



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-96-12-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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ICTR
CRIMINAL REGISTRY
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ANATOLE NSENGIYUMVA

v.

THE PROSECUTOR

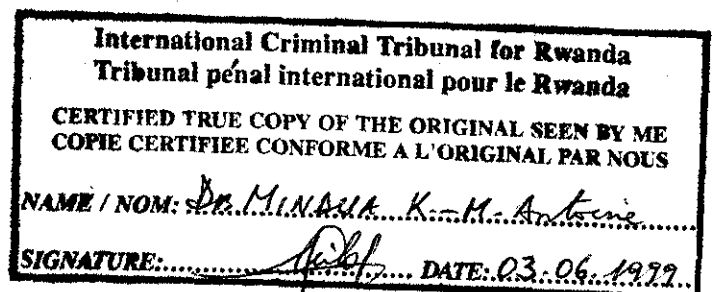
**DECISION ON APPEAL AGAINST ORAL DECISION OF
TRIAL CHAMBER II OF 28 SEPTEMBER 1998**

Counsel for the Appellant:

Mr. Kennedy Ogetto
Mr. Gershom Otachi Bw'oamwa

The Office of the Prosecutor:

Mr. David Spencer
Mr. Frédéric Ossogo
Mr. Chile Eboe-Osuji
Mr. Luc Cote
Ms. Josee D'aoust



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 Defence Counsel for the accused Anatole Nsengiyumva ("the Appellant") against an oral decision rendered by Trial Chamber II composed of Judge Sekule (Presiding), Judge Kama and Judge Khan on 28 September 1998 ("the Decision").¹ By the Decision, Trial Chamber II 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 three other accused ("the Joinder Motion").

2. Anatole Nsengiyumva was arrested in Cameroon on 27 March 1996 and Judge Ostrovsky confirmed the indictment against him on 12 July 1996.² Anatole Nsengiyumva was transferred to the International Tribunal's detention unit on 23 January 1997 and made his initial appearance on 19 February 1997 before Trial Chamber I, composed of Judge Kama (Presiding), Judge Sekule and Judge Pillay. The Appellant submits in this appeal that Trial Chamber I has exclusive jurisdiction over his case and that the composition of a Trial Chamber cannot be altered. The President of the International Tribunal, acting pursuant to Article 13 of the Statute of the International Tribunal ("the Statute"), assigned Judge Sekule (Presiding), Judge Kama and Judge Khan to Trial Chamber II, which became seized of the Leave Request and the Joinder Motion both of which were filed on 31 July 1998. Both motions were set down to be heard on 28 September 1998 before Trial Chamber II. At this hearing, the Appellant contested the Trial Chamber's competence to hear the Leave Request and the Joinder Motion, on the grounds that his case had all along been before Trial Chamber I and that, in any event, the re-composition of Trial Chamber II was unlawful.

¹ Transcripts of motion hearing on 28 Sept. 1998 in the case of, *inter alia*, Prosecutor v. Nsengiyumva, Case No.: ICTR-96-12-I, p. 32.

² Indictment, Prosecutor v. Nsengiyumva, Case No.: ICTR-96-12-I.

3. Subsequent to the oral dismissal by Trial Chamber II of the Appellant's objection to that Trial Chamber's competence, the Appellant filed a Notice of Appeal on 5 October 1998, entitled "Notice of Appeal (Article 24 Rule 108)". This Notice of Appeal was followed by the "Prosecutor's Response and Challenge to the Admissibility of the Accused's Notice of Appeal" and the "Motion in Appeal on Jurisdiction, Prosecutor's Motion for an Expedited Appeal Procedure Pursuant to Articles 14 and 28(2) of the *Statute* of the ICTR and Rules 117 and 108 of the *Rules of Procedure and Evidence* as Amended", filed on 21 October 1998.

