence rejects the approach taken by the Prosecution whereby one document, the reliability of which has not been established and which is not in evidence, is used to corroborate another document. In the opinion of the Defence it is an improper procedure when one unreliable document is used to corroborate another, and it is submitted that the alleged links between the documents are tenuous and consist of suppositions by the Prosecution. The Defence maintains that the authenticity and reliability of

the documents sought to be admitted has not been established and therefore objects to their admission.

13. According to the Defence, it is only as a second step in the process of deciding the admissibility of evidence that the Trial Chamber can move on to consider the relevance and probative value of the exhibits. In this respect the Defence contends that the evidence sought to be admitted by the Prosecution is completely irrelevant and should for that reason not be admitted. The Defence argues that the documents do not refer to the Celebici camp and often only give an account of events which are wholly unrelated to the charges in the Indictment and which go beyond the time-frame with which the Indictment is concerned.

14. The Defence concludes that these irrelevant and unreliable documents clearly cannot have any probative value. The Defence, therefore, submits that the exhibits should not be admitted.

C. Findings

15. The question before the Trial Chamber is that of the admissibility of evidence, a matter where the national legal systems of the world have adopted diverging approaches. The procedure of the International Tribunal, with its unique mixture of common and civil law features, does not conform to any one tradition in this respect. In contrast to the common law, where questions of admissibility and exclusion of evidence occupy a prominent place in criminal procedure, the ten provisions of the Rules which regulate all evidentiary matters in the proceedings before the International Tribunal do not contain a detailed set of technical rules relating to this issue.

16. The question of admissibility of evidence before the International Tribunal is governed by Section 3 of the Rules which is entitled "Rules of evidence". The approach adopted by the Rules is clearly one in favour of admissibility as long as the evidence is relevant and is deemed to have probative value (Sub-rule 89(C)), and its probative value is not substantially outweighed by the need to ensure a fair trial (Sub-rule 89(D)). Evidence may further be excluded on the grounds given in Rules 95 and 96. Sub-Rule 89(E) relates to the authentication of evidence out of Court. Finally, Sub-rule 89(B) contains a provision of a residual nature which, in cases not otherwise provided for in the Rules, permits the application of such rules of evidence as will best favour a fair determination of the matter in question and which are consistent with the Statute and general principles of law.

17. Of these provisions, Sub-rule 89(C) is of particular pertinence to the issue before the Trial Chamber. According to the plain text of this provision, the two requirements for the admissibility of evidence are those of relevance and probative value. In relation to the question of the substantive meaning of these requirements, the Trial Chamber notes that evidence which is of probative value within the common law tradition has been defined as "evidence that tends to prove an issue"[1]. As concerns relevance, it is often said that this concept in itself contains an implicit requirement of probative value. Thus it has been remarked by one prominent commentator on the subject that:

> [t]here are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case....The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove[2].

Similarly the Supreme Court of Canada, in *R. v. Cloutier* (2 S.C.R. 709, 731) has endorsed the following

statement by Sir Rupert Cross[3]:

> For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.

As the Trial Chamber noted in its Decision on the Prosecution's Oral Request for the Admission of Exhibit 155 into Evidence and For an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample (19 January 1998) ("Mucic Handwriting Decision") it is, however, obvious that these are concepts that beg of a clear and easy definition *in abstracto*. Their application calls for evaluations based on human experience as well as logic[4], and will depend upon the particular circumstances of the case and the nature of the evidence sought to be admitted.

18. In its decision on the admissibility of hearsay evidence in the case of *Prosecutor v. Dusko Tadic* (Decision on the Defence Motion on Hearsay, 5 August 1996, IT-94-1-T, 5 August 1996,), Official Record at Registry page ("RP") D 11597 - D 11588) ("Hearsay Decision") a majority of Trial Chamber II (Judges McDonald, presiding and Vohrah, separate opinion by Judge Stephen) found that the Rules implicitly require that reliability be a component of admissibility. The Trial Chamber agrees with the reasoning of that decision, and considers reliability to be an inherent and implicit component of each element of admissibility in the sense described below. It is clear that if evidence offered is unreliable, it cannot be either relevant or of probative value. As such, it is inadmissible under Sub-rule 89(C).

