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 and 31 December 1994

Case No: ICTR-96-15-A

Date: 3 June 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: **Mr. Agwu U. Okali**

Decision of: **3 June 1999**

JOSEPH KANYABASHI

v.

THE PROSECUTOR

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON THE JURISDICTION OF TRIAL CHAMBER I

Counsel for the Appellant:

Mr. Michel Marchand
Mr. Michel Boyer

The Office of the Prosecutor:

Mr. David Spencer
Mr. Ibukunolu Babajide
Mr. Chile Eboe-Osuji
Mr. Robert Petit

I. INTRODUCTION

1. The Appeals Chamber of 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 ("the International Tribunal") is seized of an appeal lodged by Joseph Kanyabashi ("the Appellant") against an oral decision rendered by Trial Chamber I composed of Judge Kama (Presiding), Judge Sekule and Judge Pillay on 24 September 1998 ("the Decision"). By the Decision, Trial Chamber I denied the Appellant's motion contesting the jurisdiction of that Trial Chamber to hear the Prosecutor's Request for Leave to File an Amended Indictment ("the Leave Request") in respect of the Appellant and the Prosecutor's Motion for Joinder, which proposed to join the Appellant with five other accused ("the Joinder Motion").

2. The Appellant was arrested in Belgium on 28 June 1995. Judge Ostrovsky confirmed the Indictment against him on 15 July 1996. The initial appearance of the Appellant took place before Trial Chamber II, composed of Judge Khan (Presiding), Judge Aspegren and Judge Pillay on 29 November 1996. The Appellant submits in this appeal that his initial appearance before Trial Chamber II marked the commencement of his trial, and consequently, Trial Chamber II has exclusive jurisdiction over his case. The President of the International Tribunal, acting pursuant to Article 13 of the Statute of the International Tribunal ("the Statute"), assigned Judge Kama (Presiding), Judge Pillay and Judge Sekule to Trial Chamber I, which became seized of the Leave Request and the Joinder Motion, both of which were filed on 18 August 1998. Both motions were set down to be heard on 24 September 1998 before Trial Chamber I. At this hearing, the Appellant contested the Trial Chamber's jurisdiction to preside over the hearing of the Leave Request and the Joinder Motion, on the grounds that his initial appearance had taken place before Trial Chamber II and that the re-composition of Trial Chamber I was unlawful.

3. Subsequent to the oral dismissal by Trial Chamber I of the Appellant's objection, the Appellant filed a Notice of Appeal on 30 September 1998, entitled "Appeal Relating to the

Lack of Jurisdiction, Rules 108(B) and 117 of the Rules of Procedure and Evidence". This Notice of Appeal was followed by the "Prosecutor's Response and Challenge to the Admissibility of the Defendant's Notice of Appeal" and the "Prosecutor's Motion for an Expedited Appeal Procedure Pursuant to Articles 14 and 24(2) of the Statute of the International Tribunal and Rules 117 and 108 of the Rules of Procedure and Evidence as Amended", filed on 15 October 1998.

4. Thereafter, the Appeals Chamber directed the Parties to submit written briefs within the time-limits indicated in the "Scheduling Order" of 18 December 1998 ("the Order"), filed on 21 December 1998. The "Prosecutor's Brief Pursuant to the Scheduling Order of the Appeals Chamber" was filed on 30 December 1998. The English translation of the Appellant's Brief was filed on 17 February 1999 and carries the same title as that of his Notice of Appeal ("Appeal Relating to the Lack of Jurisdiction, Rules 108(B) and 117 of the Rules of Procedure and Evidence").

II. The Appeal

A. The Appellant

5. The Appellant requests that the Appeals Chamber provide appropriate relief by: 1) ordering the re-composed Trial Chamber I to stay the hearing of the Leave Request and the Joinder Motion; 2) ruling that the re-composed Trial Chamber I has no jurisdiction to hear the Leave Request and the Joinder Motion; 3) quashing the Decision; 4) ordering the Leave Request to be referred to Trial Chamber II for disposition; and 5) ordering Trial Chamber II to convene a hearing, as soon as possible, in order to quash the Leave Request.

6. The grounds of appeal invoked by the Appellant in his brief can be summarised as follows. The Appellant argues that Trial Chamber I lacks jurisdiction over his case, and consequently the appeal is from an objection based on lack of jurisdiction within the meaning of Sub-rule 72(D). He contends that under Articles 10, 11 and 13 of the Statute, the

composition of a Trial Chamber cannot be altered once the Accused has made his initial appearance before that Trial Chamber, a stage marking the commencement of trial.[1]

7. As a second ground of appeal, the Appellant contends that even if Trial Chamber I had jurisdiction in its original composition, its re-composition breached Article 13 of the Statute, thereby rendering that Trial Chamber incompetent. According to the Appellant's interpretation of the Statute and the Rules, the re-composition of a Trial Chamber is prohibited except in exceptional cases, a situation not in issue in the present circumstances. The Appellant argues that the Trial Chamber was re-composed only for the purpose of hearing the Joinder Motion, a function not directly relevant to hearing the Leave Request, which was in issue. The re-composition of Trial Chamber I solely to serve that purpose indicates that this Trial Chamber, as re-composed, was not independent and impartial.[2]

8. As a third ground of appeal, the Appellant submits that even if the Prosecutor's contention that the trial commences at the time of hearing the first witness were found to be persuasive, the Appellant's right to be tried by independent and impartial judges was violated. According to the Appellant, the violation resulted from a decision by the President of the International Tribunal, Judge Kama, to re-compose Trial Chamber I, then composed of Judge Kama, Judge Pillay and Judge Aspegren. President Kama substituted Judge Sekule for Judge Aspegren, resulting in Trial Chamber I being composed of Judge Kama, Judge Pillay and Judge Sekule.[3]

9. Finally, the Appellant submits that the right to be heard by an independent and impartial Trial Chamber is fundamental. Therefore, in his view, the enjoyment of this right is directly related to the authority and ability to adjudicate, raising the issue of jurisdiction.[4] The Appellant additionally submits that the change in the composition of Trial Chamber I was not justified by exceptional circumstances, as provided for under Rules 15 and 27 of the

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[1] Prosecutor v. Kanyabashi, *Appeal Relating to the Lack of Jurisdiction, Rules 108(B) and 117 of the Rules of Procedure and Evidence*, Case No. ICTR 96-15-I, 14 October 1998, at paras. 27-29 ("*Appellant's 14 October 1998 Brief*"). In The Prosecutor v. Théoneste Bagosora and 28 Others, *Dismissal of Indictment*, Case No. ICTR-98-37-I, 31 March 1998, Judge Khan ruled that the initial appearance of the accused before a Trial Chamber marks the beginning of his trial (at p. 8).

[2] *Appellant's 14 October 1998 Brief*, at paras. 39-46.

[3] Ibid., at paras. 35-38.

[4] Ibid., at para. 58.

Rules, particularly since the Presiding Judge offered no compelling reason justifying that change. The Appellant argues that "the change in the composition of the Chamber was dictated by factors that prove that the re-composed Trial Chamber I was not independent and impartial"[5] and that such a situation gives rise to serious doubt as to the independence and impartiality of that Chamber.[6]

B. The Prosecutor

10. The Prosecutor contends that the lack of independence and impartiality of which the Appellant complains are not matters of jurisdiction and are, therefore, not the proper subject of an interlocutory appeal. [7] In this regard, the Prosecutor argues that neither the Statute nor the Rules make the assignment of a case to a Trial Chamber or the composition of a Trial Chamber a jurisdictional issue.[8] The Prosecutor submits that the assignment of Judges to the Chambers is an administrative matter falling within the authority of the President and is unrelated to the elements of the Tribunal's jurisdiction. Consistent with this line of argument, the Prosecutor also contends that jurisdiction is not affected by the particular Trial Chamber which happens to exercise the Tribunal's authority over a particular case. [9]

11. The Prosecutor is, further, of the view that even if the question submitted for review were one of jurisdiction, there is nevertheless no merit to the appeal, given that trials before the International Tribunal do not commence at the initial appearance of the accused. Moreover, even if trials were deemed to commence at the time of taking the plea, the rule against variation of the bench would not come into effect until the commencement of the presentation of evidence on the merits of the case.[10] Finally, Article 13(2) of the Statute, on which the Appellant relies in his appeal, contains the very provision, which authorises the President to assign and reassign Judges to the Trial Chambers as the administration of justice requires.

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[5] Ibid., at para. 46.
[6] Ibid., at paras. 104-106.
[7] Prosecutor v. Kanyabashi, *Prosecutor's Brief Pursuant to the Scheduling Order of the Appeals Chamber*, , Case No. ICTR 96-15-I, 30 December 1998, at p. 2.
[8] Prosecutor v. Kanyabashi, *Prosecutor's Motion for an Expedited Appeal Procedure Pursuant to Article 14 and 24(2) of the Statute of the ICTR and Rules 117 and 108 of the Rules of Procedure and Evidence as Amended*, Case No. ICTR 96-15-I, 15 October 1998, at p. 4.
[9] Ibid., at para. 32.

III. Applicable Provisions

12. The relevant parts of the applicable Articles of the Statute and Rules of the Rules are set out below.

A. The Statute

Article 10
Organisation of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

a) The Chambers, comprising three Trial Chambers and an Appeals Chamber;
b) The Prosecutor;
c) A Registry.

Article 11
Composition of the Chambers

Chambers shall be composed of fourteen independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

a) Three judges shall serve in each of the Trial Chambers;
b) Five judges shall serve in the Appeals Chamber.

Article 13
Officers and members of the Chambers

1. The Judges of the International Tribunal for Rwanda shall elect a President.

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[10] Ibid., at paras. 52-53.

2. After consultation with the judges of the International Tribunal for Rwanda, the President shall assign the judges to the Trial Chambers. A judge shall serve only in the Chamber to which he or she was assigned.

3. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of that Trial Chamber as a whole.

Article 14
Rules of procedure and evidence

The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for Rwanda with such changes as they deem necessary.

Article 19
Commencement and Conduct of Trial Proceedings

1. [...]

2. [...]

3. The Trial Chamber shall read the Indictment, satisfy itself that the rights of the accsued are respected, confirm that the accused understands the Indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set a date for trial.

4. [...]

Article 24
Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

   a) An error on a question of law invalidating the decision, or
   b) 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 Chambers.

B. The Rules

Rule 15
Disqualification of Judges

(A) A Judge may not sit at a trial or appeal in any case, in which he has a personal interest or concerning which he has or has had any association, which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place.

(B) Any party may apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber from a trial or appeal upon the above grounds. After the Presiding Judge has conferred with the Judge in question, the Bureau if necessary, shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

(C) The Judge of a Trial Chamber who reviews an indictment against an accused, pursuant to Article 18 of the Statute and Rules 47 and 61, shall not sit as a member of the Trial Chamber for the trial of that accused.

(D) [...]

(E) If a Judge is, for any reason, unable to continue sitting in a part-heard case, the Presiding Judge may, if that inability seems likely to be of short duration, adjourn the proceedings, otherwise he shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point.

However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused.

(F) In case of illness or an unfilled vacancy or in any other exceptional circumstances, the President may authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more members.

Rule 19
Functions of the President

The President shall preside at all plenary meetings of the Tribunal, co-ordinate the work of the Chambers and supervise the activities of the Registry as well as the exercise of all the other functions conferred on him by the Statute and the Rules.

Rule 27
Rotation of the Judges

(A) Judges shall rotate on a regular basis between the Trial Chambers. Rotation shall take into account the efficient disposal of cases.

(B) The Judges shall take their places in their assigned Chamber as soon as the President thinks it convenient, having regard to the disposal of pending cases.

(C) The President may at any time temporarily assign a member of one Trial Chamber to another Trial Chamber.

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 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 that 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) [...]

(C) [...]

Rule 62
Initial Appearance of Accused

Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber without delay, and shall be formally charged. The Trial Chamber shall:

(i) [...]

(ii) [...]

(iii) [...]

(iv) in the case of a plea of not guilty, instruct the Registrar to set a date for trial;

(v) [...]

(vi) [...]

Rule 72
Preliminary Motions

(A) Preliminary motions by either party shall be brought within sixty days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(I), and in any case before the hearing on the merits.

(B) Preliminary motions by the accused are:

i) objections based on lack of jurisdiction
ii) objections based on defects in the form of the indictment;
iii) applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82(B)
iv) objections based on the denial of request for assignment of counsel.

The Trial Chamber shall dispose of preliminary motions *in limine litis*.

(C) Decisions on preliminary motions are without interlocutory appeal save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as a matter of right.

(D) Notice of appeal envisaged in Sub-rule (D) shall be filed within seven days from the impugned decision.

(E) Failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.

Rule 117
Expedited Appeals Procedure

(A) An appeal under Rule 108(B) shall be heard expeditiously on the basis of the original record of the Trial Chamber and without the necessity of any brief.

(B) All delays and other procedural requirements shall be fixed by an order of the President issued on an application by one of the parties, or *proprio motu* should no such application have been made within fifteen days after the filing of the notice of appeal.

(C) Rules 109 to 114 shall not apply to such appeals.

IV. DISCUSSION

13. In answering the main questions which have been raised by the present appeal, namely, whether a right of appeal lies from the Decision, and if so, whether Trial Chamber II was competent to hear the Leave Request and the Joinder Motion, the members of the Appeals Chamber differ on a number of issues both as to reasoning and as to result. Consequently, the views of each member of the Appeals Chamber on the particular issues are set out in detail in Opinions, which are appended to this decision.

14. The Appeals Chamber, for the reasons set out in the Joint and Separate Opinion of Judge McDonald and Judge Vohrah, and, in part, the Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia and, in part, the Dissenting Opinion of Judge Shahabuddeen, finds that the appeal is admissible since a right of appeal lies from the Decision pursuant to Sub-rule 72(D) of the Rules.

15. The Appeals Chamber, for the reasons set out in the Joint and Separate Opinion of Judge McDonald and Judge Vohrah and the Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia, finds that based on a textual interpretation of Sub-rule 50(A), Trial Chamber II is the only Trial Chamber competent to adjudicate the Leave Request. Judge Shahabuddeen reserves his views, considering that on this point the appeal is not admissible.

16. The Appeals Chamber, for the reasons set out in the Joint and Separate Opinion of Judge McDonald and Judge Vohrah, the Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia and the Dissenting Opinion of Judge Shahabuddeen finds that Trial Chamber I is competent to adjudicate the Joinder Motion.

17. Accordingly, the Appeals Chamber by majority finds that the appeal should be allowed in respect of the Leave Request, and, unanimously, finds that the appeal should be dismissed in respect of the Joinder Motion.

V. DISPOSITION

THE APPEALS CHAMBER, by a majority of four to one, with Judge Shahabuddeen dissenting, **ALLOWS** the Appeal relating to the Leave Request and **REMITS** it to Trial Chamber II. **THE APPEALS CHAMBER UNANIMOUSLY DISMISSES** the appeal relating to the Joinder Motion.

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

Gabrielle Kirk McDonald
Presiding Judge

Judge McDonald and Judge Vohrah append a Joint Separate Opinion.

Judge Wang and Judge Nieto-Navia append a Joint Separate Opinion.

Judge Shahabuddeen appends a Dissenting Opinion.

Dated this third day of June 1999
At Arusha,
Tanzania.

[Seal of the Tribunal]

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 and 31 December 1994

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JOSEPH KANYABASHI

v.

THE PROSECUTOR

JOINT AND SEPARATE OPINION OF JUDGE McDONALD AND JUDGE VOHRAH

Counsel for the Appellant:
Mr. Michel Marchand
Mr. Michel Boyer

The Office of the Prosecutor:
Mr. David Spencer
Mr. Ibukunolu Babajide
Mr. Chile Eboe-Osuji
Mr. Robert Petit

I. INTRODUCTION

1. The issues for consideration in this appeal have been set forth in the Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I.

II. DISCUSSION

A. Is the appeal from a dismissal of an objection based on lack of jurisdiction within the meaning of Sub-rule 72(D)

2. In the Scheduling Order of 18 December 1998[1], the Appeals Chamber directed the parties to submit briefs on the following issues: (a) Whether the appeal is from dismissal of an objection based on lack of jurisdiction within the meaning of Sub-rule 72(D); and (b) if it is: (i) whether the Trial Chamber is competent to hear the Prosecutor's applications; and (ii) if so, whether the Trial Chamber was lawfully composed.

