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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:

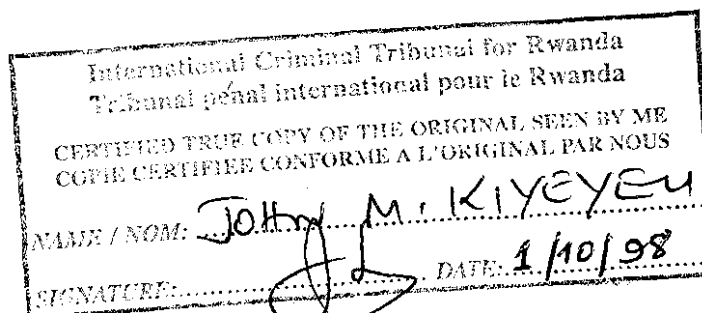
Mr. William Egbe

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.

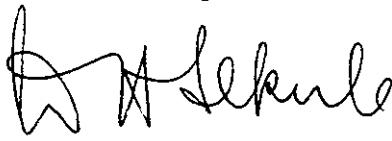
Therefore, considering the concise statement of facts attached to the indictment as well as the party's motions, we hold that the joinder of the two accused in one indictment is proper and is within the scope of rule 48 of the Rules.

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

Ntabakuze/separate trials/16/5/98

Seal of the Tribunal