19. The Defence contends, however, that a determination of reliability should be seen as a separate, first step in assessing a piece of evidence offered for admission, and argues that it is only if this first hurdle has been passed that the Trial Chamber can proceed to consider the relevance and probative value of the evidence. This view of reliability as a separate requirement, independent of those provided for by Sub-rule 89(C), has been rejected by the Trial Chamber in the Mucic Handwriting Decision. As the Trial Chamber there noted, it is a cardinal rule of construction of legislation that where the words of a provision are clear and unambiguous, the task of interpretation does not arise. So it is with Sub-rule 89 (C) and it is, therefore, neither necessary nor desirable to add to that provision a condition of admissibility which is not expressly prescribed for by that provision.

20. While the importance of the rules on admissibility in common law follows from the effect which the admission of a certain piece of evidence might have on a group of lay jurors, the trials before the International Tribunal are conducted before professional judges, who by virtue of their training and experience are able to consider each piece of evidence which has been admitted and determine its appropriate weight. As noted above, it is an implicit requirement of the Rules that the Trial Chamber give due considerations to indicia of reliability when assessing the relevance and probative value of evidence at the stage of determining its admissibility. However, this terminology may leave some room for misunderstanding, and could possibly be misperceived as demanding that a binding determination be made at this stage as to the genuineness, authorship or credibility of evidence. For this reason the Trial Chamber wishes to make clear that the mere admission of a document into evidence does not in and of itself signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts. Factors such as authenticity and proof of authorship will naturally assume the greatest importance in the Trial Chamber's assessment of the weight to be attached to individual pieces of evidence. The threshold standard for the admission of evidence, however, should not be set excessively high, as often documents are sought to be admitted into evidence, not as ultimate proof of guilt or innocence, but to provide a context and complete the picture presented by the evidence gathered.

21. The Defence argues that the admission of documents whose alleged authors are not appearing as witnesses in the present proceeding amounts to a deprivation of the right of the accused under Article 21 (4)(e) of the Statute of the International Tribunal ("Statute") to have the witnesses brought against them examined, and that as such it is incompatible with the Trial Chamber's obligation under Article 20(1) of the Statute to ensure a fair trial. For this reason, and with reference to Rules 89(D) and 95, it is asserted that the Trial Chamber should refuse admission of such documents into evidence.

22. It is clear from the relevant provisions of the Rules that there is no blanket prohibition on the admission of documents simply on the ground that their purported author has not been called to testify in the proceedings. Instead the conditions for admissibility are those contained in Sub-rule 89(C) which have been discussed above. Furthermore, should the Trial Chamber consider the probative value of any particular exhibit of this character to be substantively outweighed by the need to ensure a fair trial, it may be excluded in accordance with Sub-Rule 89(D). There is, however, no ground for a general finding to the effect that the probative value of documents of this category is so outweighed by any prejudicial effects that they should be considered generally inadmissible. It is a different matter that the probative value of such evidence by necessity will be affected by the fact that it has not received the scrutiny involved in the cross-examination of a witness. This is an important factor to which the Trial Chamber will give due consideration at the stage of assessing the weight to be attached to exhibits of this nature.

23. The Trial Chamber will now proceed to consider the admissibility of the exhibits at issue. In its discussion the Trial Chamber will distinguish between the documents on the one hand and the videotapes on the other. The Trial Chamber does not consider it necessary to treat each exhibit separately, but will rather group them into appropriate categories.

1. Documents

24. In considering the documents which allegedly form part of material seized at the Inda-Bau premises in Vienna, the Trial Chamber will first address the objection of the Defence that the Prosecution has not proven where the documents come from. Secondly, the documents will be grouped into three categories and discussed per group.