3. Sub-rule 72(D) provides that preliminary motions are without interlocutory appeal except in the case of dismissal of an objection based on lack of jurisdiction. In the appeal the jurisdiction of Trial Chamber I to hear the hearing of the two Prosecution motions is challenged. Having had his initial appearance before Trial Chamber II, the Appellant objects to the competence of any Trial Chamber other than Trial Chamber II to consider the Leave Request and the Joinder Motion on the grounds that the composition of the Trial Chambers cannot be altered. Also, it is asserted that Sub-rule 50(A) requires the submission of the Leave Request to Trial Chamber II, which conducted his initial appearance. Further, he claims that Trial Chamber I lacks jurisdiction because President Kama was not acting independently and impartially in re-composing Trial Chamber I. The challenge to the competence of Trial Chamber I to entertain the Leave Request and the Joinder Motion raises the issue as to whether the dismissal by Trial Chamber I of the Appellant's objection to the exercise of its jurisdiction is appealable pursuant to Sub-rule 72(D), and whether Trial Chamber I, as re-composed, has jurisdiction to adjudicate the Leave Request and the Joinder Motion.

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[1] Prosecutor v. Kanyabashi, *Scheduling Order*, Case No. ICTR 96-15-I, App. Ch., 18 December 1998.

4. The jurisdiction of a tribunal concerns its right and power to hear and determine a judicial proceeding. Articles 1 through 7 of the Statute of the International Tribunal establish the competence of the International Tribunal as a whole, with respect to subject matter, personal, territorial and temporal (*ratione materiae, ratione personae, ratione loci* and *ratione temporis*) jurisdiction. However, the jurisdiction of the Tribunal is exercised by the Trial Chambers. Consequently, if the competence and the legality of the composition of the Trial Chamber are challenged, it raises the issue of the power of that Trial Chamber to exercise the jurisdiction that the Tribunal possesses.

5. Since we hold that the appeal relates to a dismissal of an objection based on lack of jurisdiction within the meaning of Sub-rule 72(D), the next issue to be addressed is whether Trial Chamber I was lawfully composed and thus competent to exercise jurisdiction.

B. Whether Trial Chamber I was unlawfully composed, and was, therefore, not competent to exercise jurisdiction

6. The first issue is whether Trial Chamber I as re-composed is the proper Trial Chamber to decide the Leave Request and the Joinder Motion. A determination of this issue requires an evaluation of the procedural background of the Leave Request and the Joinder Motion.

7. Relying on evidence freshly discovered in July 1997, pointing to a conspiracy involving the Appellant and other accused, the Prosecutor submitted on 6 March 1998, an Indictment before Judge Khan for review. In the Indictment, the Prosecutor charged twenty-nine individuals with offences substantially related to the same facts. On 31 March 1998, Judge Khan conducted *ex parte* proceedings under Rule 47 and divided the twenty-nine accused into three groups. The first group, consisting of eleven persons including the Appellant, had already been previously indicted and entered pleas at their initial appearances. The second group of five persons had been previously indicted but remained at liberty. The third group consisted of thirteen persons who had not been indicted and who were at liberty. In the Amended Indictment, the Prosecutor had added a new charge of

conspiracy against persons in the first and second groups. Judge Khan rejected the Prosecutor's submission that the Indictment should be reviewed under the *ex parte* provision of Rule 47 of the Rules. Judge Khan held that the Prosecutor must first seek leave to amend the Indictment under Rule 50 of the Rules with respect to the persons in the first and second groups, or to withdraw these persons from the Indictment and resubmit the Indictment, or to follow the procedure in Rule 72 governing preliminary motions. Judge Khan, the confirming Judge, declined to exercise jurisdiction over all three groups of persons, based on a consideration for the rights of the accused, and consequently he dismissed the Indictment.[2]

8. On 6 April 1998, the Prosecutor appealed against Judge Khan's Decision pursuant to Rule 108 of the Rules setting forth various grounds of appeal. On 8 June 1998, this Appeals Chamber rejected the Prosecutor's Application for Leave to Appeal Judge Khan's Decision[3], finding that a right of appeal did not lie from Judge Khan's Decision under the Statute and the Rules.

9. Consequently, the Prosecutor proceeded on four separate original Indictments against the six named accused: one Indictment against Pauline Nyramasuhuko and Arsène Shalom Ntahobali; another against Sylvain Nsabimana and Alphonse Nteziryayo; another against Elie Ndajambaje; and one against the Appellant. Pursuant to Rule 50 of the Rules, the Prosecutor sought Leave to Amend the respective Indictments for the purposes of (i) adding new charges against the Appellant; (ii) expanding certain existing counts; (iii) adding relevant counts to the allegations; and (iv) bringing the current Indictment into conformity with the jurisprudence of the Tribunal and current trial practices.[4] Through another motion, the Prosecutor also sought to join the six accused in the same case.[5] The discussion

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[2] Prosecutor v. Théoneste Bagosora and 28 Others, *Dismissal of Indictment* , Case No. ICTR-98-37-I, 31 March 1998, at p. 12. See also Prosecutor v. Théoneste Bagosora and 28 Others, *Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Theoneste Bagosora and 28 Others*, Case No. ICTR-98-37-A, 8 June 1998.

[3] Prosecutor v. Théoneste Bagosora and 28 Others, *Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Theoneste Bagosora and 28 Others*, Case No. ICTR-98-37-A, 8 June 1998.

[4] Prosecutor v. Kanyabashi, *Prosecutor's Request for Leave to File an Amended Indictment*, Case No. ICTR-96-15-T, 17 August 1998.

[5] Prosecutor v. Nyramasuhuko and Ntahobali, *Prosecutor's Motion for Joinder of Accused,* Case No. ICTR-97-21-I, 17 August 1998; Prosecutor v. Nsabimana and Nteziryayo, *Prosecutor's Motion for Joinder of Accused,* Case No. ICTR-97-29A and B-I, 17 August 1998; Prosecutor v. Kanyabashi, *Prosecutor's Motion*

concerning which Trial Chamber is to consider the Leave Request and, if granted, which Trial Chamber is to rule on the Joinder Motion is set forth below.

10. The Appellant contends that the composition of the Trial Chambers is static and that once a Judge is assigned to a Trial Chamber he/she may not be re-assigned absent exceptional circumstances.[6] The Appellant asserts Trial Chambers may be re-composed only in accordance with Rule 15 and Rule 27, and that in the instant case, the reasons set forth by Trial Chamber I in dismissing the Appellant's objection, failed to meet the requirements established by those Rules.

11. A close reading of the Rules does not support the Appellant's assertions. Pursuant to Rule 19, the President is directed to co-ordinate the work of the Chambers. Sub-rule 27(A) provides for the rotation of Judges while taking into account the efficient disposal of cases. Sub-rule 27(B) allows the President to assign Judges to particular Trial Chambers, having regard to the disposal of pending cases, while Sub-rule 27(C) allows for the temporary assignment of a Judge from one Trial Chamber to another Trial Chamber. Sub-rule 15(E) allows the President to assign another Judge to a case in the event one of the originally assigned Judges is unable, for any reason, to continue sitting in a part-heard case. In announcing the Trial Chamber's Decision on the Appellant's Motion, Judge Kama made reference to these Rules:

> [I]n application of Rule 27, the A, B and C and Rule 15(E), the President has the power at any point in time when the needs of administration of justice requires (sic) to assign provisionally a Judge to a given Chamber[7].

12. These Rules fully comport with the Statute. The Appellant raises several arguments based on the Statute. First, he relies on Article 10, Article 19(1) and Article 22 to advance his argument for judicial independence.[8] Second, the Appellant relies on Article 11 and

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for Joinder of Accused, Case No. ICTR 96-15-T, 17 August 1998; Prosecutor v. Ndajambaye, *Prosecutor's Motion for Joinder of Accused* Case No. ICTR-96-8-T, 17 August 1998.

[6] See Prosecutor v. Kanyabashi, Case No. ICTR-96-15-I, *Appellant's Brief: Appeal Relating to an Objection Based on Lack of Jurisdiction Rules 108(B) and 117 of the Rules of Procedure and Evidence*, (hereinafter, *Appellant's 18 December 1998 Brief*), 18 December 1998, at paras. 104-106.

[7] Prosecutor v. Kanyabashi, Trial transcript, 24 September 1998, at p. 29.

[8] Ibid., at paras. 91-94.

Article 12, in asserting that the Statute requires judicial independence not only from external influences, but also judicial independence among the Trial Chambers.[9] Third, the Appellant asserts that Article 13 of the Statute, which requires a Judge to sit only on the Trial Chamber to which he or she was assigned, prohibits re-composition of the Trial Chambers.[10] Fourth, he asserts that Article 13 indicates that the Security Council, in ratifying the Statute, intended to "make the Chamber function in a stable manner while providing for flexibility whenever necessary for the proper administration of justice"[11].

13. The Statute, as the International Tribunal's constitutive document, sets forth the fundamental structure of the institution and addresses the important administrative criteria for the Tribunal's proper functioning. Articles 10, 11 and 13 explain the basic organisation of the Tribunal, the composition of the Chambers, and the means by which officers and members of the Chambers are selected. Article 10 provides that the International Tribunal shall be comprised of three organs, including the Trial and Appeals Chambers. Article 11(A) provides that the Trial Chambers shall consist of three Judges. The plain meaning of this provision is that the Trial Chambers are only competent if there are three Judges assigned to them. Article 13(2) directs the President to assign Judges to the Trial Chambers and proscribes a Judge from serving on a Chamber to which he or she was not assigned.

14. Article 14 of the Statute explicitly directed the Judges to draft the Rules. The Rules were crafted to flesh out and provide substance to the Statute. Rule 15 governs the disqualification of Judges and provides in Sub-rule 15(A) that a Judge may withdraw from a case in which he/she has or has had any association which might affect his/her impartiality and that in such circumstances, the President shall assign another Judge to sit in his/her place. Such a situation would result in a re-composition of that Trial Chamber. Sub-rule 15(B) allows for disqualification of a Judge, thereby enabling the re-composition of that Trial Chamber.[12] Sub-rule 15(E) enables the President to change the composition of the Trial Chamber by assigning another Judge to the case and to order either a rehearing or the

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[9] *Appellant's 18 December 1998 Brief* at paras.102-104.
[10] Ibid., at para. 98 and Prosecutor v. Kanyabashi, *Appeal Relating to the Lack of Jurisdiction, Rules 108(B) and 117 of the Rules of Procedure and Evidence*, Case No. ICTR 96-15-I, 14 October 1998, (*"Appellant's 14 October 1998 Brief"*), at para. 40.
[11] *Appellant's 14 October 1998* Brief at para. 40.
[12] See Prosecutor v. Kordic and Cerkez, *Decision on the Application for the Disqualification of Judges Jorda and Riad*, Case No. IT -95-14/2-PT, 8 October 1998.

continuation of the proceedings where a Judge is unable to continue sitting in a part-heard case. [13]

15. The President of the International Tribunal is charged with administrative tasks conferred upon him/her by the Statute and the Rules. In interpreting the Statute, and the Rules which implement the Statute, Trial Chambers of both the International Tribunal and the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY"), as well as the Appeals Chamber have consistently resorted to the Vienna Convention of the Law of Treaties ("the Vienna Convention")[14], for the interpretation of the Statute.[15] Although the Statute is not a treaty, it is a *sui generis* international legal instrument resembling a treaty. Adopted by the Security Council, an organ to which Member States of the United Nations have vested legal responsibility, the Statute shares with treaties fundamental similarities. Because the Vienna Convention codifies logical and practical norms that are consistent with domestic law, it is applicable under customary international law to international instruments which are not treaties. Thus, recourse by analogy is appropriate to Article 31(1) of the Vienna Convention in interpreting the provisions of the Statute. 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."

16. The overarching object and purpose of the Statute is ensuring a fair and expeditious trial for the accused. The Trial Chambers are re-composed to ensure the attainment of this object and purpose. Thus, the contextual interpretation of the provisions of the Statute, and by extension, of the Rules implementing the Statute, should meet that object and purpose. For example, as noted above, Sub-rule 15(E) authorises the President to assign a new Judge to a Chamber to replace one who is disqualified or was otherwise unable to sit in a part-heard case. The Statute, in setting forth the organisational structure of the Chambers, is

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[13] However, after the opening statement or the beginning of the presentation of the evidence, a situation not applicable to this case, the proceedings can be ordered to continue only with the consent of the accused.

[14] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

[15] Other cases where Trial Chambers of the International Tribunal or the ICTY have had recourse to Article 31 in interpreting the provisions of the Statutes include: Prosecutor v. Théoneste Bagosora and 28 Others, *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*, op. cit., note 1 at pp. 12-13; Prosecutor v. Tadi}, *Decision on the Prosecutor's Motion, Protective Measures for Victims and Witnesses*, Case No. IT-94-I-T, 10 August 1995, at p. 10; Prosecutor v. Erdemovic, *Judgement*, Case No. IT-96-22-A, 7 October 1997, at p. 3; and Prosecutor v. Delalic and Others, Case No. IT-96-21-T, 16 November 1998, at pp. 396-397.

silent on this point. Rather, the Statute leaves to the Judges the responsibility for drafting rules for the conduct of the proceedings.[16] The Rules that allow for a re-composition meet this purpose. To interpret silence as a prohibition would frustrate this object and purpose of the Statute.

17. Thus, the assignment of a Judge to a Trial Chamber is not "frozen in time". Altered circumstances such as the resignation, serious illness, death, or disqualification of a Judge, or the need for rotation to best co-ordinate the work of the Chambers may demand the re-composition of a Trial Chamber. An interpretation of the Statute that would find a requirement that Judges serve forever in the Chamber to which they are assigned, despite the disqualification, illness, death or resignation of a Judge of that Chamber, would lead to an absurd result. Further, it would defeat the object and purpose of the Statute to ensure that an accused has a fair and expeditious trial.

18. Acting pursuant to his mandate under Article 13 of the Statute, President Kama assigned Judge Pillay, Judge Sekule and himself to Trial Chamber I to hear the Leave Request and the Joinder Motion. The composition of this Trial Chamber reveals President Kama's administrative foresight since the Indictments against the six accused who are the object of the Joinder Motion had been confirmed by the following Judges: Khan, Aspegren and Ostrovsky. Sub-rule 15(C) disqualifies a Judge who reviews an indictment against an accused to sit as a member of the Trial Chamber for the trial of the same accused. A Trial Chamber composed of Judges who would not be subject to disqualification should the Leave Request or the Joinder Motion be granted could *only* include Judge Kama, Judge Sekule and Judge Pillay, as the International Tribunal at the time was composed of only six Judges. Contrary to the Appellant's contention, we find that this constitutes an exceptional circumstance.

19. The Statute and the Rules confer upon the President the authority to replace Judges and to re-compose Trial Chambers, in exceptional circumstances, circumstances including the disqualification[17], resignation, serious injury or death of a Judge, in order to ensure the attainment of the object and purpose of the Statute and to avoid any absurd result. The

[16] See Article 14.

[17] Sub-rule 15(C), for example, clearly states that a Judge who reviewed an Indictment against an accused pursuant to Article 18 and Rules 47 and 61, is disqualified to sit as a member of the Trial Chamber for the trial of that accused. It was precisely for this reason that President Kama re-composed the Trial Chamber.

alternative would be the discontinuance of trials and the violation of the accused's fundamental rights. The composition and re-composition of Trial Chambers by the President is a judicial administrative function, pursuant to the Statute and Rules, formulated for the efficient judicial administrative operation of the Tribunal.

C. Whether the Trial Chamber that conducts the initial appearance has exclusive jurisdiction over the case

1. Whether the Initial Appearance Constitutes the Commencement of Trial

20. The Appellant also asserts that once an accused has made an initial appearance before a Trial Chamber that Chamber has exclusive jurisdiction over his case, on the ground that his initial appearance marks the beginning of trial.[18] In paragraph 29 of the Appellant's 17 February 1999 Brief, Appellant asserts:

> [A] suspect acquires the status of accused when he enters his plea during his initial appearance before the Trial Chamber. It is only then that he becomes an accused and his case begins in earnest.

We find that in the present case, the Appellant's trial had *not* commenced for the purpose of concluding that Trial Chamber II has exclusive jurisdiction over his case. The following discussion will suffice to show that the Appellant's assertion in this regard is unfounded.

21. In making this assertion, the Appellant relies on the Decision in Prosecutor v. Bagosora and 28 Others[19]. In that case, Judge Khan concluded that a trial commences at the time of the initial appearance, when the accused enters pleas on the charges involving the

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[18] *Appellant's 17 February 1999 Brief* at paras. 24-29; para. 43.

[19] Prosecutor v. Théoneste Bagosora and 28 Others, *Dismissal of Indictment* , Case No. ICTR-98-37-I, 31 March 1998 at p. 9. See also Prosecutor v. Théoneste Bagosora and 28 Others, *Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Theoneste Bagosora and 28 Others*, Case No. ICTR-98-37-A, 8 June 1998.

crimes for which he has been brought before the Tribunal.[20] Article 19 of the Statute of the International Tribunal directs the Trial Chamber to "set a date for trial" after the accused enters a plea of not guilty. Sub-rule 62(iv), governing the Initial Appearance of the Accused, provides for the same result. Clearly, an event could not have occurred if the Statute and Rules require that a date be set for the commencement of that event.