4. Thereafter, the Appeals Chamber directed the parties to submit written briefs within the time-limit indicated in a Scheduling Order of 18 December 1998. The Appellant filed his "Brief Submitted in Accordance With the Order of the Appeals Chamber Made on 18th December 1998" on 31 December 1998. The English translation of the Prosecutor's Brief was filed on 3 March 1999 and carries the title "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".

II. The Appeal

A. The Appellant

5. The Appellant requests that the Appeals Chamber provide appropriate relief by 1) quashing the Decision; 2) declaring Trial Chamber II, composed of Judge Sekule, Judge Kama and Judge Khan, to be without jurisdiction to entertain the Leave Request and the Joinder Motion; and 3) remitting the matter to Trial Chamber I "duly constituted".³ The grounds of appeal invoked by the Appellant can be summarised as follows. The Appellant argues that Trial Chamber II 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) of the

Rules of Procedure and Evidence ("the Rules"). He contends that it follows from Article 13 of the Statute that the composition of the two Trial Chambers cannot be altered. Only Trial Chamber I, composed of Judge Kama, Judge Aspegren and Judge Pillay, and Trial Chamber II, composed of Judge Sekule, Judge Khan and Judge Ostrovsky, constitute the proper Trial Chambers of the Tribunal, to which the jurisdiction to hear cases belongs exclusively. Consequently, Trial Chamber II was not lawfully composed and is not competent to conduct proceedings in any case.⁴

6. As a second ground of appeal, the Appellant argues that pursuant to Article 19 of the Statute and Sub-rule 50(A) of the Rules, the Trial Chamber before which an accused enters a plea has exclusive jurisdiction to hear his case and that the entering of a plea is a stage which marks the commencement of trial. In consequence, after an accused has pleaded before a Trial Chamber, his case cannot be transferred to another Trial Chamber. Trial Chamber II, therefore, is not competent to hear the Leave Request and the Joinder Motion, even if it is considered to have been lawfully composed.⁵

B. The Prosecution

7. In response, the Prosecution asks that the Appeals Chamber reject the appeal since no right of appeal lies from the Decision. In the event the Appeals Chamber finds the appeal to be admissible, the Prosecution requests that it dismiss the appeal and confirm the competence of Trial Chamber II to hear the Leave Request and the Joinder Motion. The main submissions of the Prosecution may be summarised as follows. The Prosecutor submits that the elements relating to the jurisdiction of the Tribunal are set out in Articles 1 to 7 of the Statute, all of which apply to the Tribunal as a whole and are not restricted to the separate Trial Chambers. 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. Hence, the subject-matter of the appeal does not involve a question of jurisdiction but one of procedure.⁶

³ Brief Submitted in Accordance with the Order of the Appeals Chamber Made on 18th December 1998 ("Appellant's Brief"), p. 21.

⁴ *Ibid.*, paras. 6 to 9.

⁵ *Ibid.*, paras. 10 to 13.

⁶ Prosecutor's Response and Challenge to the Admissibility of the Accused's Notice of Appeal, paras. 14 to 18.

8. The Prosecutor is 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 Article 13 of the Statute enables the President to assign and reassign judges to the Trial Chambers as the administration of justice requires.⁷ Moreover, as evidenced by an analysis of Article 19 of the Statute and, *inter alia*, Rules 62, 66, 67, Sub-rule 69(C) and Rule 73bis of the Rules, the proceedings before the Tribunal involve different stages, specifically pre-trial, trial and appeal, and trial does not commence at the time of entering a plea.⁸ However, even if trials were deemed to commence upon the entering of a plea, the rule against changing the composition of a Trial Chamber does not come into operation until the commencement of the presentation of evidence on the merits of the case.⁹

III. Applicable Provisions

9. The relevant parts of the applicable provisions of the Statute and 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

⁷ *Ibid.*, para. 59.

⁸ *Ibid.*, paras. 38 to 47.

⁹ *Ibid.*, paras. 50 to 56.

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.
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 accused 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

10. 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 appended to this decision.

11. 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, also 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.

12. 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 I 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.