25. The Defence alleges that the witness, Moerbauer who was brought before the International Tribunal to authenticate the documents, was unable to retrieve the marks he had put on the documents subsequent to their seizure. The Prosecution, on the other hand, correctly points to the testimony of this witness who, on the basis of the inventory he prepared, was able to confirm that each of the documents now sought to be admitted was seized at the premises of the Inda-Bau company and put in one of the binders admitted into evidence by the Trial Chamber by its decision of 12 September 1997. Moreover, in his testimony Moerbauer was able to identify from which particular binder the individual documents presented to him were taken. There can be, therefore, no doubt that the witness Moerbauer positively identified every document now before the Trial Chamber as being a document found at the Inda-Bau premises.

26. For the admissibility of each individual exhibit it needs to be shown that the offered evidence is both relevant and of probative value. In view of their common origin and context, however, the Trial Chamber considers it appropriate to evaluate the admissibility of the documents grouped into the following three categories. The first group consists of documents which have already been admitted. Secondly, there are a number of documents which are particularly relevant to the case. A third, larger group of documents are suggested to be of more general relevance only.

(a) Documents already admitted.

27. Of the documents seized at Inda-Bau, the Trial Chamber has already admitted the documents numbered as exhibits 137 and 141. These exhibits have been admitted through the testimony of General Pasalic who was able to authenticate the documents on 22 October 1997. The Defence has not presented any additional information which could give rise to the exclusion of these documents at this stage. It is, therefore, unnecessary to consider those documents again. The exhibits 137 and 141 remain admitted into evidence.

28. Exhibit 118 consists of the order for appointment of Zejnil Delalic as commander of Tactical Group 1 and was recognised by the accused Delalic during an interview with the Prosecution on 22 and 23 August 1996 at Scheveningen. A copy of the document was consequently annexed to the record of interview which has been admitted as exhibit 99 by the Trial Chamber's Decision on the Motion for the Exclusion of Evidence by the Accused Zejnil Delalic, dated 25 September 1997 (RP D 5162- D 5180). The exhibit is further identical to the document which was admitted through the testimony of Dr Marie-Janine Calic as exhibit 71 by the Trial Chamber's decision of 24 March 1997. The Defence has not presented any information which could give rise to the exclusion of exhibits 71 and 99, and they remain admitted into evidence. It is not necessary to reconsider the admissibility of this document. On the Prosecutor's motion it is admitted as exhibit 118.

(b) Documents of particular relevance.

29. The second group of documents presented to the Trial Chamber for admission consists of document of particular relevance to the charges of command responsibility against the accused Delalic. The documents numbered as exhibits 117, 130, 131, 132, 144 and 147A all refer in some way to the position of Delalic as commander of Tactical Group 1. It is clear that these documents fulfil the first requirement for admissibility under Sub-rule 89(C) since they are directly relevant to certain of the charges set out in the Indictment.

30. Exhibit 144 is a report allegedly written by Delalic which gives an account of the incidents which occurred in the Konjic area in 1992. The letter produced as exhibit 117 contains very similar information, as does exhibit 130 which is a report allegedly written by Mucic giving a rather detailed account of the incidents which occurred in Konjic in 1992, and the role played by certain persons including Delalic. Similarly exhibit 147 A, which is a registration card for the United Association of War Veterans of the Republic of Bosnia and Herzegovina, contains a description of Delalic as co-ordinator and later commander of Tactical Group 1. Exhibits 131 and 132 are purportedly written by the Deputy Commander of Tactical Group 1, Edib Saric. This account of the events and the position held by Saric corresponds to the information contained in the document previously admitted as exhibit 137. The information provided by these documents is further consistent with that given by the witness General Pasalic, and that contained in other documents now presented to the Trial Chamber.