22. Further, the provisions of Sub-rule 15(E) clearly provide that a case is considered to be "part-heard" after the opening statement or the presentation of the evidence, neither of which has occurred in this case[21]. Moreover, although Sub-rule 15(E) enables the President to change the composition of the Trial Chamber even in the event of a part-heard case, after the opening statement or the commencement of the presentation of evidence, the proceedings can continue only with the consent of the accused.

23. We also note that Sub-rule 73*bis*(A), which was adopted after the Bagosora Decision, provides that the Trial Chamber shall hold a Pre-Trial Conference prior to the commencement of the trial. No Pre-Trial Conference has yet been held in the Appellant's case.

24. Read together, these provisions lead to the inescapable conclusion that the initial appearance of the Appellant does *not* mark the commencement of his trial. Therefore, Trial Chamber II does not have exclusive jurisdiction over his case. We turn now to address the specific disposition of the Leave Request and the Joinder Motion.

2. Whether the Leave Request is Properly Before Trial Chamber II

25. The Prosecutor submitted the Leave Request to Trial Chamber II, composed of Judge Sekule, Judge Khan and Judge Pillay. The Appellant's initial appearance had previously been held before Trial Chamber II although, at that time, Trial Chamber II was composed of Judge Khan, Judge Aspegren and Judge Pillay. Thus, the composition of Trial Chamber II had been

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[20] *Appellant's 17 February 1999 Brief* at para. 25, citing The Prosecutor v. Théoneste Bagosora and 28 Others, op. cit., p. 9.

[21] Sub-rule 15(E) governs the Disqualification of Judges involving cases which are "part heard." Under the first sentence of that Sub-rule, the President may assign another Judge to replace a Judge who is unable, for any reason, to continue sitting in a part heard case. Such an assignment is permissible even in the absence of the accused's consent. Pursuant to the second sentence of that Sub-rule, however, after the opening statement or the

itself altered, a fact which the Appellant does not challenge. However, the Leave Request was set for hearing before Trial Chamber I which was seized of the Joinder Motion[22]. The Appellant asserted before the Trial Chamber that the Leave Request should have been heard by Trial Chamber II. In making this assertiion, Counsel for the Appellant relied on Article 13(2) of the Statute and the Bagosora Decision:

> [I]n light of the statute and also in light of the previous decisions that I have just referred to, Kanyabashi argues that the motion for amendment must be heard by Chamber II which is the Chamber before which the initial appearance of the accused was made[23]

26. Rule 50 contains three stages during which the Prosecutor can amend an Indictment[24]. Only one of these three stages is relevant to the disposition of this appeal. The relevant portion of Sub-rule 50(A), provides that, "At or after such initial appearance, an amendment of an indictment may only be made by leave granted by *that* Trial Chamber pursuant to Rule 73." (Emphasis added.)

27. In referring the Leave Request and the Joinder Motion to the same Trial Chamber, President Kama relied on three grounds: 1) the need for flexibility; 2) the need to avoid

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beginning of the presentation of evidence, the proceedings can be continued only with the consent of the accused.

[22] The Prosecutor addressed the Joinder Motion to neither a numbered Trial Chamber nor to specific Judges.

[23] Prosecutor v. Kanyabashi, Case No. ICTR-96-15-I, Trial transcript, 24 September 1998, at p.10.

[24] With respect to the procedures for amending Indictments, there are slight differences between the Statutes of the International Tribunal and the ICTY. Sub-rule 50(A) of the ICTY states:

> Rule 50
> Amendment of Indictment
>
> (A) The Prosecutor may amend an Indictment:
>
> (i) at any time before its confirmation, without leave;
> (ii) thereafter, and until the commencement of the presentation of evidence in terms of Rule 85, with leave of the Judge who confirmed the Indictment, *or a Judge assigned by the President*; or
> (iii) after the commencement of the presentation of evidence, with leave of the Trial Chamber hearing the case, after having heard the parties.

(Emphasis added). Notwithstanding the different language used in the two rules, as reflected in the emphasized phrase, we find that an "exceptional circumstance" as set forth in ICTR Sub-rule 50(A) includes circumstances present in this case. The language "hearing the case" contained in ICTY Sub-rule 50(A)(iii) clearly indicates that the trial has begun.

assigning the Leave Request and the Joinder Motion to a Chamber where one or more Judges would be disqualified; and 3) the need to resolve both issues simultaneously, due to the linkage between the Leave Request and the Joinder Motion. Regarding the need for flexibility, Judge Kama stated:

> Article 13 of the Statute does not disallow flexibility in the composition of the Chamber. ...[A]s an illustration of this flexibility, the Chamber had as evidence what was referred to as Chamber II... It's not the normal composition of Chamber II because the two Judges had been assigned to Chamber I, and this is prove [sic] of the flexibility that the Tribunal and the Chamber is exercising[25].

With respect to avoiding referral to a Chamber where one or more Judges would be disqualified, Judge Kama said:

> ...[I]t cannot be otherwise when we know that the present Tribunal is composed of only six Judges making up two Trial Chambers and that for one reason or another one or other Judge may be unable to be present. ...[W]e belief [sic] that for the proper administration of justice and also for a fair trial, it was not responsible that Judges who have been disqualified be able to sit in a Chamber which are considering amendments for, amendments of Indictments and Motions for Joinder and it is for this reason that the Chamber was composed as you know, taking into account that the other Judges had been pre-disqualified for having confirmed an Indictment[26].

With respect to the issue of the linkage between the Leave Request and the Joinder Motion, Judge Kama indicated that:

> ...[T]he amendments which should be considered today, this consideration should be in direct relation with the Joinder Motion presented by the Prosecutor. The Motions are for the amendment of Indictments and for Joinder of accused[27].

28. Relying on Article 31(1) of the Vienna Convention[28], we find that a need for flexibility alone cannot justify departure from the plain language of the Rules. We also find that no

[25] Prosecutor v. Kanyabashi, Case No. ICTR-96-15-I, Trial transcript, 24 September 1998, at pp. 28-29.
[26] Ibid., at pp. 28-30
[27] Ibid., at pp. 29-30.

recourse to supplementary means of interpretation is necessary since this approach is resorted to only when the language of the provision is ambiguous[29]. The language of Sub-rule 50(A) is plain and unambiguous. Here, it is clear in the ordinary meaning of the language of Sub-rule 50(A) that an indictment can be amended after initial appearance of the accused *only by the Trial Chamber before which the initial appearance took place*, in this case Trial Chamber II. Accordingly, the Leave Request must be returned to Trial Chamber II, as the only competent Trial Chamber to adjudicate this matter.

29. In fact, there was no need for flexibility except with respect to the Joinder Motion. As will be discussed in the next section, this motion does not run afoul of any explicit Rule that directs its presentation to a certain Chamber and, consequently different considerations obtain.

30. With respect to the issue of the potential disqualification of Judges as it relates to the Leave Request, we find that President Kama's concerns in this regard were not justified. There was no realistic concern for potential disqualification of Judges with respect to the Leave Request.

31. Regarding the issue of the linkage between the Leave Request and the Joinder Motion, this became so only *after* President Kama re-composed Trial Chamber I and directed that both motions be heard by that Trial Chamber. The Leave Request could and should have properly been presented to, and decided by, the Judges to whom the Prosecutor addressed the Leave Request since those Judges did not face the disqualification problem.

2. Whether the Joinder Motion is Properly Before Trial Chamber I

32. Rule 48 of the Rules provides for persons accused of the same or different crimes committed in the course of the same transaction to be jointly charged and tried. Rule 49 of the Rules of the ICTY is identical to Rule 48 of the Rules of the International Tribunal and they both appear to have been drawn from the "same transaction" test found in the federal

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[28] See discussion, supra., at para. 15.

[29] See Vienna Convention, Articles 31-32. See also Prosecutor v. Erdemovic, *Judgement* and *Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, A. Ch., 7 October 1997, at para. 3.

system of the United States of America. The "same transaction test" provides for offences to be joined if they are "based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."[30] 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. The jurisprudence of the ICTY clearly permits joint trials and points to the existence of specific elements to justify joinder and joint trials[31]. However, the requirements necessary to be fulfilled before joinder can be granted are not in issue since we are concerned here only with determining the particular Trial Chamber competent to hear the Joinder Motion.

33. This is not to suggest that the Leave Request and the Joinder Motion should be heard together. We find that there is no justification substantiated by the Statute and the Rules which support the view that the two motions must be heard in the same proceeding before the same Trial Chamber. In any event, there is no Rule that requires the Leave Request and the Joinder Motion to be considered in "direct relation" to each other. For the reasons set out above, we hold that the Leave Request must be returned to Trial Chamber II for determination as to whether it should be granted and that the Joinder Motion may remain with Trial Chamber I for determination on its merits.

34. In the result,[32], we hold that Trial Chamber I is not unlawfully composed and that it is competent to exercise jurisdiction over the Joinder Motion. However, where, as in this case, the challenge from the Appellant is based on allegations that the re-composition gives rise to a lack of independence and impartiality resulting in the violation of the Appellant's fundamental rights to a fair trial, such a concern, notwithstanding our finding that the Trial Chamber was properly composed, warrants examination.

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[30] Criminal Procedure, Second ed., Wayne R. LaFave and Jerold H. Israel, at p. 761, citing Fed.R.Crim.P 8(a). See also Prosecutor v. Kovacevic, *Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998 and Separate Opinion of Judge Shahabuddeen*, Case No. IT-97-24-AR73, 2 July 1998, at p. 3.
[31] See, for example, Prosecutor v. Kovacevic, *Decision on Motion for Joinder of Accused and Concurrent Presentation of Evidence*, Case No. IT-97-24-PT, 14 May 1998.
[32] See discussion at pp. 3-8, supra.

D. Does Trial Chamber I as re-composed cause the appearance of a lack of independence and impartiality violating a fundamental right of the Appellant

1. The principle of independence and impartiality of a Tribunal

35. The concepts of independence and impartiality are distinct from one another. Independence connotes freedom from external pressures and interference. Impartiality is characterised by objectivity in balancing the legitimate interests at play. Nevertheless, the two concepts are linked insofar as they both give rise to and nurture trust and confidence through an absence of bias, prejudice and partisanship.

36. Article 20 of the Statute of the International Tribunal and Article 21 of the Statute of the ICTY are in large measure identical to Article 14 of the International Covenant on Civil and Political Rights. Subparagraph (1) of that provision guarantees to an accused the right to an independent and impartial tribunal. However, neither of the two Statutes of the Tribunals specifically refers to the right of a trial by an independent and impartial tribunal. The absence of such reference is not of substantial consequence, since the principles of independence and impartiality are inherent in the notions of fairness and due process duly specified in both Statutes.

37. Thus, the right of an accused to a trial by an independent and impartial tribunal is of such fundamental value that the claim by the Appellant of a lack of independence and impartiality on the part of Trial Chamber I requires careful analysis.

2. The Appellant's arguments that the re-composed Trial Chamber I lacked independence and impartiality

38. A lack of independence or impartiality is plainly incompatible with judicial functions, and a showing by the Appellant as to the lack of independence and impartiality on the part of Trial Chamber I would necessarily result in a violation of his fundamental right to a fair trial.

39. The Appellant refers to various international instruments and cites four cases from the European Court of Human Rights ("the European Court") to support his view that a test of appearance is to be applied in evaluating both the independence and impartiality of judges. However, the cases cited by the Appellant concern situations in which the function of the Judges was found to be inconsistent with the nature of other offices they held, creating legitimate doubt as to the appearance of a lack of independence and impartiality.[33]

40. In assessing the existence of impartiality for purposes of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court has consistently applied a test comprising objective and subjective prongs. While the subjective prong serves the purpose of enabling the Court to ascertain the personal conviction of a particular judge in a given case, the objective test helps in the examination by the Court of the guarantees offered by the judge to exclude any legitimate doubt with respect to his/her independence and impartiality.[34]

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[33] The Appellant cites the following cases: The Delcourt Case, Eur. Court. H.R. Judgment of 17 January 1970, Series A, Vol. 11, at pp. 17-19, where the Court held that although the presence of a member of the Procureur général's department at the deliberations of the Cour de Cassation may allow doubts to arise about the satisfactory nature of the system in dispute, they do not however amount to proof of a violation of the right to a fair hearing; Piersack v. Belgium, Eur. Court. H.R., Judgment of 1 October 1982, Series A, Vol. 53, at p. 12, para. 30, where the Court found that an individual, after holding office in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, he cannot subsequently sit in the same case as a judge, the public is entitled to fear that he does not offer sufficient guarantees of impartiality; Sramek v. Austria, Eur. Court. H.R., Judgment of 22 October 1982, Series A, No. 84, at p. 20, where the Court found that where a member of a Tribunal is in a subordinate position, in terms of his duties and the organisation of his service vis-à-vis one of the parties to the case, litigants may entertain legitimate doubt about that persons' independence; The Belilos Case, Eur. Court. H.R. Judgment 29 April 1988, Series A, Vol. 132, at pp. 30-31, where the Court found that where the Police Board of Vaud, Switzerland, its single member being appointed by the municipality, is given a judicial function and the proceedings before it are such as to enable an accused to present his defense, the ordinary citizen will tend to see him as a member of the police force, subordinate to his superiors and loyal to his colleagues and such a situation may undermine confidence in the courts

[34] See among other authorities: De Cubber v. Belgium, Eur. Court. H.R. Judgment of 26 October 1984, Series A, Vol. 86, at pp. 13-14; Thorgeir Thorgeirssdn v. Iceland, Eur. Court. H.R. Judgment of 25 June 1992, Series A, vol. 239, at para. 49; Fey v. Austria, Eur. Court. H.R. Judgment of 24 February 1993, Series A Vol. 255-A, at para. 28; Hauschildt v. Denmark, Eur. Court. H.R. Judgment of 26 September 1988, Series A Vol. 154, at para. 56; Saraiva de Carvalho v. Portugal, Eur. Court. H.R. Judgment of 22 April 1994, Series A Vol. 286-B, at para. 35; The Holm Case, Eur. Court. H.R. Judgment of 25 November 1993, Series A Vol. 279A, at para. 33; Nortier v. Netherlands, Eur. Court. H.R. Judgment of 24 August 1993, Series A, Vol. 267, at paras. 33-36; Piersack v. Belgium, Eur. Court. H.R. Judgment of 1 October 1982, Series A Vol. 53, at para. 27; The Delcourt Case, Eur. Court. H.R. Judgment of 17 January 1970, Series A Vol. 11, at para. 31; Bulut v. Austria, Eur. Court. H.R. Judgment of 22 February 1996, Reports 1996-II, at para. 31; Thomann v. Switzerland, Eur. Court. H.R. Judgment of 1997, 24 EHRR 553, at para. 30.

41. As to the subjective prong, the Appellant alleges that Judge Kama's comment during the hearings wherein he stated that "...the amendments which should be considered today, this consideration should be in direct relation with the Joinder Motion presented by the Prosecutor" indicated personal bias in favour of the Prosecution. The personal impartiality of a judge must be presumed until proof to the contrary. In this particular case, Judge Kama's statement does not support a finding of his personal conviction indicating an appearance of subjective bias towards the Prosecution.

42. Under the objective test, a judge's lack of independence and impartiality is determined, quite apart from the judge's personal conduct, on ascertainable facts which may not only raise doubt as to the lack of independence and impartiality of a judge but could give the appearance of such a lack of independence and impartiality. The determinative factor under this test is whether the doubt can be held to be objectively justified. A change in the composition of the Trial Chamber *per se*, added to the decision on the part of Judge Kama to place before Trial Chamber I both of the Prosecutor's motions, cannot give rise to an objective fear of lack of independence, contradicting the content of the dictum "justice must not only be done; it must also be seen to be done".

43. The Appellant's contention that it is not necessary that he prove an actual lack of independence or an interest or bias on the part of the Presiding Judge, or that he demonstrate the existence of specific damage is without merit. Should a finding of an appearance of lack of independence and impartiality be established on the basis of the Appellant's arguments, such a ruling would result in the disqualification of any Judge with respect to whom a moving party alleges, without proof, a lack of independence and impartiality. The Appellant wrongfully assumed that he does not carry the burden to prove the lack of independence and impartiality on the part of the Presiding Judge or the Trial Chamber. The independence and impartiality of the Judges appointed to the Chambers are to be presumed until contrary proof is established.[35] A showing that there exist circumstances likely to give rise to fear or apprehension of lack of independence and impartiality is not enough, in the absence of

[35] See, for example, Le Compte Van Leuven and De Meyere v. Belgium, Judgement of 23 June 1981, Series A, No. 43, at p. 25, para. 58. In R.D.S. v. The Queen, Supreme Court of Canada, 1997 Can. Sup. Ct., Lexis , at p. 5. Through Judge Cory, the Court found that a high standard has to be met for a finding of a reasonable apprehension of bias on the part of a Judge.

substantive grounds supporting legitimate fears that the independence and impartiality of Trial Chamber I could be compromised[36].