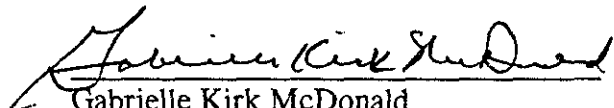
13. The Appeals Chamber, for the reasons set out in the Joint and Separate Opinion of Judge McDonald and Judge Vohrah, the Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia and the Dissenting Opinion of Judge Shahabuddeen, finds that Trial Chamber II is competent to adjudicate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

14. 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.

IV. 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 I. **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 and Separate Opinion.

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

Judge Shahabuddeen appends a Dissenting Opinion.

Dated this third day of June 1999
At Arusha
Tanzania



[Seal of the Tribunal]



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v.

THE PROSECUTOR

**JOINT AND SEPARATE OPINION OF JUDGE McDONALD
AND JUDGE VOHRAH**

Counsel for the Appellant:

Mr. Kennedy Ogetto
Mr. Gershom Otachi Bw'oamwa

The Office of the Prosecutor:

Mr. David Spencer
Mr. Frédéric Ossogo
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International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS	
NAME / NOM: <i>Dr. MINAUA K. M. A. A. A.</i>	
SIGNATURE: <i>[Signature]</i>	DATE: <i>03.06.1999</i>

I. INTRODUCTION

1. The preliminary question which has to be decided in this appeal is whether a right of appeal lies from the Decision. If so, the issue of whether Trial Chamber II is competent to adjudicate the Leave Request and the Joinder Motion would have to be resolved, necessitating a discussion concerning the circumstances under which a Trial Chamber may be re-composed and to what extent, if any, the Trial Chamber that conducts the initial appearance of an accused has exclusive jurisdiction over his case.

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 II to hear the Leave Request and the Joinder Motion is challenged. Having had his initial appearance before Trial Chamber I, the Appellant objects to the competence of any Trial Chamber other than Trial Chamber I to consider the Leave Request and the Joinder Motion on the grounds that the composition of the Trial Chambers cannot be altered and that cases cannot be transferred from one Trial Chamber to another.

4. The challenge to the competence of Trial Chamber II to entertain the Leave Request and the Joinder Motion raises the issue as to whether the dismissal of the Appellant's objection to the exercise of its jurisdiction is appealable pursuant to Sub-rule 72(D), and whether Trial

¹ *Scheduling Order, Prosecutor v. Nsengiyumva*, Case No.: ICTR 96-12-I, App. Ch., 18 Dec. 1998.

Chamber II, as re-composed, has jurisdiction to adjudicate the Leave Request and the Joinder Motion.

5. The jurisdiction of a tribunal concerns its right and power to hear to determine a judicial proceeding. Articles 1 through 7 of the Statute 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 a Trial Chamber are challenged, it raises the issue of the power of that Trial Chamber to exercise the jurisdiction that the Tribunal possesses.

6. 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 II was lawfully constituted and thus competent to exercise jurisdiction.

B. Whether Trial Chamber II was unlawfully constituted, and was, therefore, not competent to exercise jurisdiction

7. The first issue is whether Trial Chamber II as re-composed is competent 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.

8. 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 that 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 indictment, the Prosecutor had added a new charge of conspiracy against persons in the first and second groups. The learned Judge rejected the Prosecutor's submission that the indictment should be reviewed under the *ex parte* provision of Rule 47 of the Rules. He held that the Prosecutor must first seek leave to amend the original indictments 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.² In the event, Judge Khan declined to exercise jurisdiction over all the three groups of persons, having regard especially to the rights of the accused, and accordingly he dismissed the indictment.³

9. 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, finding that a right of appeal did not lie from Judge Khan's decision under the Statute and the Rules.⁴

10. Consequently, the Prosecutor proceeded on four separate original indictments against the following four accused; Anatole Nsengiyumva; Theoneste Bagosora; Gratien Kabiligi; and Aloys Ntabakuze. 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 present indictments into conformity with the jurisprudence of the Tribunal and current trial practices.⁵ Through another motion, the Prosecutor also sought to join the four accused in one and the same case.⁶ The discussion as to which Trial Chamber is to consider the Leave Request and, if granted, which Trial Chamber is to rule on the Joinder Motion is dealt with hereafter.