31. The documents now at issue were all found at the premises of Inda-Bau, a company with which Delalic had some form of association and where he was observed by the Austrian Police a few days before the seizure. The pattern of events described in the documents is, to an extent, consistent between the documents themselves, and generally corresponds to witness statements and documents already admitted into evidence. It is therefore warranted to conclude, at this stage, that sufficient indicia of reliability have been established for the documents presented to the Trial Chamber to be deemed both relevant and *prima facie* of probative value. As such they are admissible. It should again be emphasised that this decision does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted. These are matters to be assessed by the Trial Chamber at a later stage in the course of determining the weight to attached to these exhibits.

(c) Documents of general relevance

32. The third group of documents which the Prosecution seeks to admit are numbered exhibits 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 133, 135, 143, 145, 146 and 147 B - C. The general focus of these exhibits is again to show that Zejnil Delalic was appointed commander of Tactical Group 1, that he regarded himself as such and was so regarded by others. Similarly, Mucic appears as commander of the Celebici prison. Altogether these exhibits tell a story of the activity of Delalic and Mucic in the Konjic area in 1992. As such, they corroborate the exhibits 118, 137, 141, 144 and 147A which have been properly admitted into evidence. They are documents which were found in the Inda-Bau premises, and which were not obtained under circumstances which render reliance upon them objectionable. Specifically relating to exhibit 125, the Trial Chamber notes that the Defence's challenge to the authenticity and reliability of this document must be seen in the light of the fact that an identical document was submitted by Counsel for Delalic on 27 October 1997 and was marked but not tendered as Defence (Delalic) exhibit D82/1.

33. In English law, according to the doctrine of *res gestae*, a fact may be held relevant to a fact in issue on account of its contemporaneity with the matter under investigation. This may be so if it throws light on the matter under investigation by reason of the proximity in time, place or circumstance in such a manner as to constitute part of the event being investigated. Hence, when a statement is made contemporaneously with the occurrence of the act or event being inquired, such a statement is admissible for the purposes of explaining the existence of the act or event. Such evidence is therefore, as an exception to the hearsay rule, admissible as part of the *res gestae*.

34. It is a correct proposition of law that the proper person to justify or explain the circumstances of an act or event is the person who acted. However, it is difficult in certain circumstances to have direct evidence of the act or statement of the actor. Hence, statements are admissible if made roughly contemporaneously with the subject matter under enquiry by the actor related to the issue, and having connections with it. This is, in the opinion of the Trial Chamber, the position of this third category of the exhibits. That the statement was made by the actor or another participant can be determined from circumstantial evidence unequivocally pointing towards the fact. For instance, exhibits 124 and 125 are statements relating to the escape of Delalic from Konjic. Statements which acknowledge the escape, statements that Zejnil Delalic had donated 2000 uniforms to soldiers and had worked without rest for twenty-four hours, can only be referable to Delalic as the maker. Similarly, other exhibits contain spontaneous statements relating to the events in which the accused Delalic was involved. This is the case for instance with his assertion of innocence of accusations of dishonesty or flight from the region. It is not necessary in the situation to prove that the statements are true. It is sufficient that they were made: that in the circumstances it is part of the *res gestae*.

35. The Trial Chamber is of the opinion that the exhibits tendered contain statements made contemporaneously with the issue of the position of Delalic and Mucic in the period of hostilities under enquiry. They shed light on the role played and positions occupied by them. Being part of the entire transaction, they are admissible as evidence in these proceedings.

2. Videotapes

36. In addition to the documents discussed above, the Trial Chamber was also asked to consider the admissibility of five videotapes. Of these five, three tapes had been seized at the premises of the accused Zdravko Mucic in Vienna, and the other two are alleged to have been found at the Inda-Bau premises.

37. The first set of tapes was recovered by the witness Wolfgang Panzer, District Inspector at the Vienna Police Department, who testified before the Trial Chamber and recognised the tapes. The videotapes, exhibits 110 to 112, show different scenes at the Celebici camp. The tapes are relevant since they relate to the accused Mucic and his activities at the Celebici camp. The tapes were found at the apartment of

Mucic, who is easily recognisable on the tapes. The tapes, therefore, demonstrate indicia of reliability and are deemed to have probative value. Exhibits 110, 111 and 112 are admitted into evidence.