44. President Kama assigned Judges Sekule and Pillay and himself to Trial Chamber I and thereafter directed the Joinder Motion and the Leave Request to that Trial Chamber. In so doing, President Kama evinced his concern for ensuring the smooth administrative functioning of the Chambers since only these particular Judges had not reviewed any Indictment of the accused sought to be joined for trial. This justification is reflected in his comment during the proceedings on the Prosecutor's motions where he stated:

> [W]e belief [sic] that for the proper administration of justice and also for a fair trial, it was not responsible that Judges who have been disqualified be able to sit in a Chamber which are [sic] considering amendments for indictments [sic] and Motions for Joinder.[37]

45. We fail to see how the statement made by Judge Kama, his decision to re-compose Trial Chamber I, or his decision to place both the Leave Request and the Joinder Motion for joint consideration before the re-composed Trial Chamber I, indicates any pre-determined judgement to grant the Joinder Motion prior to the hearing. We find that President Kama's administrative decision in the assignment of the Judges does not constitute a departure from the Rules, conforms with the independence and freedom from external influences which are necessary in the administration of justice, is justified in the present circumstances and does not support the Appellant's contention that the re-composition of the Trial Chamber gives the appearance of a lack of independence and impartiality. Additionally, the decision to re-compose Trial Chamber I demonstrates President Kama's objectivity in balancing the

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[36] In advancing his arguments, the Appellant has failed to take into consideration the fact that the Prosecutor addressed the Leave Request not to a numbered Trial Chamber, but to the following specific Judges: Judge Sekule, Judge Khan and Judge Pillay. These are the same Judges before whom the Appellant had his initial appearance. It follows that if the Prosecutor had intended to influence Judge Kama, Judge Sekule and Judge Pillay, (assigned to Trial Chamber I as re-composed), she would have addressed the motion to them by name. As regards the Joinder Motion, the Prosecutor did not address this motion to a specific Trial Chamber, nor did she include the names of the Judges who would preside over the hearing of this motion.

[37] Elie Ndayambaje and Others, *Proceedings on Motions Against Composition of Chamber, Motion for Amendment of Indictment and Joinder*, Case No. ICTR-96-8-T, 24 September 1998, at p. 30. As discussed above, of the six Judges appointed to the International Tribunal, only Judge Kama, Judge Sekule and Judge Pillay had not reviewed indictments against the accused who are the subject to the Prosecutor's motions. In any event, only these Judges could sit on the Trial Chamber conducting the trial of the Appellant and the five additional accused if the Joinder Motion is granted.

legitimate interest of the fundamental rights of the accused to have a fair and expeditious trial before Judges who were not subject to disqualification by the indictment review process while ensuring the efficient assignment of Judges to all of the cases before the Tribunal. Although we find that the assignment of the Leave Request to Trial Chamber I was improper, that alone does not demonstrate any lack of independence or impartiality.

E. Our Conclusions

46. For the foregoing reasons, we find that-

(1) The appeal is admissible pursuant to Sub-rule 72(D) of the Rules, since the Appellant has raised an issue relating to a lack of jurisdiction of the re-composed Trial Chamber I ;

(2) The re-composition of a Trial Chamber by the President is an administrative decision that does not offend the provisions of the Statute or the Rules;

(3) Based on the textual interpretation of Sub-rule 50(A), Trial Chamber II is the only Trial Chamber competent to adjudicate the Leave Request;

(4) Trial Chamber II is competent to adjudicate the Joinder Motion; and

(5) The Appellant has failed to show that President Kama was not acting independently and impartially when he re-composed Trial Chamber I.

47. Consequently, we would allow the appeal in respect of the Leave Request and remit it to Trial Chamber II for adjudication and dismiss the appeal in respect of the Joinder Motion. Further, we would dismiss the appeal with regard to the assertions that President Kama was not acting impartially and independently in referring the Leave Request and the Joinder Motion for adjudication.

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

Gabrielle Kirk McDonald

Lal Chand Vohrah

Dated this third day of June 1999
At Arusha,
Tanzania.

[Seal of the Tribunal]

UNITED
NATIONS

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 and 31 December 1994

Case No: ICTR-96-15-A

Date: 3 June 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: **Mr. Agwu U. Okali**

Decision of: **3 June 1999**

JOSEPH KANYABASHI

v.

THE PROSECUTOR

JOINT SEPARATE AND CONCURRING OPINION OF JUDGE WANG TIEYA AND JUDGE RAFAEL NIETO-NAVIA

Counsel for the Appellant:

Michel Marchand
Michel Boyer

The Office of the Prosecutor:

Frédéric Ossogo
Robert Petit
Chile Eboe-Osuji
Ibukunolu Babajide
Mathias Marcussen

1. We join our fellow Judges, Judge McDonald and Judge Vohrah, in the Decision disposing of the interlocutory appeal from Mr. Joseph Kanyabashi ("the Appellant") ("the Decision") concerning his challenge to the jurisdiction of Trial Chamber I, as recomposed, to hear the "Prosecutor's Motion for Joinder of Accused" ("the Joinder Motion") and the "Prosecutor's Request for Leave to File an Amended Indictment in respect of, inter alia, the Appellant" ("the Request"), to the extent that the appeal is held admissible under Rule 72, and upheld on the merits, resulting in the Request's being remitted to Trial Chamber II, being the proper Chamber under sub-Rule 50(A), for decision. In view of the Joint Separate Opinion of Judge McDonald and Judge Vohrah ("the Opinion"), we maintain that any Trial Chamber can hear the Joinder Motion after the Request is disposed of. We respectfully append a separate and concurring opinion setting forth different reasoning for this conclusion.

2. It is necessary for us to append a separate opinion because, in our view, in our reading of sub-Rule 72(D) of the Rules of Procedure and Evidence of the Tribunal ("the Rules"), the Appeals Chamber must first resolve the preliminary issue and decide that an objection does indeed go to jurisdiction before the Chamber can proceed to consider its merits. Therefore, a showing of non-compliance with the Statute and/or the Rules alone is inadequate to establish a right of appeal under the provision. The Appellant must demonstrate that that non-compliance renders the Tribunal incompetent to adjudicate his case. We are not saying that the preliminary stage can be completely divorced from the merits phase. What we would like to emphasise is that an appeal under Rule 72 cannot be upheld unless there has been a prior determination that its basis is jurisdictional. We are of the view that at the preliminary stage, the Appellant need not prove that his objection falls squarely within the meaning of jurisdiction. Establishing a *prima facie* case suffices.

3. We find that only the second of the four grounds of appeal as argued by the Appellant is admissible under sub-rule 72 (B)(i). We dismiss each of the other three grounds for failing to reasonably establish its connection to jurisdiction. We hold the appeal on the second ground to be upheld. Without recounting the factual background, which is set out in the Decision, our reasons for this opinion follow.

4. The Appellant argues, as his first ground of appeal, that his initial appearance before Trial Chamber II marked the commencement of his trial, and therefore, that is the Chamber with exclusive jurisdiction over his case. The Opinion has taken a close look at the provisions of the Statute and the Rules to conclude that trial does not commence with the initial

appearance. We respectfully add that, in our view, at issue is not when trial begins, but rather whether the initial appearance of the accused renders a particular Trial Chamber seized of a case to the exclusion of any other Chamber. Therefore, we need not decide when trial begins to resolve this issue. It is clear from Article 19 (3) of the Statute and Rule 62 that the exclusive jurisdiction, if any, of a particular Trial Chamber over a case does not vest with the initial appearance of the accused. The fact is that Rule 62 does not stipulate that the President shall forthwith assign a case to a Trial Chamber upon the transfer of an accused to the seat of the International Tribunal for Rwanda ("the Tribunal"). Furthermore, only rarely do the Rules require a case to be dealt with by a specific Trial Chamber, thereby indicating that there are a very limited number of situations where the authority or power to hear a case lies with a specific Chamber, and none other. The obvious example is the provision of sub-Rule 50 (A). It may be arguable that, in the practice of the Tribunal, exclusive jurisdiction over a case occurs after the opening statements, or the beginning of the presentation of evidence. But this proposition would not be based on any explicit provision of the Statute or Rules. It is implicit in Article 20 of the Statute which guarantees the right of an accused to a fair trial. Moreover, the case under appeal here has not reached that stage where the proposition may reasonably be invoked. Therefore, the jurisdiction, if any, of Trial Chamber I over the present case could not be affected by the Appellant's initial appearance before Trial Chamber II. Consequently, his challenge on this ground fails to make a jurisdictional objection.

5. The second ground of appeal in *Kanyabashi* relates to the interpretation of sub-Rule 50 (A). We concur with the Opinion on Rule 48 which provides that persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

6. We respectfully add that there is no difficulty for us to accept that Rule 48 lays down the condition that a joinder motion is meant to be a request for jointly charging and trying several accused. We tend to think that permission for joint charging under that rule does not necessarily require the bringing of a new, substitute indictment in lieu of the existing ones, because by adding names to one of the existing indictments which concern the same facts or transactions, the case may become a joint trial of several accused on different charges found in one single indictment, subject to, of course, any request for amendment. This proposition may, as some may opine, create a disequilibrium, because the accused whose indictment is

selected for amendment before being joined by charges against other accused, who are mentioned together with him in a separate, joinder motion, may complain about non-compliance with sub-Rule 50 (A),[1] while the other accused may not, due to the fact that their status as co-accused would be one imported into this case by way of the Joinder Motion if the latter is granted. However, this inequitable situation is somewhat more advanced than the stage which the dispute in the present appeal seems to have reached. We note that the Request was filed on 17 August 1998 before Trial Chamber II comprising Judges Sekule, presiding, Khan and Pillay, this composition of the Chamber differing from that before which the Appellant made his initial appearance. We take note of this fact because the Request was placed before the same Chamber before which the initial appearance was conducted, although the composition of the Chamber had changed. It may not be stretching reason to say that "that Trial Chamber", as required by sub-Rule 50 (A), means a particularly numbered Chamber which may, however, be composed of different Judges on account of other provisions of the Rules. On the contrary, the Joinder Motion, also filed on 17 August 1998, did not specify the Trial Chamber to which it was to be presented. No objection based on jurisdiction could have arisen if the Request remained before Trial Chamber II.

7. We also note that the presiding Judge of Trial Chamber I stressed the close link between the Joinder Motion and the Request. This is an approach which appears to have ignored the issue of which process should appropriately come for consideration by that Chamber. If, as we stated above, the Request remained before Trial Chamber II, there would only be the Joinder Motion pending before Trial Chamber I. Since Rule 48 does not stipulate which Trial Chamber should hear joinder motions, we have no objection to the hearing of this one by Trial Chamber I. What we fail to comprehend is why this motion was heard together with the Request, since the latter had already come before the other Chamber, thus giving rise to the complaint of non-compliance with sub-Rule 50 (A). In fact, it is not difficult to see the Joinder Motion and the Request as separate matters. Unlike new counts to be added by way of amendment – if leave be granted, that is – the existing counts against the various accused are by no means identical because the factual allegations underlying them are quite different. Otherwise, there would have been a joinder motion long before.

[1] There is another way of dealing with questions of non-compliance, which is provided for under Rule 5. However, the condition for Rule 5 to apply would be an objection based on non-compliance raised before the

8. As the facts on the basis of which the various existing indictments were drawn clearly differ, we would infer that the reason for the Joinder Motion was the late discovery in July 1997 of new evidence allegedly pointing to a conspiracy involving the several accused, including the Appellant. To have the amendments of the indictments considered, together with the Joinder motion, at that moment[2] would certainly prolong the proceedings against the several accused, including the Appellant who made his initial appearance in November 1996 because the new Chamber would have to become familiar with the materials that had already been proffered to the Chamber of initial appearance.

9. Whether non-compliance with sub-Rule 50 (A) may detract from jurisdiction is the issue the deliberation of which persuades us to allow the appeal. We consider that Trial Chamber I lacks jurisdiction to hear the Request. This consideration is chiefly based on our interpretation of sub-Rule 50 (A) which states:

> 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 that 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. (emphasis added)

10. The starting point would be our interpretative approach. We rely on the Appeals Chamber's Decision in *Prosecutor v. Théoneste Bagasora and 28 Others*, where the Chamber agreed with the Prosecution that Article 31 of the Vienna Convention on the Law of Treaties of 1969 applies, *mutatis mutandis*, in the interpretation of the Statute.[3] The Rules are devised by the Judges pursuant to Article 14 of the Statute which provides:

relevant Trial Chamber, as distinct from one based on lack of jurisdiction. This condition was not, however, met in relation to the present appeal.

[2] The Request was brought on 17 August 1998.

[3] Case No. ICTR-98-37-A, 8 June 1998, para.28. Also see *Prosecutor v. Dusko Tadi}* (Case No. ICTY-94-1-T), *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, 10 August 1995, paras.17-18; *Prosecutor v. Dra`en Erdemovi}* (Case No. ICTY-96-22-A), Joint Separate Opinion of Judges McDonald and Vohrah, para.3.

> The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.

11. The Rules were obviously drafted in conformity with the controlling terms of the Statute. The two documents serve identical purposes and objects underlying the mandate of the Tribunal. It would therefore be appropriate to apply identical rules of interpretation to both, namely, rules of the Vienna Convention on the Law of Treaties, with allowance being given to the distinct characteristics of the Rules, which we concede are not a treaty in the traditional sense of that term. On the other hand, the rules of the Vienna Convention, and Article 31 in particular, reflect customary rules of interpretation which originate from principles found in systems of municipal law "expressive of common sense and of normal grammatical usage".[4] As the interpretation of a provision of any legal instrument is to establish the meaning which is intended by the parties making it, we see no obstacle to applying in the interpretation of sub-Rule 50(A) the rules of the Vienna Convention which contain logical and practical norms consistent with the domestic law and practice of States. This view is buttressed by the fact that the Statute and the Rules are international documents which may be interpreted constructively according to the general rule of interpretation of treaties which are a particular type of such documents. The Statute is an instrument relying on the UN Charter, itself being a treaty, for validity, and the Rules are a derivation of the Statute.

12. The general rule of interpretation of treaties, found in Article 31 of the Vienna Convention, provides that:

> 1. 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.
>
> ....

[4]Sir R. Jennings and Sir A. Watts (eds.), *Oppenheim's International Law* (9th edn., Longman, London and New York, 1996), vol.1, Parts 2-4, s.631, p.1270. Cf. also *Case concerning the Territorial Dispute* (Libya/Chad), ICJ Rep. (1994), p.6, Judgement of 3 February 1994, para.41, and its statement on the customary status of Article 31 has been endorsed in *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Qatar v. Bahrain (Jurisdiction and Admissibility), ICJ Rep. (1995), p.6, Judgement of 15 February 1995, para.33.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32, entitled "Supplementary means of interpretation", states that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

13. It is clear that the Vienna Convention has adopted the textual and the teleological approach of interpretation. Interpretation has to be made "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" except where the treaty itself establishes a specific meaning for a word. A word or a provision is supposed to reflect the final, authentic intention of the parties. As a general rule, the interpreter cannot abandon the plain textual meaning of a word or phrase, although the object and purpose of a treaty and the context of its terms are, of course, aids to its interpretation. Recourse to supplementary means is for the purpose of confirming the meaning resulting from the application of Article 31, or of determining the meaning where the interpretation according to Article 31 suggests more than one meaning or where it leads to a result that is manifestly absurd or unreasonable. The general rule of interpretation of treaties thus requires that the interpreters must give words, which are clear, plain and unambiguous their normal meaning, disregarding the literal meaning only in very exceptional circumstances.

14. In our view, the contentious point in this appeal is the interpretation of sub-Rule 50 (A) which contains the phrase "that Trial Chamber (la Chambre)[5] pursuant to Rule 73". The Rules of the ICTY say in Rule 50 (A)(iii): "with leave of the Trial Chamber hearing the case, after having heard the parties". Does the sub-Rule restrict to a particular Trial Chamber the power to grant leave to the Prosecutor to amend an indictment? The structure of the sub-Rule is quite simple: the Prosecutor may amend an indictment at any time before its confirmation, without seeking leave; after its confirmation but before the initial appearance, with leave of

[5] In the French text, the wording is "la chambre de premiere instance".

the confirming Judge; and after such initial appearance, with leave of the Trial Chamber before which the initial appearance was made. Therefore, the provision speaks very clearly about which Trial Chamber may consider requests for leave to amend indictments at the stage of post-initial appearance, and cannot reasonably give rise to different interpretations. The word "that" or "la" should not offer any complication: it means what it means in normal language. What the rule seeks is the assurance that the confirming Judge or the Trial Chamber duly seized of an indictment decides on its amendment, so as to comply with the objects and purposes of the Rules and the Statute to avoid unnecessary delays of trial and to avoid the confusion caused by passing a case back and forth between the confirming Judge and a Trial Chamber. This latter applies *a fortiori* to the present case where two Trial Chambers are involved in the matter of amending the indictment against the Appellant. There would be no absurd or unreasonable result from our interpretation of sub-Rule 50 (A) in relation to the present appeal. But such result would occur if the Joinder Motion and the Request along with other like requests, were to be combined for consideration because the problem of the disqualification of Judges under Rule 15 would arise in relation to the hearing of the Joinder Motion, but not in respect of the Request. If in a future case, our interpretation could result in any unreasonable consequences because of the operation of Rule 15 leading to disqualification, the objects and purposes of the Statute and the Rules shall prevail. Having said this, there is no need to look further to supplementary means for the interpretation of the sub-Rule. We would find that the appeal on the second ground is admissible and should be allowed.