² *Dismissal of Indictment, Prosecutor v. Bagosora and 28 Others*, Case No.: ICTR-98-97-I, 31 March 1998, at p.6.

³ *Ibid.*, at p. 12.

⁴ *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, Prosecutor v. Bagosora and 28 Others*, Case No.: ICTR-98-37-A, 8 June 1998.

⁵ *Prosecutor's Request for Leave to File an Amended Indictment and Brief in Support of Prosecutor's Request for Leave to File an Amended Indictment, Prosecutor v. Nsengiyumva*, Case No.: ICTR-96-12-I.

11. The Appellant contends that Article 13 of the Statute prohibits the alteration of the composition of the Trial Chambers. A close reading of the Rules and the Statute, however, does not support this contention. Pursuant to Rule 19, the President is directed to coordinate the work of the Chambers. Sub-rule 27(A) provides for the rotation of Judges while taking into account the efficient disposal of cases. 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 if one of the originally assigned Judges is unable, for any reason, to continue sitting in a part-heard case.

12. These Rules fully comport with the Statute, which as the 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 Tribunal shall be comprised of three organs, including the Trial and Appeals Chambers. Article 11, subparagraph (A), provides that the Trial Chamber shall consist of three Judges. The plain meaning of this provision is that a Trial Chambers is only competent if it comprises three Judges. 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.

13. 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 the disqualification of a Judge, thereby enabling the re-composition of that

⁶ *Prosecutor's Motion for Joinder of Accused and Brief in Support of Prosecutor's Motion for Joinder of Accused*, *Prosecutor v. Bagosora*, Case No.: ICTR-96-7; *Prosecutor v. Kabiligi*, Case No.: ICTR-97-34; *Prosecutor v. Ntabakuze*, Case No.: ICTR-97-30; *Prosecutor v. Nsengiyumva*, Case No.: ICTR-96-12.

Trial Chamber.⁷ Sub-rule 15(E) enables the Presiding Judge to change the composition of the Trial Chamber by assigning another Judge to the case and to order either a rehearing or the continuation of the proceedings where a Judge is unable to continue sitting in a part-heard case.⁸

14. 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 ("the ICTY"), as well as the Appeals Chamber have consistently resorted to the Vienna Convention of the Law of Treaties ("the Vienna Convention"), for the interpretation of the Statute.⁹ 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 which 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."

15. 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 that this very aim is achieved. 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

⁷See *Decision on the Application for the Disqualification of Judges Jorda and Riad*, *Prosecutor v. Kordic and Cerkez*, Case No.: IT-95-14/2-PT, 8 Oct. 1998.

⁸ However, after the opening statement and 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.

⁹ Other cases where ICTY Trial Chambers have had recourse to Article 31 in interpreting the provisions of the Statutes include: *Decision on the Prosecutor's Motion, Protective Measures for Victims and Witnesses*, *Prosecutor v. Tadić*, Case No.: IT-94-I-T, 10 Aug. 1995, at p. 10; *Judgement, Prosecutor v. Erdemović*, Case No.: IT-96-22-A, 7 Oct. 1997, at p. 3; *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* *Prosecutor v. Théoneste Bagosora and 28 Others*, *op. cit.*, note 4 at pp. 12-13.

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 otherwise unable to sit in a part-heard case. The Statute, in setting forth the organisational structure of the Chambers, is silent on this point. Rather, the Statute leaves to the Judges the responsibility of drafting rules for the conduct of the proceedings.¹⁰ 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.

16. 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 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.