38. The two other tapes now presented by the Prosecution for admission are exhibits 115 and 116. The Prosecution submits that both tapes formed part of a larger number of fifty-four tapes recovered from the Inda-Bau premises in Vienna. The Defence points out that in the initial record of the seizure (the "Niederschrift") prepared at the time of the search by the witness Wolfgang Navrat of the Vienna Police Department, the number of tapes seized at Inda-Bau was given as fifty-one. It was only one month after the seizure that the witness Moerbauer, when making an inventory of all the documents and videotapes recovered, counted fifty-four tapes. In the opinion of the Defence this discrepancy makes it impossible to conclude with certainty that the tapes sought to be admitted were in fact found at the premises of Inda-Bau in Vienna.

39. Exhibit 115 is a video of an interview with the witness General Divjak and Delalic, together with another man. The second tape submitted as exhibit 116 consists of two parts of which the Prosecution seeks to admit the first, being a recording of the Zagreb television program "Slikom na Sliku" of May 1992 which contains an interview with Delalic. Both videotapes contain information concerning the general situation in the Konjic area and the activities of the accused Delalic in 1992 and are therefore relevant.

40. The nature of the contents of the two exhibits - that is recordings of recognisable persons conducting interviews - is further such that their probative value is not necessarily excluded by a certain remaining uncertainty concerning the source of these exhibits. The Trial Chamber notes that it has earlier admitted portions of another videotape alleged by the Prosecution to have been seized at Inda-Bau on the same occasion. This is Exhibit 114 which shows an interview with General Pasalic, who testified before the Trial Chamber that he remembered the interview. On this basis portions of the tape were admitted into evidence on 22 October 1997. As concerns the two videotapes now sought to be admitted, the witness General Divjak has testified before the Trial Chamber and recognised the portion of exhibit 115 showing the interview given by himself and Delalic. Although not shown exhibit 116 as such, Delalic has, when asked about it by the Prosecution in the interview conducted in Scheveningen on 23 August 1996, acknowledged that he did participate in such an interview for the television program "Slikom na Sliku" at the relevant time. In this context it should further be noted that parts of this latter tape were shown to the witness Branko Gotovac by Counsel for the accused Esad Landzo on 25 March 1997, upon which it was subsequently admitted as Defence (Landzo) exhibit D5/4. On this occasion Counsel informed the Trial Chamber that this tape, which had been given to the Defence by the Prosecution, was one of the tapes that had been seized from Delalic. An excerpt from the tape has also been used by Counsel for Delalic and has been admitted as Defence exhibit (Delalic) D11 6/1. As the Prosecution correctly has pointed out this would seem to indicate that also members of the Defence are placing some credibility on this exhibit.

41. The Trial Chamber is accordingly satisfied that sufficient indicia of reliability have been shown for the tapes to be deemed both relevant and of probative value. Exhibits 115 and 116 are therefore admissible. The portions of exhibit 114 earlier admitted remains admitted into evidence.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the motion of the Prosecution and

PURSUANT TO RULE 54,

IN ACCORDANCE WITH RULE 89,

HEREBY ADMITS exhibits 110, 111, 112, 115, 116, 117, 118, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 143, 144, 145, 146 and

147A - C into evidence.

Done in both English and French, the English text being authoritative.

Adolphus Godwin Karibi-Whyte

Presiding Judge

Dated this nineteenth day of January 1998

At The Hague,

The Netherlands.

[Seal of the Tribunal]

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1. Henry C. Black, Black's Law Dictionary 1203 (6th ed. 1991).

2. Charles T. McCormick, McCormick on Evidence, pp. **338-339 (4th ed. 1992).**

3. Cross on Evidence, p. 16 (4th ed. 1974).

4. Cf. Halsbury's Laws of England, Volume 17, para 5 **(4th ed. 1976).**