15. The Appellant claims, as the third ground of appeal, that even if Trial Chamber I in its original composition had jurisdiction, the change in its composition breached Articles 10, 11 and 13 of the Statute, thereby rendering Trial Chamber I, as recomposed, incompetent. It is the Appellant's position that Articles 10, 11 and 13 fix the composition of a Trial Chamber; consequently, he posits that any variation therefrom is unlawful and renders the recomposed Chamber incompetent. The issue raised by the Appellant is two-pronged: (1) was Trial Chamber I, as recomposed, lawfully composed under the Statute? (2) if not, did its unlawful composition render it incompetent? There is the sense that to render a Trial Chamber incompetent means to deprive it of the right to exercise its jurisdiction. So the Appellant is in effect arguing that the breach of Articles 10, 11 and 13 divests Trial Chamber I of the right to exercise the jurisdiction it is presumed to have over the present case.

16. Articles 10, 11 and 13 serve to establish the two Trial Chambers and allocate three Judges to sit in each of them. The last sentence of Article 13 (2) provides that "A judge shall serve only in the Chamber to which he or she was assigned." In our view, the plain meaning of this provision does not preclude a Judge from sitting occasionaly on a case in a Chamber different than that to which he or she was assigned, provided that the accused's right to a fair trial is not prejudiced (see paragraphs 21 and 22 below).

17. This ground more suitably appertains to the Joinder Motion than does the Request, since, as stated above in relation to the second ground of appeal, the matter of amending indictments falls within the purview of sub-Rule 50 (A) which only insists on a particular Trial Chamber, but not one with a fixed composition.[6] There is no need for a lengthy discussion of this ground, following our reasoning regarding the second ground, because as long as the Request is separated from the Joinder Motion, under the Statute and Rules, the latter can be dealt with by the recomposed Trial Chamber I or another Trial Chamber. We hold therefore, that the third ground does not serve to found the present appeal. However, it may still deserve some attention for its association with a different inquiry as to whether the matter of re-composition goes to jurisdiction in respect of cases coming, or to come, before the Tribunal.

18. The Appellant seems to have drawn a distinction between a possession of jurisdiction and a possession of the right to exercise jurisdiction. He alleges that Trial Chamber I had jurisdiction but lost the competence or right to exercise it because of its unlawful composition. Therefore, in the context of the Rules, the matter of composition relates to the issue of jurisdiction only in a negative way. Would it not follow, then, that if there is no provision in the Statute or the Rules prohibiting re-composition, then the re-composition ground does not affect the jurisdiction of Trial Chamber I? Following this logic, the argument on the third ground does not go to jurisdiction.

[6] This has been conceded by the Appellant: "Appeal relating to the Lack of Jurisdiction (Rules 108 (B) and 117 of the Rules of Procedure and Evidence)", 14 October 1998, para.37.

19. We respectfully submit that the matter of composition is in no way concerned with the jurisdiction of a Trial Chamber. We take the view that the third ground is not admissible under Rule 72. Article 13 and Rules 15 and 27 are all concerned with judicial administration, reflecting considerations of efficiency and judicial economy, themselves being formulated in the interests of fair and expeditious trials, unless action taken thereunder detracts from the jurisdiction of the Tribunal or violates a fundamental right of the accused. There is no such concern in this appeal, as no objection to the jurisdiction of the Tribunal has been made out. In fact, a contravention of sub-Rule 50 (A) did occur, but it affects only the power of Trial Chamber I over the Request, and has been dealt with as a separate ground of appeal, as distinct from the third.

20. Questions relating to judicial administration, such as the seisin of a court at a certain level, would have been regulated in a municipal law context by statutory instruments. The statutory instrument for the Tribunal, the Statute, delegates the power of regulating such matters to the Judges in plenary, and they have duly drafted the Rules and amended them time and again in accordance with the Statute of the Tribunal, as stated above in relation to the second ground of appeal. Therefore, the Rules represent, as it were, an interpretation of the provisions of the Statute. If there is no outright conflict of terms between the two documents, the Judges are to be presumed to have the liberty to amend and improve on the Rules in consideration of any unusual problems which arise in practice but are not covered by the existing Rules. While the Judges may have that liberty, certain general principles of law, recognised by all major legal systems but not explicitly provided for by the Statute, would always, we submit, assume precedence over the need to incorporate in the Rules a new practice that may appear to the Judges to be useful. This is the case with the principle of recusal in the interests of fair trials, which though not articulated in the Statute, finds expression in Rule 15.

21. Under Article 13 (2), a Judge can only be assigned to sit in one of the three Trial Chambers at a time. However, in many instances, a Judge needs to seek recusal from cases allocated to his/her Chamber because of a prior association which might appear to taint

his/her independence or impartiality. This is not an uncommon situation because all Judges confirm indictments. There is no doubt that the procedure of recusal under Rule 15 is of general importance to the work of the Tribunal as an impartial, independent judicial body. On the other hand, the Tribunal may, by reason of this procedure intended to guarantee the right of the accused to a fair trial in consistence with the spirit and objects of Articles 19 and 20 of the Statute, often find itself in the uncomfortable situation where there are many accused in pre-trial detention awaiting trial and a scarcity of Trial Chambers and Judges to deal with the cases. For instance, at the time the Joinder Motion and the Request were heard, there were only two Trial Chambers and six Judges.[7] Under these circumstances, and in the interests of fairness to the accused, the President of the Tribunal must be allowed some leeway to recompose Trial Chambers to enable trials to proceed; otherwise, the work of the Tribunal would grind to a halt. We dread therefore that a strictly literal interpretation of Article 13(2) to the exclusion of the provisions of Rules 15 and 27 would lead to what is termed in Article 32 of the Vienna Convention on the Law of Treaties as an "unreasonable" result. We really cannot accept the practice that a trial on a certain indictment may be conducted before a Trial Chamber, a member of which is the Judge who confirmed the indictment, simply because s/he Judge was assigned to that Chamber when s/he was sworn in.

22. What follows from above is a presumption that judicial necessity may have been the reason underlying Rules 15 and 27. It is in this light that the matter of judicial administration may be best appreciated. In the case of the Tribunal, judicial necessity as a principle is even more important given the very limited number of Judges available to adjudicate cases. It may not be unlikely that, because of the accepted procedure of recusal and these numerous challenges to compositions or re-compositions, the Tribunal will soon find cases unsusceptible to adjudication for there being no available Judges. That would be a bizarre situation where the Tribunal may find itself empowered to adjudicate, but powerless to empanel a Trial Chamber to do so. In the practice of the Tribunal, to allow jurisdictional challenges to be based on re-composition is, ultimately, to allow the parties to question the validity of the portion of the Rules regarding judicial administration. If this is a matter of jurisdiction, whose and which jurisdiction would be questioned: that of the relevant Trial

Chamber to follow the Rules or of the Plenary Meeting of the Judges to design and amend the Rules? Is it not true that the validity of the Rules has already been confirmed by Article 14 of the Statute which delegates to the Judges the power to adopt and amend the Rules, provided that they do not contradict the Statute or undermine the objects and purposes of the Tribunal?

23. Accordingly, a question regarding re-composition pursuant to the Rules does not amount to a potentially jurisdictional challenge within the meaning of sub-Rule 72(B)(i). It follows that the third ground must therefore be deemed inadmissible. With respect to the substantive question as to whether Trial Chamber I was lawfully composed, we simply hold that no provision in the Statute or Rules prohibits changing the composition of a Trial Chamber at the stage of the proceedings against the Appellant, where he has made an initial appearance before a Trial Chamber but the presentation of evidence has not commenced. As the re-composition of Trial Chamber I at the stage of the proceedings against the Appellant is not inconsistent with the Statute and the Rules, we do not need to consider the Appellant's further submissions on why the unlawful composition of the Chamber rendered it incompetent.

24. With regard to the fourth ground of appeal in *Kanyabashi*, namely, the question of independence and impartiality allegedly posed by the re-composition of Trial Chamber I to hear the Request and the Joinder Motion together,[8] we respectfully offer different reasoning from the Opinion.

25. It may be helpful, above all, to rehearse the submissions of the Appellant with respect to the fourth ground of appeal. It is first noted that the ground consists of two limbs, being judicial independence and impartiality. As to the first limb, the basic proposition of the Appellant is that a change to the composition of a Trial Chamber would constitute a breach of the Statute of the Tribunal, except in exceptional circumstances as provided for by Rules 15

[7] The situation has improved since the UN Security Council by Resolution 1165 (1998), 30 April 1998, established a third Trial Chamber for the Tribunal. The new judges were sworn in to office on 22 February 1999.

[8] *Appellant's Brief*, paras. 104, 138.

and 27 of the Rules.[9] Trial Chamber I is said to have changed its composition without offering a compelling reason to the parties, because, according to the Appellant, Rules 15 and 27 did not apply in this matter. The Appellant then argues that the change in composition was effected at the behest of the President and the Tribunal, including the Office of the Prosecutor.[10] Relying on international and national practice regarding the separation of powers, the Appellant submits that there is a reasonable doubt as to the independence of Trial Chamber I, as recomposed, to hear the Request. On the second limb, the Appellant claims that by taking over the Request from Trial Chamber II for consideration, together with other indictments also sought to be amended, Trial Chamber I "appears to have formed its opinion in advance, by favouring the Prosecutor",[11] given that the Joinder Motion for a joint trial on those indictments has already been pending before it. The Appellant reads this action of Trial Chamber I as proof that the Trial Chamber has prejudged on the Joinder Motion before it is heard *inter parties*.[12]

26. First of all, we would like to affirm that the Chambers of the International Tribunal must act independently and impartially in the exercise of their judicial function, and that this independence and impartiality must not only be done, but also be seen to be done. Even an appearance of partiality or bias on the part of the Chambers would dangerously undermine the authority of the Tribunal, and render ineffective their efforts to fulfil the mandate of the Tribunal to dispense justice in accordance with the Statute and the Rules. One caveat is that the appearance may be perceived by any party to a case, subject, of course, to proof of the existence of the appearance of bias to the satisfaction of the Judges of the Trial Chamber hearing the case. An allegation without sufficient proof does not suffice.

27. Secondly, we would emphasise that the fourth ground of appeal is raised by the Appellant as a corollary to the objection to Trial Chamber I's re-composition, which constitutes the third ground for this appeal. However, during the proceedings before Trial Chamber I on 24 September 1998, the fourth ground, unlike the third, was not raised by the

[8] *Appellant's Brief*, paras. 104, 138.
[9] Ibid., para. 104.
[10] Ibid., paras. 107-109.
[11] Ibid., para. 140.
[12] Ibid., para. 147.

Appellant as an independent, preliminary objection based on lack of jurisdiction which was dismissed by Trial Chamber I then and there. Given that the present appeal is interlocutory in nature, there is no other basis to found it than that provided by sub-Rule 72 (B) (i) and (D). Consequently, we find that the fourth ground does not meet the terms of those provisions. It follows that the fourth ground can be dismissed for failing to reasonably put in question the Tribunal's jurisdiction.

28. However, thirdly, assuming for the moment that the fourth ground could be validly raised to found an interlocutory appeal in general, it has not been the case in the present appeal, because the question of independence or impartiality was considered by the Appellant to be consequential upon that of re-composition. Since the re-composition of Trial Chamber I is not in our view jurisdictional, this fourth ground also cannot go to jurisdiction. It is indeed questionable whether it is appropriate to treat it separately from the third ground concerning re-composition, given that the former is alleged through the manifestation of the latter to involve a contravention of the Statute and the Rules, thus creating the impression of being predisposed to certain requests of the Prosecution before hearing them. It would suffice for the purpose of the present analysis to emphasise that the matter of re-composition has been found not to be jurisdictional, and that insofar as the present case may involve inquiry into whether Trial Chamber I was legally constituted, the re-composition of Trial Chamber I was effected on a sound legal basis, not at the behest of a third party intervening with the judicial function of that Chamber. Any suggestion that Trial Chamber I was composed in spite of the provisions of the Statute and the Rules has not been proved. It does follow that an act of a Trial Chamber performed in accordance with the Statute and the Rules could give rise to an appearance of partiality or bias, unless the complaint concerned is a challenge to the validity of the Rules themselves, which is not the case here. However, even supposing that such a complaint could have been made in the context of this appeal, it would be dubious to regard it as a matter falling within the jurisdiction of the Appeals Chamber, as distinct from the powers of the Plenary Meeting of the Judges of the Tribunal to amend the Rules. It would follow that even this complaint cannot be jurisdictional.

29. Fourthly, as the re-composition of a Trial Chamber does not necessarily put into doubt the impartiality or independence of the Trial Chamber, especially where it is warranted by the

Statute and the Rules, the Appellant has not shown that the fourth ground could serve as an independent ground for interlocutory appeal. For this we turn to the claim of the Appellant that Trial Chamber I prejudged the Joinder Motion agreeing to hear it with the Prosecution requests to amend the several indictments, thus creating the appearance of partiality. Because the Appellant alleges that dealing with the amendment requests would predispose the Chamber toward granting the Joinder Motion. Reference is made to our discussion on the second ground of appeal, which shows that the placing of the Request before the recomposed Trial Chamber I contravened the requirement of sub-Rule 50 (A). However, it does not necessarily follow that by jointly considering the several indictments for amendment, with account having been taken of the terms of Rules 15 and 27, Trial Chamber I would necessarily prejudge the matter of the joinder of trials on those indictments before the hearing on the Joinder Motion. After all, its decision on the motion could be in favour of the Appellant. In fact, if the concern of the Appellant is that a joint trial would prejudice his rights to a fair and expeditious trial under the Statute, based on the information we have received through the Briefs of the parties in the present appeal, there is no question of even a consolidation of the several indictments, much less of an attempt to substitute a single indictment for them, given both processes are capable of prolonging the trial proceedings.

30. We would however go so far as to state that even a prejudgement manifesting partiality does not necessarily lead to a finding of lack of jurisdiction. An impartial judicial institution may lack jurisdiction over certain types of case in a constitutional sense. Conversely, having been conferred by statute with this jurisdiction, it may at some point in the exercise of it appear to be lacking impartiality. In the latter case, the natural course of remedy would be the lodging of an appeal against a decision of a lower court which appeared to be partial in making the decision. But this recourse to interlocutory appeal does not retroactively deprive the lower court of its jurisdiction over the case *ab initio*. An appellate court may treat the issue of partiality as a legal error invalidating the decision under appeal, but cannot proceed to question the *existence* of the jurisdiction of the lower court, as opposed to the *way* in which the jurisdiction has been exercised by the lower court. In respect of the present appeal, the above proposition is certainly applicable to the extent that a claim of partiality on the part of Trial Chamber I does not deprive it of jurisdiction, if any.

31. Lastly, it may be arguable that lack of independence or impartiality may affect the rights of the accused to a fair trial as guaranteed by Articles 19 and 20 of the Statute.[13] However, the remedy in such circumstances would be to appeal against the judgement following a trial. It is to be stressed at this juncture that the independence and impartiality of the Chambers and the Judges are to be presumed in any event, unless allegations against them are proved, this being said to affirm that a Chamber can and will redress any complaint of partiality raised and proved by either or both of the parties to a certain case before it.

32. To sum up, we would state that the claim in the present appeal by the Appellant of lack of independence or impartiality on the part of the recomposed Trial Chamber I does not constitute an objection based on lack of jurisdiction within the meaning of sub-Rule 72 (B) (i) and (D) giving rise to the exercise of his right of interlocutory appeal, and that even assuming that the claim could be validly raised as a ground of interlocutory appeal, it was brought in the present appeal as part of the complaint over the re-composition of Trial Chamber I, an issue which in itself is not jurisdictional. Alternatively, we find that since the Appellant has not shown that the fourth ground is necessarily connected with the third ground, there is no convincing argument by the Appellant to justify that it may serve as an independent basis for interlocutory appeal within the purview of the Statute and the Rules.