17. Acting pursuant to his mandate under Article 13 of the Statute, President Kama assigned Judge Sekule (presiding), Judge Khan and himself to Trial Chamber II 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 four accused who are the objects of the Joinder Motion had been confirmed by Judge Ostrovsky, who confirmed the indictment against the Appellant, and Judge Aspegren, who confirmed the indictments against the other three accused. 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 three out of the following four Judges: Judge Kama, Judge Sekule, Judge Khan or Judge Pillay, as the International Tribunal at the time was composed of only six Judges. We find that this constitutes an exceptional circumstance which justifies the re-composition of the Trial Chamber.

¹⁰ See Article 14 of the Statute.

18. In our view, the Statute and the Rules confer upon the President the authority to replace Judges and to re-compose Trial Chambers, in exceptional circumstances, to ensure the attainment of the object and purpose of the Statute and to avoid any absurd result. The 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 the 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

19. The Appellant 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.¹¹ We find that in the present case, the Appellant's trial had not commenced for the purpose of deciding whether Trial Chamber I has exclusive jurisdiction over his case. The following discussion will suffice to show that the Appellant's assertion in this regard is unfounded.

20. In making his assertion, the Appellant relies on the Decision in Prosecutor v. Bagosora and 28 Others.¹² In that case, Judge Khan concluded that a trial commences at the time of the initial appearance, when the accused enters his plea on the charges involving the alleged crimes for which he has been brought before the Tribunal.¹³ Article 19 of the Statute 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 an accused, provides for the same result. Clearly, an event could not have occurred if the Statute and the Rules require that a date be set for the commencement of that event.

¹¹ *Appellant's Brief* at paras. 10 to 13.

¹² See *supra* note 2.

¹³ *Appellant's Brief*, para. 12.

21. 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.¹⁴ 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.

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

23. 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 I does not have exclusive jurisdiction over his case. We now turn to address the specific disposition of the Leave Request and the Joinder Motion.

2. Whether the Prosecutor's Request for Leave to File an Amended Indictment is Properly
Before Trial Chamber II

24. The Prosecutor submitted the Leave Request to Trial Chamber I, composed of Judge Kama, Judge Pillay and Judge Aspegren. The Appellant's initial appearance had previously been held before Trial Chamber I although, at that time, that Chamber was composed of Judge Kama, Judge Sekule and Judge Pillay. Thus, the composition of Trial Chamber I itself had been altered. However, the Leave Request, was set down for hearing before Trial Chamber II which was also seized of the Joinder Motion.¹⁵

¹⁴ 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 beginning of the presentation of evidence, the proceedings can be continued only with the consent of the accused.

¹⁵ The Prosecutor addressed the Joinder Motion to neither a numbered Trial Chamber nor to specific Judges.

25. Rule 50 contains three stages during which the Prosecutor can amend an indictment.¹⁶ Only one of these three stages is relevant to the disposition of this appeal. The relevant portion of Sub-rule 50(A), provides that “[a]t 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.)

26. 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 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.

27. Relying on Article 31(1) of the Vienna Convention,¹⁷ we find that a need for flexibility alone cannot justify departure from the plain language of the Rules. We also find that no recourse to supplementary means of interpretation is necessary since this approach is resorted to only when the language of a provision is ambiguous.¹⁸ The language of Sub-rule 50(A) is plain and unambiguous. Here, it is clear in the ordinary meaning of the language of that provision 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

¹⁶ With respect to the procedures for amending indictments, there are slight differences between the Rules of the International Tribunal and the ICTY. Sub-rule 50(A) of the Rules 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 emphasised 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.

¹⁷ Article 31(1) of the Vienna Convention states: “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.” See also Article 31 and 32 of that same Convention.

Chamber I. Accordingly, the Leave Request must be returned to Trial Chamber I, as the only competent Trial Chamber to adjudicate this matter.

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

29. 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.

30. 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 II 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 had addressed the Leave Request since those Judges did not face the disqualification problem.

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

31. 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 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."¹⁹ It is

¹⁸ See Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Articles 31-32. See also *Prosecutor v. Erdemović*, *Judgement*, Case No.: IT-96-22-A, A. Ch., 7 Oct. 1997, *Joint Separate Opinion of Judge McDonald and Judge Vohrah*, at para. 3.