CONCLUSION

33. For the foregoing reasons, we would dispose of the appeal by accepting it on the second ground, which we find to constitute an objection based on lack of jurisdiction within the meaning of sub-Rule 72 (B) (i) and (D), and dismissing the other three grounds for failing to meet the requirement of sub-Rule 72 (B) (i). Accordingly, we would remit the Request to the Trial Chamber stipulated by sub-Rule 50 (A), being Trial Chamber II. We note that since the Request was severed in accordance with the relief sought, the Joinder Motion can be heard by any of the Trial Chambers.

[13] Ibid., para.108. Also, see n.4, supra, paras.43, 50, 55-56.

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

Wang Tieya

Rafael Nieto-Navia

Dated this third day of June 1999
At Arusha,
Tanzania

[Seal of the Tribunal]

UNITED
NATIONS

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 and 31 December 1994

Case No: ICTR-96-15-A

Date: 3 June 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: **Mr. Agwu U. Okali**

Decision of: **3 June 1999**

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CRIMINAL REGISTRY
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JOSEPH KANYABASHI

v.

THE PROSECUTOR

DISSENTING OPINION OF JUDGE SHAHABUDDEEN

The Office of the Prosecutor:
Mr. David Spencer
Mr. Frédéric Ossogo
Mr. Robert Petit
Mr. Chile Eboe-Osuji
Mr. Ibukunolu Babajide
Mr. Mathias Marcussen

Counsel for the Appellant:
Mr. Michel Marchand, Lead Counsel
Mr. Michel Boyer, Co-Counsel

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Dr. M.I.N.A.M.A. K.M. Anatasie
SIGNATURE: ..... DATE: 03.06.1999

Preliminary

The appellant asked the Appeals Chamber to "rule that the reconstituted Trial Chamber I has no jurisdiction to hear and quash the motions for an amended indictment and joinder of trials". It is clear, however, that his chief objection was to the motion for leave to amend being heard by Trial Chamber I. In his view, that motion could be heard only by Trial Chamber II. Accordingly, he asked for an "Order that the motion to amend the Appellant's indictment be referred to Trial Chamber II which has jurisdiction".[1] He did not ask for a similar order of referral in respect of the motion for joinder; presumably, he would be content with this remaining with Trial Chamber I, provided that the motion for leave to amend was transferred to Trial Chamber II.

In respect of the motion for leave to amend, the appeal has been allowed. In respect of the motion for joinder, the appeal has been dismissed; but this is of no practical importance to the appellant. The result of the appeal gives him the substance of what he sought.

Though agreeing with some of its aspects, I respectfully differ from the decision of the Appeals Chamber to allow the appeal in respect of the motion for leave to amend. To explain my dissent, I turn to the issues arising in the case. These may, for present purposes, be summarised as follows:

First, the initial appearance having been held before Trial Chamber II, in the course of which the appellant pleaded "not guilty", did that Trial Chamber have exclusive jurisdiction in the case as a whole, with the consequence that Trial Chamber I had no jurisdiction to hear the motions for amendment and joinder?

Second, did the fact that the initial appearance was held before Trial Chamber II also mean that, under Rule 50(A) of the Rules, that Trial Chamber had exclusive jurisdiction to grant

[1] Appeal Relating to the Lack of Jurisdiction, dated 30 September 1998, operative paras.

leave to make the requested amendments to the indictment, with the consequence that Trial Chamber I had no jurisdiction to grant such leave?

Third, even if Trial Chamber I had jurisdiction, was it constituted as required by Articles 10, 11 and 13 of the Statute, and, if it was not, could it exercise its jurisdiction?

Fourth, even if Trial Chamber I had jurisdiction, did its recomposition mean that it could not act independently or impartially, as it was required to do by the Statute, with the consequence that it could not exercise its jurisdiction?

I propose to examine these issues, first, on the question whether they give rise to a right of interlocutory appeal, and, second, if they do, on the substance of the appeal.

I. WHETHER THE APPELLANT HAS A RIGHT OF INTERLOCUTORY APPEAL

This question turns on whether the appeal is "in the case of dismissal of an objection based on lack of jurisdiction" within the meaning of Rule 72(D) of the Rules, that being the only ground on which an interlocutory appeal may be brought from a decision on a preliminary motion. The Appeals Chamber has answered this in the affirmative. It has done so in a global way. For the purposes of what follows, it will be useful to differentiate in relation to the specific issues summarised above. Thus considered, the case discloses a right of interlocutory appeal on two of those issues, but not on the others.

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The traditional view of jurisdiction is that it comprises jurisdiction *ratione materiae*, jurisdiction *ratione personae*, jurisdiction *ratione loci* and jurisdiction *ratione temporis*. The prosecution submits that none of these four heads comprehends the appellant's objections, and that accordingly he did not make an objection based on lack of jurisdiction.

In support of the position taken by the prosecution, there may be cited the well-known proposition that jurisdiction "is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties".[2] That, at any rate in domestic law, precludes a court, *qua* court, from challenging its own existence[3]; but I do not understand it to mean that the determination of a question of jurisdiction may not include the determination of an issue as to whether a particular court, for a reason peculiar to itself, has power to deal with a case of a type which would ordinarily be within the jurisdiction of courts of the same category.

For these reasons, the correctness of the prosecution's submission is not so clear to me. There are two aspects to each of the four standard elements of jurisdiction. Thus, jurisdiction of the subject matter, a rough translation of jurisdiction *ratione materiae*, has been defined as the "power of a particular court to hear the type of case that is then before it"[4]. That suggests that two branches are involved - the power of the *particular* court, and the type of case.

It is not necessary to deal with the second branch of jurisdiction; the appellant does not question that the two motions are among the type of things that could be dealt with by a Trial Chamber. He is raising the first branch of jurisdiction; he is saying that, for various reasons, a particular Trial Chamber lacked power to deal with them. How should this submission be dealt with in relation to the four issues summarised above?

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As to the first issue, the argument here was that jurisdiction resided only with the Trial Chamber before which the initial appearance was held. In this case, the initial appearance was

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[2] *Black's Law Dictionary, With Pronunciation*, 6th ed. (Minnesota, 1990), p.853, citing *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E. 2d 633.

[3] For the reasons which it gave, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in effect held that that restraint does not apply in the case of an international court. See *Prosecutor v. Dusko Tadic* (1994-1995) I ICTY JR 357. That holding is not being considered here.

[4] *Black's Law Dictionary, With Pronunciation, 6th ed.* (Minnesota, 1990), p. 854.

held before Trial Chamber II. It followed that Trial Chamber I had no jurisdiction. The appellant's objection to that effect was an objection as to lack of jurisdiction. Accordingly, on the first issue, I consider that the appeal is admissible as an interlocutory appeal under Rule 72 (D) of the Rules.

As to the second issue, concerning non-compliance with the amendment procedure prescribed by Rule 50 (A) of the Rules, this would clearly be an objection to jurisdiction.

However, this issue was not raised by the appellant before Trial Chamber I. It was first raised in the course of the subsequent appeal proceedings. And it was not the appellant who then raised it.[5] It was the prosecution which did so. In the course of its written arguments on appeal, the prosecution said:

> "It is the Prosecutor's bounding duty to assist the Appeals Chamber in matters of law, procedure and fact. This duty involves bringing to the attention and notice of the Appeals Chamber the exact position of the law, procedure and evidence even in circumstances where the point of law, procedure and evidence appears adverse to the Prosecutor's contention. In this regard, the Prosecutor wishes to bring to the attention of the Appeals Chamber the provisions of Rule 50. Sub-rule 50(A) provides in part thus": [the text of the provision being then set out].[6]

That posture was in keeping with the traditions of domestic law. It is good to know that the prosecution has taken those traditions into an international court.

Of more immediate significance is the circumstance that the appellant did not rebut the implication of the Prosecutor's statement that the point about the amendment procedure prescribed by Rule 50(A) was new. His counsel did submit to Trial Chamber I that "the competent Chamber to rule ... on the motion on the amendment ... is Chamber II...".[7] But, as

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[5] See the Appeal Relating to the Lack of Jurisdiction, 30 September 1998.

[6] Prosecutor's Brief Pursuant to the Scheduling Order of the Appeals Chamber, 30 December 1998, section 2A.

[7] Transcript, 24 September 1998, p. 7.

he explained, that "was the Chamber to which the matter was referred". The argument rested on the original assignment of the matter to Trial Chamber II, on the fact that the initial appearance, inclusive of the "not guilty" plea, had been held before that Chamber, and on the alleged illegality of the composition of Trial Chamber I. Reliance was not placed on the argument of non-compliance with the specific amendment procedure laid down by Rule 50(A) of the Rules.[8]

The oral decision of Trial Chamber I, which was delivered immediately after the oral arguments, did not, in my opinion, manifest an understanding that the appellant was raising a question of non-compliance with the specific amendment procedure prescribed by Rule 50(A) of the Rules: the decision nowhere adverted to the point and, accordingly, the views on it of that Trial Chamber are not available to the Appeals Chamber.[9] Immediately after delivery of the oral decision, it should have been open to the appellant to object that the Trial Chamber had neglected to deal with an argument on the amendment procedure specified by Rule 50(A) of the Rules. The appellant did not do so. Nor did he in his later submissions in the appeal contend that Trial Chamber I failed to consider an argument on the point. What he contended on appeal was that "Rule 50 of the Rules of Procedure and Evidence...confirms this interpretation", i.e., that a trial begins with the plea.[10] That proposition, *besides being made on appeal and not at the hearing before Trial Chamber I*, did not assert that there was a breach of the specific amendment procedure prescribed by Rule 50(A) of the Rules or that Trial Chamber I had failed to consider any such argument.

In view of those circumstances, it would strain belief now to make the belated argument that a submission that there was non-compliance with the amendment procedure prescribed by Rule 50(A) of the Rules was implied by the other arguments which were in fact presented by the appellant to Trial Chamber I. It did not necessarily follow from the appellant's other arguments before Trial Chamber I that he was also submitting to that Trial Chamber that Rule 50(A)

[8] See also Motion by the Accused Challenging the Jurisdiction of the Trial Chamber seized of the Prosecutor's Request for Leave to File an Amended Indictment and Motion for Joinder of the Accused, 18 September 1998; and Response of the Accused to the Prosecutor's Motion for Joinder of Accused, 18 September 1998.

[9] See transcript, 24 September 1998, pp. 28-31.

[10] Appellant's Brief, 16 December 1998, para. 26. And see, *ibid.*, paras. 37 and 38.

required the amendments to be made by the Trial Chamber which took the initial appearance. Rightly, an argument based on implication has not been made by the appellant. If it were made, it would not hold.

A similar approach seems to have been taken on another point by Judge Wang and Judge Nieto-Navia in their joint separate and concurring opinion. They emphasised that the fourth ground of appeal (relating to independence and impartiality) was raised (in the appeal) "as a corollary" to the objection to Trial Chamber I's recomposition. Notwithstanding the "corollary", they observed that "during the proceedings before Trial Chamber I on 24 September 1998, the fourth ground, unlike the third, was not raised by the Appellant as an independent, preliminary objection based on lack of jurisdiction which was dismissed by Trial Chamber I then and there". The position thus taken is consistent with the fact that, in the companion case of *Anatole Nsengiyumva v. Prosecutor*, decided today, the Appeals Chamber did not take the view that an argument about independence and impartiality was implied by the argument about the composition of the Trial Chamber.

Without entering into the question how far a liberal interpretation of provisions relating to interlocutory appeals in criminal matters is permissible, I would note that there is a distinction between a liberal interpretation and a misinterpretation. There would be a misinterpretation of the provisions governing interlocutory appeals to say that the appellant may be treated as having made an objection to jurisdiction based on non-compliance with the specific amendment procedure prescribed by Rule 50(A) of the Rules.

Reviewing the material, I consider that it would be artificial to say that Trial Chamber I dismissed an objection by the appellant based on non-compliance with the specific amendment procedure prescribed by Rule 50(A) of the Rules. On this point, the appeal is not admissible as an interlocutory appeal under Rule 72(D) and falls to be dismissed.

As to the third issue, concerning the composition of Trial Chamber I, it has been held, in one legal system, that a "court may lack *'jurisdiction'* to hear and determine a particular action or application because (i) of the *composition* of the court (for example, the bias of the judge)."[11] (emphasis added). The meaning of that is that the biased judge should not have sat. Here too, the substance of the appellant's argument is that some judges should not have sat; they having sat and not others in their place, the composition of the bench was affected. When there is an error in the composition of the bench, the court is not properly constituted. And where the court is not properly constituted, it cannot exercise its jurisdiction. Authority for that view can be found in some national legal systems.[12]

I think it is also possible to extract some support from the jurisprudence of the International Court of Justice for the proposition that an error in the composition of a judicial, or quasi-judicial, body goes to jurisdiction. The differences between that court and this Tribunal obviously counsel care in using the jurisprudence of the former; but, equally obviously, those differences do not prohibit recourse to that jurisprudence on relevant matters, more particularly having regard to the fact that both institutions are international judicial bodies.

In the *Mortished* case, a panel of the Administrative Tribunal of the United Nations sat with four members, whereas the authorised complement was three. The fourth member was an alternate member; he should only have participated in the judgement in place of another member. Because of the special configuration of the request for an advisory opinion which was made in that case, the Court took the view that further consideration of the point was not called for. (*I.C.J. Reports 1982*, pp. 340-342, paras. 33-35). The sense of the Court on the matter was nevertheless clear. It could not have differed materially from the observation of Judge El-Khani, dissenting, that "it is incomprehensible, and even unlawful, for an alternate to 'replace' a full member of the Tribunal who is present, otherwise the Tribunal would have a composition

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[11] *Oscroft v. Benabo* [1967] 2 All ER 548 at 557, CA, per Diplock LJ.

[12] *R. v. Inner London Quarter Sessions, ex parte D'Souza* [1970] 1 All ER, [1970] 1 WLR 376. And see *de Smith's Judicial Review of Administrative Action*, 4th ed. (London, 1980), pp. 111 and 115.

of four and not three members, which would be a violation of Article 3, paragraph 1, of its Statute." (*Ibid.*, p. 449).

Also arising in that case was a question concerning the composition of the Committee on Applications for Review of Administrative Tribunal Judgements. Subject to possible misunderstanding as to what actually happened, it appears that, in his own absence, the chairman of the Committee designated a non-member of the Committee to act as chairman in his place. The Court referred to the replacement as "[o]ne of the most important irregularities in the procedure adopted by the Committee ...", and considered the particular irregularity to be "fundamental to the whole question of the present reference to this Court" (*Ibid.*, pp. 342-343, paras. 38-39). "Despite the irregularities", the Court "nevertheless" felt called upon to "accept the task of assisting the United Nations Organisation" by giving the requested advisory opinion. (*Ibid.*, p. 347, para. 45). That the Court took this course does not detract from the seriousness with which it regarded the particular irregularity, and not the least for the reason that it considered that the Committee was quasi-judicial in character: in the instant case, the bodies concerned were judicial. In his dissenting opinion, Judge El-Khani said that the "Committee ... does not appear to have been legally constituted". (*Ibid.*, p. 450).

In my opinion, the jurisprudence shows that an error in the composition of a tribunal can go to the jurisdiction of the tribunal. Accordingly, on the third issue, the appeal is admissible as an interlocutory appeal under Rule 72 (D) of the Rules.

As to the fourth issue, concerning the impartiality and independence of Trial Chamber I, a like position is suggested on the basis of the foregoing and other references. Thus, in another case it was held that "[i]f actual or apprehended bias arises from a judge's words or conduct, then the judge has *exceeded* his or her *jurisdiction*"[13] (emphasis added). Bias would, of course,

[13] *R.D.S. v. The Queen*, Supreme Court of Canada, 1997 Can. Sup. Ct., Lexis 83, judgment of Cory J., para. 99. In English law, there is authority for the view that a tribunal, having jurisdiction over a matter in the first instance, might exceed its jurisdiction by breaking the rules of natural justice. See *de Smith's Judicial Review of Administrative Action*, 4th ed. (London, 1980), p. 113, citing *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147, HL, at pp. 171, 195, 207, 215.

go to impartiality. Lack of independence, though different from impartiality, is not always clearly distinguishable from the latter[14] and would lead to a similar excess of jurisdiction, if not total want of it. In my view, it does not matter whether lack of jurisdiction existed *ab initio* or came about subsequent to the commencement of the proceedings; in either case, there would be a "lack of jurisdiction" within the meaning of Rule 72(D) of the Rules.

But this point was not raised before Trial Chamber I. It is sought now to be tacked on as an inference to be drawn from the recomposition of the Trial Chamber and the placing of all the motions before that Trial Chamber. No doubt, the composition of a court can give rise to doubt about its impartiality[15]; but in this case, as explained above, that inference was not put to the Trial Chamber. The Notice of Appeal, dated 30 September 1998, talks at length of independence and impartiality. So does the Appellant's Brief dated 16 December 1998, containing copious references to those subjects. None of this was put to Trial Chamber I. The oral arguments there never once used the words "impartiality" or "independence". If an objection as to lack of independence and impartiality could have been put to the impugned court while sitting but was not, it is considered waived and should not be permitted to be later raised save in exceptional circumstances.[16] There are no such circumstances in this case.

Accordingly, I think the appeal should be dismissed so far as this point is concerned. In this respect, I support the position taken by Judge Wang and Judge Nieto-Navia in their joint separate and concurring opinion.

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Subject to what has been said above about the second and fourth issues not having been raised before Trial Chamber I, it has also to be borne in mind that the appellant's propositions about the absence of jurisdiction need not be shown to be correct to justify the conclusion that

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[14] See P. van Dijk et al (eds.), *Theory and Practice of the European Convention of Human Rights* (The Hague, 1998), p.451.
[15] *Ibid.*, p. 454.
[16] See *de Smith's Judicial Review of Administrative Action*, 4th ed. (London, 1980), p. 275; the *Bulut Case*, E.C.H.R., 1996-II, Vol. 5, para.34; and *In re Pinochet*, 15 January 1999, H.L., U.K., per Lord Browne-Wilkinson.

he was making an objection based on lack of jurisdiction; it is enough if they were reasonably arguable. If they were reasonably arguable, he would have a right of appeal; whether the Appeals Chamber would ultimately uphold any of those propositions at the appeal is a different matter.

The distinction between a claim which is "fondée" on a treaty and a claim which is "bien fondée" on a treaty comes to mind. In the *Ambatielos case* (*I.C.J. Reports 1953,* p. 10, at p. 12), the International Court of Justice was construing the words "in so far as this claim is based on the Treaty of 1886", as used in the operative part of its judgement of 1 July 1952. In its view, those words were "intended to indicate the character which the Ambatielos claim must possess in order that it may be the subject of arbitration in accordance with the Declaration of 1926 [between Great Britain and Greece]. They do not mean that the Ambatielos claim must be found by the Court to be validly based on the Treaty of 1886". (*Ibid.*, p. 16).

In the *Unesco* case, of 1956, the International Court of Justice was likewise considering the statutory duty of the Administrative Tribunal of the International Labour Organisation "to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials ". Referring to the *Ambatielos* case, it observed: " 'Complaints alleging' is a wider expression than 'complaints based on'. The latter may be interpreted as meaning that the object of such a complaint must be legally well-founded. Yet the Court, when confronted with the words 'claims ... based on the provisions' of a treaty, considered that these words 'cannot be understood as meaning claims actually supportable under that Treaty' (*Ambatielos case, Merits: Obligation to arbitrate*, *I.C.J. Reports 1953*, p. 17). This is particularly true in the case of the more flexible expression 'complaints alleging' ".[17]

It does not appear that in the *Unesco* case the Court abandoned the position taken by it in the *Ambatielos* case. Thus, in the *Unesco* case, the Court went on to say that "Article II, paragraph 5 [containing the phrase 'complaints alleging'] does not mean that a mere verbal reference to certain terms or provisions would suffice to establish the jurisdiction of the

[17] *Judgements of the Administrative Tribunal of the International Labour Organisation Upon Complaints Made against the United Nations Educational, Scientific and Cultural Organization, I.C.J.Reports 1956*, pp. 88-89.

Administrative Tribunal. A mere allegation by the complainant cannot be sufficient to cause the Tribunal to accept it for the purpose of examining the complaint" (*I.C.J. Reports 1956*, p. 89). It cited a passage from the *Ambatielos* case to the effect that "it is not enough for the claimant Government to establish a remote connection between the facts of the case and the Treaty" invoked, although balancing this by another citation to the effect that "it is not necessary for that Government to show ... that an alleged treaty violation has an unassailable legal basis ...". (*Ibid.*). I do not consider that the essential principles which these cases laid down have been varied by the later case concerning *Oil Platforms (Islamic Republic of Iran v. United States) Preliminary Objection (I.C.J.Reports 1996*, p. 803).

In this case, to uphold the appellant's right of appeal, the Appeals Chamber has to find that an arguable relationship existed between the appellant's objection and relevant provisions of the Statute and the Rules, read in the light of any applicable jurisprudence; a mere remote connection would not suffice. (*Unesco* case, *supra*, at p. 89). Were these criteria met?

Without anticipating too much at this stage, it appears to me that the appellant can reasonably relate his submissions to the provisions of the Statute and the Rules and that he can do so in relation to all of the issues summarised above. However, as has been noted, the second and fourth issues were not argued before Trial Chamber I. So far as those issues are concerned, the appellant made no objection as to jurisdiction before the Trial Chamber, and accordingly he has no right of interlocutory appeal in relation to them. He does, however, have a right of interlocutory appeal on the other two issues.

For convenience, I shall consider all four issues below.

II. WHETHER THE INITIAL APPEARANCE BEFORE TRIAL CHAMBER II MEANT THAT TRIAL CHAMBER I COULD NOT HEAR THE MOTIONS

As to the first of the four issues summarised above, the appellant submits that the trial began with the initial appearance before Trial Chamber II, when he pleaded "not guilty", and that thereafter that Trial Chamber had exclusive jurisdiction in the case as a whole. I agree with the rejection by the Appeals Chamber of the submission but propose to explain my point of view below.

The prosecution agrees that Trial Chamber I could not hear the motions after the trial had begun in Trial Chamber II but questions whether the trial had begun with the initial appearance. It points out that, although the motions were presented to Trial Chamber I after the initial appearance in Trial Chamber II, the hearing in Trial Chamber I took place before the presentation of evidence had begun in Trial Chamber II. By reason of that fact, it argues that the trial had not yet begun in Trial Chamber II.

When a trial begins may depend on the particular regime in force; and, under the same regime, it may begin for one purpose but not for another. Thus, for the purpose of the statutory requirement that a "trial" shall be fair, few would deny that a "trial" could be regarded as having begun before the presentation of evidence has commenced; and this, I think, is the meaning of the term in Rule 15(C) of the Rules which provides that a judge of a Trial Chamber who reviews an indictment against an accused "shall not sit as a member of the Trial Chamber for the *trial* of that accused" (emphasis added). But whether a trial has begun for other purposes could be another matter.

As is shown by Rule 62 of the Rules, the substantial object of the initial appearance is to take the plea of the accused. In this case the accused pleaded "not guilty". I take the general rule to be that a "not guilty" plea does not mark the commencement of a trial but merely establishes the need for a trial.[18] It seems that the Statute has adopted the general rule; thus,

[18] See, in one jurisdiction, *Quazi v. Director of Public Prosecutions*, 152 J.P. 385, [1988] Crim. L.R. 529, D.C.

Article 19(3) stipulates that, the accused having pleaded, the "Trial Chamber shall then set the date for trial". This statutory division between the plea stage and the trial stage finds reflection in Rule 62 of the Rules, among others.

I have considered the decision of Judge Khan in *The Prosecutor versus Théoneste Bagosora and 28 others*[19] to the effect that a trial commences with the plea. That may be right in certain situations; but, if it was put forward as a principle of universal validity, I would respectfully demur. In this case, I consider that the trial had not yet begun in Trial Chamber II when the motions were presented to Trial Chamber I. Accordingly, so far as this head of argument is concerned, Trial Chamber I was lawfully seized of the motions.

III. WHETHER LEAVE TO MAKE THE AMENDMENTS COULD BE GIVEN ONLY BY TRIAL CHAMBER II

As to the second of the four issues summarised above, the question is whether the right to grant leave to amend the indictment was exclusively possessed by Trial Chamber II as a result of Rule 50 (A) of the Rules. I have expressed the view above that the appellant made no objection on this point before Trial Chamber I and that he accordingly has no right of interlocutory appeal under Rule 72(D) of the Rules. On this point, the appeal should be dismissed. I would reserve my views on the substance of the contention, particularly in the light of questions which merit further reflection, including those mentioned below.

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To appreciate the situation it is necessary to step back a little and to look into the antecedents of the case. They involved the existence of a prosecutorial problem of common occurrence and the need to find a sensible solution for it in the case of the Tribunal, consistently with governing legal criteria relating to a fair trial. Unless such a solution can be found, the Tribunal becomes incapable of dealing with the factual situation which called it into being and of responding meaningfully to the expectations of the international community.

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[19] Case No. ICTR-98-37-I of 31 March 1998.

On the basis of such material as it has, the prosecution may lay a charge against an accused for a particular offence. As investigations proceed - and the Prosecutor in this case has a continuing duty to investigate - new information may suggest that the accused should be charged for additional offences. The information may also suggest that another person, or other persons, should be made to answer with the original accused in respect of some or all of the charges in a single set of proceedings. How is this to be done?

At the level of details, domestic procedures vary. However, one method - it is not the only one[20] - is this: where, in the light of other evidence, the prosecution desires to join fresh persons with a person who is already charged on an indictment, a common practice is to bring a new indictment against them all, and for the court to stay action on the old indictment or to require the prosecution to elect on which indictment it wishes to proceed.[21]

In substance, this was what the Prosecutor sought to do in this case. She brought a composite indictment against the appellant and 28 others embracing substantially the same matter as that presented in an original indictment against him, along with a count for conspiracy. Judge Khan, however, took the view, *inter alia*, that he had no jurisdiction to confirm the new indictment unless the Prosecutor, with leave of the Trial Chamber hearing the case, first withdrew the original indictment, under Rule 51 of the Rules, and did likewise in respect of several others against whom indictments were also pending.[22]

The Prosecutor did not do so[23], doubtless fearing the creation of a vacuum between withdrawal of the old indictment and conjectural confirmation of the new, with accompanying risk of release of the accused and others in the interval. As the Prosecutor did not do so, Judge

[20] Alternatively, one of the existing separate indictments might be selected for amendments, inclusive of the addition of the names of the other accused and consequential textual changes; the other indictments being discontinued with leave. See the standard text of *Archbold, Criminal Pleading, Evidence and Practice* (London, 1999), paras. 1-165, 1-218, and 1-220.
[21] *Archbold, supra*, para. 1–220.
[22] See his decision of 31 March 1998, paras. 6 and 8, and p. 11.
[23] *Ibid.*, para. 6.

Khan dismissed her application for confirmation of the new indictment. It seems that he thought that it was legally not possible to have two overlapping indictments on the file. If that was what he thought, the books show that it is not unusual in some jurisdictions for two indictments to be in existence at the same time against the same person for the same offence or offences based on the same facts, the prosecution of course being permitted to proceed only on one.[24]

The Prosecutor, having failed in her motion before Judge Khan, now sought, by another means but only in relation to six of the accused, to secure her objective of ensuring that they were tried in the same proceedings, without incurring the risk of having the accused meanwhile set at liberty. She would no longer seek to substitute a single indictment against all of the accused. She would rest on the separate original indictments against them, one indictment being against two accused, a second indictment being against another two, a third indictment being against the fifth (the appellant), and a fourth indictment being against the sixth. However, in a motion to amend, she would seek leave to amend each indictment, *inter alia,* by the addition of new charges. Then, as I understand it, in a motion for an order of " joinder of ... the cases" (filed together with the motion to amend but ordered by the Trial Chamber to be heard later), she would ask to hold one trial on all of the indictments. The separate indictments, having been amended, would remain; they would merely be tried together. There would not be a new single substitute indictment. In effect, what was sought was consolidation of hearings on separate indictments, as distinguished from joinder *stricto sensu,* the difference being referred to below.

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In some common law areas, two or more indictments may be tried together if the offences, and the accused if there is more than one, could have been joined in a single indictment.[25] Legislation may be used to regulate the procedure but is not always necessary to authorise it, a court being regarded as having inherent power to adopt that course if the interests of justice so require. The jurisprudence refers to that as a case of consolidation, an idea which is perhaps more customary in civil proceedings, and, possibly for this reason, not so far, I believe,

[24] *Archbold, supra,* paras. 1-208, 1-218, 1-220.
[25] See *McElroy v. United States*, 164 U.S.76, citing section 1024 of the Revised Statutes; and see Wayne R. La Fave and Jerold H. Israel, Criminal Procedure, 2nd ed. (Minnesota, 1992), p. 772, para. 17.3(a).

the subject of observation in the case law either of the International Criminal Tribunal for Rwanda or of the International Criminal Tribunal for the former Yugoslavia.

As distinguished from consolidation, there is joinder *stricto sensu*, in which two or more accused are charged jointly in the same indictment. This is based on the traditional common law rule that a trial is to be limited to one indictment and that "[w]here two or more indictments are tried together the trial is a nullity.[26]

Which of these two approaches is contemplated by Rule 48 of the Rules? As is mentioned in the decision of the Appeals Chamber, that 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".

One interpretation of the Rule 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 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.

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The question which remains, but on which I would reserve my views, is this: where the prosecution seeks leave to amend an indictment as a step in achieving consolidation but does so

[26] *Archbold, supra,* para. 7-292.

after initial appearance, is it the case that the motion for leave to amend can be heard only by the Trial Chamber before which the initial appearance was held?

The plain meaning of Rule 50(A) of the Rules does indeed require leave to be granted by the Trial Chamber which took the initial appearance where amendments are sought to be made to an indictment after the initial appearance. But is there another question as to what are the situations to which the requirement is directed? Is the "plain meaning" of the provision plain enough on this point? Considerations of convenience aside, do the object and purpose of the provision suggest that the provision was directed to a situation in which what was desired was to amend an indictment on the basis that the prosecution would continue only as against the person or persons originally accused? Or, was it also directed to a case in which the substance of what was sought was to require the accused to answer with a new set of accused on basically, if not wholly, similar charges? Could it be that this second situation is a qualitatively different one not within the contemplation of Rule 50 (A) of the Rules, and to which that Rule is in consequence not applicable? Was that perhaps the reasoning behind the observation by President Kama, speaking independently of any submission on that Rule, that the motions for leave to amend were linked to the motion for joinder?

There is, of course, no Rule which requires a Trial Chamber to hear an application for leave to amend an indictment together with an application for joinder of accused persons as a combined operation. That is a consideration; but, in assessing how decisive it is, there may be need to take account of the inherent competence of a judicial body, whether civil or criminal, to regulate its own procedure in the event of silence in the written rules[27], so as to assure the exercise of such jurisdiction as it has, and to fulfil itself, properly and effectively, as a court of law.[28] Without that residual competence, no court can function completely. It is the case that Article 19(1) of the Statute provides that "Trial Chambers shall ensure ... that proceedings are conducted in accordance with the rules of procedure and evidence...". But, where "the rules of

[27] An analogy, in non-criminal proceedings, is provided by *Qatar v. Bahrain, I.C.J. Reports 1994*, p.112, attention being invited to the separate opinion of Judge Schwebel at p.130, and to the dissenting opinion of Judge Oda at p.134, about the decision of the Court to split the jurisdictional phase of the case without regulatory authority.

[28] See *Halsbury's Laws of England*, 4th ed., Vol. 37, para. 14.

procedure and evidence" do not provide, can it be argued that nothing in that provision of the Statute was intended to denude a Trial Chamber of that residual competence if it could be exercised consistently with the requirement for trials to be fair and expeditious? That, indeed, that residual competence was impliedly granted to the Tribunal by the Statute when it empowered the Tribunal to hold trials?

The Appeals Chamber may be right in deciding that the motion for leave to amend could only be heard by the Trial Chamber which took the initial appearance. But I do not consider that it was either necessary or competent to decide the point if I am right in thinking that the appeal should be dismissed, so far as Rule 50(A) is concerned, on the ground that no objection as to jurisdiction was made before Trial Chamber I on the basis of non-compliance with the specific amendment procedure prescribed by that provision. Accordingly, I would reserve my views on what I believe are some of the questions which arise.

IV. WHETHER THE RECOMPOSITION OF TRIAL CHAMBER I WAS LAWFUL.

The third of the four issues summarised above concerns the recomposition of Trial Chamber I. I support the decision of the Appeals Chamber that the recomposition did not involve an invalidity. But my approach may be different.

I would not found the decision on the argument by the prosecution that "[a]ssignment to the Chambers is an administrative matter within the purview of the President. It simply has nothing to do with the elements of the Tribunal's jurisdiction".[29] Though within the same system - as is often the case in domestic arrangements - the two Trial Chambers could be regarded as separate courts. It is said, in a work of authority, that " ... where there is no assignment whatever, a judge of one court who is not a judge, *ex officio* or otherwise, of another court until he is assigned thereto cannot perform judicial acts in the latter court or hold a term thereof".[30] I take that to mean that an assignment, where one is required, goes to the competence of a judge to exercise the jurisdiction of the court. Of course, the function of assigning is an

[29] Prosecutor's Response and Challenge to the Admissibility of the Defendant's Notice of Appeal, para. 32.
[30] See *Corpus Juris Secundum* (Minnesota, 1990), Vol. 21, para. 123, p. 142.

administrative activity as opposed to a judicial one. But it is an administrative activity which is authorised by statute, and it can have legal effects. These effects go to the competence of a judge to exercise the jurisdiction of the Tribunal. Unless assigned by the President to a Trial Chamber, no judge can exercise any part of the jurisdiction of the Tribunal.