¹⁹ *Criminal Procedure*, Second ed., Wayne R. LaFare and Jerold H. Israel, at p. 761, citing Fed.R.Crim.P

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. Where possible public interest and the concern for judicial economy would require joint offences to be tried together. The jurisprudence of the ICTY clearly permits joint trials and points to the existence of specific elements to justify joinder.²⁰ However, the requirements necessary to be fulfilled before joinder can be granted are not in issue as we are concerned here only with determining the particular Trial Chamber competent to hear the Joinder Motion.

32. 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 I for determination as to whether it should be granted and that the Joinder Motion may remain with Trial Chamber II for determination on its merits.

33. In the result,²¹ we hold that Trial Chamber II is not unlawfully constituted and that it is competent to exercise jurisdiction over the Joinder Motion.

C. Our conclusions

34. 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 II;

8(a). See also *Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998 and Separate Opinion of Judge Shahabuddeen, Prosecutor v. Kovacevic*, Case No.: IT-97-24-AR73, App. Ch., 2 July 1998, at p. 3.

²⁰ See, for example, *Decision on Motion for Joinder of Accused and Concurrent Presentation of Evidence, Prosecutor v. Kovacevic*, Case No.: IT-97-24-PT, T.Ch. II, 14 May 1998.

²¹ See discussion at pp. 3-7, *supra*.

- (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 I is the only Trial Chamber competent to adjudicate the Leave Request; and
- (4) Trial Chamber II is competent to adjudicate the Joinder Motion.

35. Consequently, we would allow the appeal in respect of the Leave Request and remit it to Trial Chamber I for adjudication and we would dismiss the appeal in respect of the Joinder Motion.

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]



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-96-12-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

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ANATOLE NSENGIYUMVA

v.

THE PROSECUTOR

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

Counsel for the Appellant:

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Mr. Gershom Otachi Bw'oamwa


The Office of the Prosecutor:

Mr. David Spencer
Mr. Frédéric Ossogo
Mr. Chile Eboe-Osuji
Mr. Luc Cote
Ms. Josee D'aoust

On page 6, footnote 9 of the aforementioned Opinion, replace the word "Erdemovi}" with the word "Erdemovic."

On page 11, footnote 18 of the same Opinion, replace the word "Erdemovi}" with the word "Erdemovic."


Gabrielle Kirk McDonald


Lal Chand Vohrah

Dated this fourth day of June 1999
At Arusha
Tanzania

[Seal of the Tribunal]



International Criminal Tribunal for the
Prosecution of Persons Responsible for
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ANATOLE NSENGIYUMVA

v.

THE PROSECUTOR

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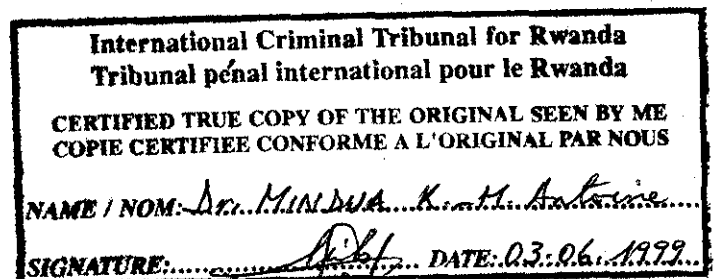
**JOINT SEPARATE AND CONCURRING OPINION
OF JUDGE WANG TIEYA AND JUDGE RAFAEL NIETO-NAVIA**

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Mr. Frédéric Ossogo
Mr. Chile Eboe-Osuji
Mr. Luc Cote
Ms. Josee D'aoust