On the other hand, if a provision of the Statute has the effect of precluding a judge from sitting in both Trial Chambers (there were only two at the time), the administrative character of the President's power of assignment cannot be invoked to lift the ban. The President's power of assignment has to be exercised consistently with the Statute.

In this respect, the last sentence of Article 13(2) of the Statute is specific; it says that a "judge shall serve only in the Chamber to which he or she was assigned". That command - a command issuing from the Statute itself - makes no sense if the judge could be simultaneously assigned by the President to both Trial Chambers and could thus serve in both. The structure of the Statute shows that, of six judges, three were to be assigned to one of two Trial Chambers and the remaining three to the other. An assignment of a judge to one Trial Chamber may be rescinded and a new one made. But, so far as that provision is concerned, the provision did not visualise that a judge could, by dual assignments, be a member of both Trial Chambers at the same time.

This conclusion could produce obvious difficulties: it would exclude the possibility of making needed substitute and temporary appointments. If that happens, the Tribunal cannot function. What is the answer?

The answer is to be found in the view that the overriding statutory duty of the Tribunal to hold trials that are fair and expeditious would necessitate the making of substitute or temporary assignments from time to time, recusation being an obvious example of a situation calling for such a remedy; that, for such purposes, the Statute therefore impliedly authorises the rule-making body to make rules providing for substitute or temporary assignments; and that the apparent conflict between this implied authorisation by the Statute of dual assignments and the prohibition of dual assignments by Article 13(2) of the Statute is to be resolved by construing

the latter as being referable to substantive assignments only, and not also to provisional ones. To reach this conclusion, it is not necessary to call on the administrative character of the President's power of assignment or to deny that dual assignments are forbidden by Article 13(2) of the Statute, as they plainly are.

Accordingly, the prohibition set out in the last sentence of Article 13(2) of the Statute does not apply to substitute or temporary assignments. What I am not able to support is the idea that the administrative character of the President's power to assign somehow enables the President to make a dual assignment in spite of that provision. The President may make a dual assignment, but the situations in which he may do so are not controlled by that provision and are not subject to the prohibition which it imposes.

This is because Article 13(2) is, in my view, addressed to substantive assignments, not to provisional ones. With respect, President Kama saw the distinction correctly when, referring to Rule 15(E) and Rule 27(A), (B) and (C) of the Rules, he said that, under these provisions, "the President has the power at any point of time when the needs of administration of justice require to assign *provisionally* a judge to a given chamber".[31] Those provisional assignments are not assignments within the meaning of Article 13(2).

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For the purposes of this opinion, little turns on the question what principles of interpretation apply to the Statute. However, as the matter has been mentioned, I would offer a respectful word.

A Chamber of the Tribunal, seeking to apply the Statute, may obviously be faced with the task of interpreting it. The Statute prescribes no principles of interpretation. It may therefore be understood as authorising the Tribunal to interpret it in accordance with reason. But reason, which could sometimes be understood differently by each party concerned, suggests that some

[31] Transcript, 24 September 1998, p.29 (emphasis added).

known body of principles of interpretation should be sought. In deciding what these should be, the Tribunal will naturally have regard to the character of the Statute.

The Statute is not municipal legislation. And notwithstanding the treaty character of the Charter under which it was made, there could be difficulty in the argument that it is a "treaty" within the meaning of the definition of that term as set out in Article 2(1)(a) of the Vienna Convention on the Law of Treaties 1969. It is, however, an international document proximate in nature to a treaty, having been promulgated by the Security Council acting on behalf of the member States of the United Nations. That proximity to a treaty will justify recourse being had, on an analogical basis, to principles of treaty interpretation. These will include, as has been held in the jurisprudence both of the International Criminal Tribunal for the former Yugoslavia and of the International Criminal Tribunal for Rwanda, the principles set out in that Convention.[32] As is recalled by the decision of the Appeals Chamber, the leading interpretative principle of the Convention is that a "treaty shall be interpreted in good faith and 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". (Article 31(1)).

There is another route leading to a substantially similar result. *Serbian Loans, P.C.I.J., Series A, No. 20,* concerned the interpretation of certain loan contracts between a State and private persons or lenders. The Permanent Court of International Justice regarded the contracts as not being treaties between States (*ibid,* p. 40). It applied "elementary principles of interpretation" (*ibid.*, p. 30), and established their meaning "on a reasonable construction" (*ibid.*, p. 40). In the companion case of the *Brazilian Loans, P.C.I.J., Series A, No. 21,* the court spoke of "a familiar rule for the construction of instruments that, where they are found to be ambiguous, they should be taken *contra proferentem*" (*ibid.*, p. 114). In effect, the court applied the body of principles of interpretation generally accepted in domestic jurisdictions. I consider

[32] See *Decision on the Prosecutor's Motion requesting Protective Measures for Victims and Witnesses*, in *Tadic*, (1994-1995) I ICTY JR 125 at 141. In the later case of *Prosecutor v. Bagosora*, ICTR-98-37-A, of 8 June 1998, para. 28, the Appeals Chamber of the International Criminal Tribunal for Rwanda said that it agreed "with the Prosecutor on the applicability, *mutatis mutandis*, of the *Vienna Convention on the Law of Treaties* to the Statute". The convention is, in many respects, a consolidation of customary international law. See, inter alia, *Gabcikovo-Nagymaros Project, I.C.J. Reports 1997*, paras.46, 99 and 104.

that that body of generally accepted principles results today in substantially the same general principles of interpretation as are referred to above.

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For completeness, it is convenient to make a closing reference to a possible argument. The argument, though not made in this case, was made, by the prosecution, in the companion case of *Anatole Nsengiyumva* v. *Prosecutor*[33], decided today. Based on the use of chambers in the International Court of Justice, the contention seems to be that, if certain chambers were validly constituted in that court, the recomposition of Trial Chamber I was also valid. I have reached the same conclusion, but without the assistance of that argument.

Unlike the Tribunal, the jurisdiction of the International Court of Justice is ordinarily exercised by all of its judges sitting *en banc*. The court had certain chambers, but these were not in question. A new and special type of chamber was established by a rule of court of relatively recent vintage. Four of these chambers, called *ad hoc* chambers, were appointed in the eight-year period between 1979 and 1987, the last judgement of such a chamber being rendered in 1994. No *ad hoc* chambers have been appointed since 1987. Legal advisers of potential litigant states may be canvassing the chances of a determined attack being successfully repelled.

What happened was that, in the meantime, argument had been made in and out of the court that the rule of court effectively sought to authorise the election by the court of the members of such a chamber in accordance with the wishes of the parties; that this, in substance, collided with a fundamental principle on which the court, as a permanent court, was created, namely, that, with the exception of judges *ad hoc,* the members of the court would not be chosen by the parties; and that the appointment of such chambers was consequently invalid.

[33] Supplementary Brief in Reply by the Prosecutor Regarding the Admissibility of the Notice of Appeal filed by the Accused Anatole Nsengiyumva, against the Decision of Trial Chamber II Rendered on 28 September 1998 on the Request for Leave to Amend Indictment and Motion for Joinder of the Accused, dated 30 December 1998, para. 39.

It can be contended, as it has been contended, that the fact that the full court appointed such chambers meant that the court rejected that argument. But that would be because the court rejected the premise of the argument that elections of members of the chambers were made in accordance with the wishes of the parties. Thus, the question was one of evaluation of the facts, not of the applicability of a principle.

Here, by contrast, the question is not one of evaluation of the facts, but of the applicability of a principle to the facts. Did the prohibition of a dual assignment apply to the admitted facts? I am not confident that the situation concerning chambers at the International Court of Justice helps to answer that question one way or another.

It does not appear to me that the position regarding *ad hoc* chambers is helpful to the analysis which is now required. I think that the appropriate analysis is that set out above. In accordance with that analysis, and without recourse to other possible lines of inquiry, I support the holding of the Appeals Chamber that the recomposition of Trial Chamber I was not prohibited.

V. WHETHER THERE WAS LACK OF INDEPENDENCE AND IMPARTIALITY

As to the last of the four issues, the appellant pleads his "fears about the independence and impartiality of the Chamber".[34] As mentioned above, I support the view of Judge Wang and Judge Nieto-Navia that this contention was not made to Trial Chamber I. The point is inadmissible and the appeal on it, as an interlocutory appeal, should be dismissed.

Even if that is wrong, the result should be the same. It is not necessary to cite authority for the importance of the qualities of independence and impartiality in a judge. But I agree with the decision of the Appeals Chamber that they were not wanting in this case.

[34] Appeal Relating to the Lack of Jurisdiction, dated 30 September 1998, para. 24.

It is generally recognised that, if there is an appearance of lack of independence and impartiality, the appellate court will not inquire into whether there was any actual prejudice. Trial Chamber I spoke of "prejudice", stating that "there is no particular prejudice, as we have seen",[35] and this has been criticised by the appellant.[36] It has to be noted, however, that, in doing so, Trial Chamber I, as it seems to me, had in mind not the specific question of judicial independence and impartiality (which was not argued), but ordinary non-compliance with the Rules, the position being that, under Rule 5, a complaint of non-compliance with the Rules has to show that "material prejudice" resulted from the non-compliance.[37]

Neither the prosecution nor the defence, who both spoke of "prejudice', related that concept to judicial independence and impartiality.[38] Before Trial Chamber I, they were both talking of the appellant's claim to a right to a hearing before Trial Chamber II as a matter of the statutory organisation of the Tribunal, and not as a matter resting on the specific issues of "judicial independence and impartiality." These words were not used in the proceedings before Trial Chamber I.

As to whether there is an appearance of lack of independence and impartiality, this question is not to be answered by asking whether there is a real danger or likelihood of lack of independence and impartiality. The issue is one of public confidence in the system of administering justice. But it is not the case that that issue is to be judged by the views of the hypersensitive and the uninformed. The test is whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial.[39]

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[35] Transcript, 24 September 1998, p.31.

[36] Appellant's Brief, 16 December 1998, para. 121.

[37] See, later, Prosecutor's Response and Challenge to the Admissibility of the Defendant's Notice of Appeal, 15 October 1998, para. 19.

[38] Transcript, 24 September 1998, pp. 18, 19, 20 and 21.

[39] *Webb and Hay v. The Queen*, (1994) 81 C.L.R. 41 (High Court of Australia). In paragraph 5 of his opinion in Webb's case, Deane J. compared the main tests thus: "The substance of the House of Lords test is 'a real danger of bias'. The substance of this Court's test is 'a reasonable apprehension of bias'. The reference point of the House of Lords test is the appellate court itself or, where the question arises at first instance, the trial judge. The reference point of this Court's test is the fair-minded informed lay observer". See also *R.D.S. v. The Queen*, 1997 Can. Sup. Ct., Lexis 83. Compare the House of Lords decision in *Re Pinochet Ugarte*, The Times, 18 January 1999, in which Lord Browne-Wilkinson, giving the leading speech, said that "it is unnecessary to determine whether the test of apparent bias laid down in Reg. v. Gough [1993] A.C.646 ('is there in the view of

On that basis, it is not possible to appreciate how there could be an appearance of lack of independence and impartiality arising from the circumstance that the normal composition of Trial Chamber I was changed. It is artificial to say that a fair-minded member of the public who had taken reasonable steps to inform himself of the material facts would have had any reasonable suspicion that there could be a lack of independence and impartiality.

In addition, it may be noted that the allegations concerning lack of independence and impartiality metamorphose the argument that the recomposition of Trial Chamber I gave rise to invalidity. Thus, counsel for the appellant submitted that "... a change in the composition of the Chamber directly gives rise to a fear of lack of independence"[40]. The appellant also pleaded the circumstance that the motions for leave to amend were placed together with the motion for joinder before Trial Chamber I. It seems clear to me, however, that the ultimate foundation of the contention of lack of independence and impartiality was the fact of recomposition of Trial Chamber I. The alleged invalidity in the recomposition of the Chamber is the premise. For the reasons given above, the premise is not correct.

Consequently, the conclusion does not follow that the dismissal by Trial Chamber I of the appellant's motion challenging the recomposition of the Chamber shows that the appellant has "serious reasons to nurture fears about the independence and impartiality of the Chamber".

CONCLUSION

On the one ground on which the Appeals Chamber has upheld the case of the appellant, that ground is, for the reasons given above, inadmissible, the point in question, concerning non-compliance with the amendment procedure prescribed by Rule 50 (A) of the Rules, not having been argued before Trial Chamber I and no decision dismissing an objection to jurisdiction on the basis of that argument having been in consequence made by that Chamber.

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the court a real danger that the judge was biased?') needs to be reviewed in the light of subsequent decisions". A similar result is reached through the jurisprudence of the European Court of Human Rights, cited in the judgement of the Appeals Chamber in this case and, in substance, previously relied on by the Bureau of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Delalic*, 4 September 1998.

[40] Appellant's Brief, 16 December 1998, para. 104. See also, *ibid*, para. 142.

It is not correct that the Appeals Chamber should be deciding issues of this kind without the assistance and benefit of the views of the Trial Chamber from the decision of which the appeal is sought to be brought. The specific question of there being a need to comply with the amendment procedure required by Rule 50(A) of the Rules not having been argued before Trial Chamber I, the views of that Trial Chamber on that question have not been expressed and are not available to the Appeals Chamber.

For the reasons given above, I would dismiss the appeal in its entirety.

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

Mohamed Shahabuddeen

Dated this third day of June 1999
At Arusha,
Tanzania.

[Seal of the Tribunal]

(38)

ICTR-96-15-A
254-252
7-JUNE-1999

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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 and 31 December 1994

Case No.: ICTR-96-15-A

Date: 4 June 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: **Mr. Agwu U. Okali**

Decision of: **3 June 1999**

JOSEPH KANYABASHI

v.

THE PROSECUTOR

JOINT AND SEPARATE OPINION OF JUDGE McDONALD AND JUDGE VOHRAH/Corr.

Counsel for the Appellant:
Mr. Michel Marchand
Mr. Michel Boyer

The Office of the Prosecutor:
Mr. David Spencer
Mr. Ibukunolu Babajide
Mr. Chile Eboe-Osuji
Mr. Robert Petit

continuation of the proceedings where a Judge is unable to continue sitting in a part-heard case. [13]

15. The President of the International Tribunal is charged with administrative tasks conferred upon him/her by the Statute and the Rules. In interpreting the Statute, and the Rules which implement the Statute, Trial Chambers of both the International Tribunal and the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY"), as well as the Appeals Chamber have consistently resorted to the Vienna Convention of the Law of Treaties ("the Vienna Convention")[14], for the interpretation of the Statute.[15] Although the Statute is not a treaty, it is a *sui generis* international legal instrument resembling a treaty. Adopted by the Security Council, an organ to which Member States of the United Nations have vested legal responsibility, the Statute shares with treaties fundamental similarities. Because the Vienna Convention codifies logical and practical norms that are consistent with domestic law, it is applicable under customary international law to international instruments which are not treaties. Thus, recourse by analogy is appropriate to Article 31(1) of the Vienna Convention in interpreting the provisions of the Statute. 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."

16. The overarching object and purpose of the Statute is ensuring a fair and expeditious trial for the accused. The Trial Chambers are re-composed to ensure the attainment of this object and purpose. Thus, the contextual interpretation of the provisions of the Statute, and by extension, of the Rules implementing the Statute, should meet that object and purpose. For example, as noted above, Sub-rule 15(E) authorises the President to assign a new Judge to a Chamber to replace one who is disqualified or was otherwise unable to sit in a part-heard case. The Statute, in setting forth the organisational structure of the Chambers, is

[13] However, after the opening statement or the beginning of the presentation of the evidence, a situation not applicable to this case, the proceedings can be ordered to continue only with the consent of the accused.
[14] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.
[15] Other cases where Trial Chambers of the International Tribunal or the ICTY have had recourse to Article 31 in interpreting the provisions of the Statutes include: Prosecutor v. Théoneste Bagosora and 28 Others, *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*, op. cit., note 1 at pp. 12-13; Prosecutor v. Tadic, *Decision on the Prosecutor's Motion, Protective Measures for Victims and Witnesses*, Case No. IT-94-I-T, 10 August 1995, at p. 10; Prosecutor v. Erdemovic, *Judgement*, Case No. IT-96-22-A, 7 October 1997, at p. 3; and Prosecutor v. Delalic and Others, Case No. IT-96-21-T, 16 November 1998, at pp. 396-397.

On page 7, footnote 15 of the aforementioned Opinion, replace the word "Tadi}" with the word "Tadic."

Gabrielle Kirk McDonald

Lal Chand Vohrah

Dated this fourth day of June 1999
At Arusha,
Tanzania.

[Seal of the Tribunal]