We join our fellow Judges, Judge McDonald and Judge Vohrah, in the Decision disposing of the interlocutory appeal from Mr. Anatole Nsengiyumva ("Appellant") concerning his challenge to the jurisdiction of Trial Chamber II, as recomposed, to hear the Prosecutor's Motion for Joinder ("Joinder Motion") and the Prosecutor's Request for Leave to File an Amended Indictment in respect of the Appellant ("Request"), to the extent that the appeal is held admissible under Rule 72 and upheld on the merits, resulting in the Request being remitted to Trial Chamber I, being the proper Chamber under sub-Rule 50 (A), for decision. We respectfully append a separate and concurring opinion setting forth different reasoning for this conclusion. Since the present case resembles the appeal of *Kanyabashi v. Prosecutor* (Case No. ICTR-96-15-A) in terms of the issues raised for consideration by the Appeals Chamber, except for the ground of lack of independence and impartiality which was not pleaded here, our reasoning in the opinion delivered in *Kanyabashi* stands for this appeal as well.

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]



International Criminal Tribunal for the
Prosecution of Persons Responsible for
Genocide and Other Serious Violations of
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Decision of: 3 June 1999

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ANATOLE NSENGIYUMVA

v.

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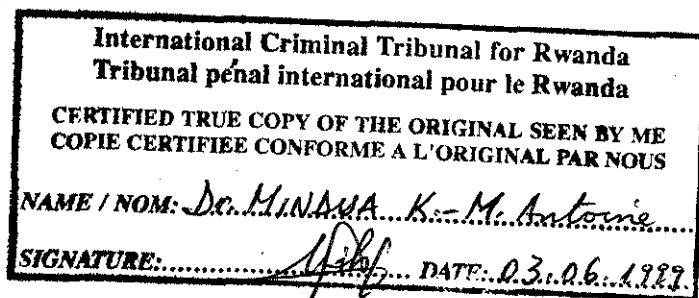
DISSENTING OPINION OF JUDGE SHAHABUDDEEN

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The Office of the Prosecutor:

Mr. David Spencer
Mr. Frédéric Ossogo
Mr. Chile Eboe-Osuji
Mr. Luc Cote
Ms. Josee D'aoust



I respectfully dissent from the decision of the Appeals Chamber. The substance of my reasons is given in an opinion which I have appended to the judgement of the Chamber in the case of *Joseph Kanyabashi v. The Prosecutor*, decided today. As in that case, I have reached the conclusion that the appeal, as an interlocutory appeal, should be dismissed.

There are two points which I should add. The first is that the present case does not raise any question of judicial independence and impartiality. Consequently, my remarks on these points in *Kanyabashi's* case do not apply.

The second point is that, as in *Kanyabashi's* case, the sole ground on which the Appeals Chamber has allowed the present appeal is that, in its view, the procedure for granting leave to make amendments to an indictment, as laid down by Rule 50(A) of the Rules, was not complied with.


But, as in *Kanyabashi's* case, this point was not the subject of objection by the appellant at any stage during the hearing of the matter by Trial Chamber II. His concern was with the alleged illegality of the recomposition of that Trial Chamber and the alleged exclusive competence of Trial Chamber I to handle the whole of the case on the strength of the fact that it took the initial appearance.

This was how the matter was understood by Trial Chamber II: in no part of its oral judgement, delivered immediately after the oral arguments on 28 September 1998, did it pass upon the point concerning the specific amendment procedure prescribed by Rule 50(A) of the Rules or in any way refer to it. What the Presiding Judge spoke of was "the two motions filed by the defence on the issue of the recomposition of the Trial Chamber or, rather, the challenge to the recomposition of Trial Chamber". (Transcript, 28 September 1998, pages 29 – 30).

Nor was any such point, about the specific amendment procedure prescribed by Rule 50(A) of the Rules, raised by the appellant in his Notice of Appeal of 2 October 1998.

An objection of non-compliance with the amendment procedure prescribed by Rule 50(A) of the Rules would be "an objection based on lack of jurisdiction" within the meaning of Rule 72(D) of the Rules, but, one not having been made to Trial Chamber II, it could not be said that the Trial Chamber dismissed such an objection. Since there is no right of interlocutory appeal unless there is a "dismissal of an objection based on lack of jurisdiction", the appeal is not competent and falls to be dismissed.

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]