

ICTR-97-34-I
13-4-2000
(5444-5435)

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International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

OR: ENG

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

Registrar: Dr. Agwu U. Okali

Decision of: 13 April 2000

THE PROSECUTOR
v.
GRATIEN KABILIGI and
ALOYS NTABAKUZE

Case No. ICTR-96-34-I

ICTR
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**DECISION ON THE DEFENCE MOTIONS
OBJECTING TO A LACK OF JURISDICTION AND
SEEKING TO DECLARE THE INDICTMENT VOID AB INITIO**

The Office of the Prosecutor:

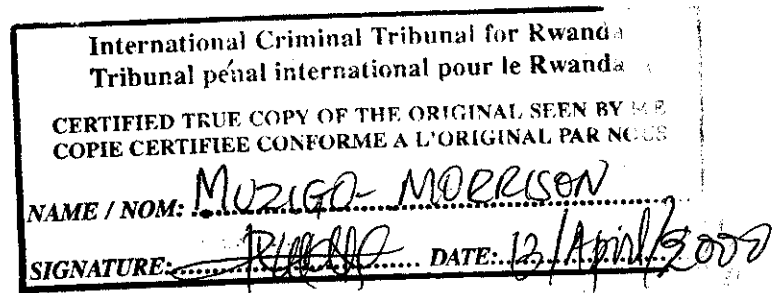
Carla Del Ponte
David Spencer
Frédéric Ossogo
Holo Makwaia

Defence Counsel for Gratien Kabiligi:

Jean Yaovi Degli

Defence Counsel for Aloys Ntabakuze:

Clemente Monterosso



INTRODUCTION

1. The International Criminal Tribunal for Rwanda (Tribunal), sits today as Trial Chamber III, composed of Judges Lloyd George Williams, Presiding, William H. Sekule (as assigned by the President), and Pavel Dolenc.
2. On 13 August 1999, the Prosecution filed an amended indictment against Kabiligi and Ntabakuze, in accordance with the decision of the Trial Chamber to grant the Prosecution's motion to amend.
3. On 13 October 1999, Counsel for Ntabakuze filed his "Preliminary Motion to Declare the Indictment Filed 13 August 1999 Void *Ab Initio* (Rule 72)," (Motion to Declare the Indictment Void *Ab Initio*).
4. On 14 October 1999, Counsel for Ntabakuze filed his "Motion Based on Lack of Jurisdiction" (Ntabakuze's Motion on Jurisdiction), under Rule 72(B)(i) of the Tribunal's Rules of Procedure and Evidence (Rules).
5. On 29 November 1999, Counsel for Kabiligi filed his "Extremely Urgent Motion on Objection Based on Lack of Jurisdiction" (Kabiligi's Motion).
6. On 4 February 2000, the Prosecution filed its "*Mémoire du Procureur en Réponse à la Réquête de la Défense en Extrême Urgence en Exception d'Incompétence*" (Prosecutor's Response to Ntabakuze's Motion).
7. On 4 February 2000, the Prosecution filed its "Prosecutor's Brief in Response to Defence Extremely Urgent Motion on Objection Based on Lack of Jurisdiction" (Prosecutor's Response to Kabiligi's Motion).
8. On 1 and 2 December 1999 and 7 and 8 February 2000, the Trial Chamber heard arguments. On 2 December 1999, the Trial Chamber heard substantial argument from Defence Counsel on the issues raised by the Motion to Declare the Indictment Void *Ab Initio*. See Transcript of 2 December 1999, at pages 70-115.
9. On 27 March 2000, the Prosecution filed the "Prosecutor's Brief in Response to Defence's Preliminary Motion to Have Declared Void *Ab Initio* the Indictment Filed on 13 August 1999 Pursuant to Rule 72" (Response to the Motion to Declare the Indictment Void *Ab Initio*).

SUMBISSIONS OF THE DEFENCE

Ntabakuze's Motions

10. Counsel for Ntabakuze submits that the indictment lacks temporal jurisdiction and violates Article 7. Counsel for Ntabakuze contends that because of references to allegations before 1994, numerous paragraphs (including paragraphs 1.1 to 1.30, 5.1, 5.5, 5.8, 5.10, 5.16, 5.17, and 5.22) of the indictment's concise statement of facts violate the notion of temporal jurisdiction. Some of these paragraphs violate Rule 47(C) as to the form of the indictment.

11. Counsel for Ntabakuze contends that the indictment lacks jurisdiction over natural persons and violates Article 5. Counsel for Ntabakuze asserts that, because of references to the Rwandan Armed Forces, nine paragraphs, as follows: 5.16, 5.35, 5.36, 6.7, 6.8, 6.32, 6.33, 6.34, 6.46, of the indictment's concise statement of facts violate the jurisdiction over natural persons under Article 5. Some of these paragraphs also violate Rule 47(C) as to the form of the indictment.

12. Counsel for Ntabakuze, in his Motion to Declare the Indictment Void *Ab Initio* challenged the validity of the indictment based on alleged defects in the amendment process.

13. Counsel for Ntabakuze's prays that the Trial Chamber decide his two motions before the Prosecutor's Motion for Joinder (Joinder Motion), and rule that the Trial Chamber lacks jurisdiction over an indictment that violates the Statute because it alleges facts occurring before 1994 and refers to institutions (not natural persons). Finally, Counsel for Ntabakuze asks the Trial Chamber to set aside the indictment and declare it void *ab initio*.

Kabiligi's Motion

14. Counsel for Kabiligi submits that the Tribunal lacks jurisdiction on four grounds. First, the previous proceedings are a nullity. Second, the indictment exceeds the temporal jurisdiction of Article 7. Third, the indictment violates Article 5, defining jurisdiction over natural persons. Fourth, the indictment is improper because the new counts were not confirmed and because there exist two indictments.

15. First, Counsel for Kabiligi argues that the previous proceedings are a nullity for violations of Articles 17, 18(2), 19(2), and Rules 40 and 40bis, and Rules 7 and 8 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal. Kabiligi was detained as a suspect for more than twenty days, and served an indictment only after a sixty-nine-day delay. Kabiligi's motion filed on 25 September 1997 objecting to these violations was dismissed only on 4 November 1999. Counsel for Kabiligi also has appealed the decision of Trial Chamber II that denied his motion of 25 September 1997. See *Prosecutor v. Kabiligi & Ntabakuze*, ICTR-97-34-I, (Decision on the Defence Motion for Nullity of Proceedings and Release) (4 November 1999) See Kabiligi Motion, at paras. 33, 34.

16. Second, Counsel for Kabiligi contends that, because of references to allegations before 1994, numerous paragraphs (including paragraphs 1.1 to 1.30, 5.2, 5.5, 5.15, 5.21, 5.23, 5.28, and 5.29) of the indictment's concise statement of facts violate the temporal jurisdiction of Articles 1 and 7. Some of these paragraphs also violate Rule 47(C) as to the form of the indictment. Counsel for Kabiligi, at the hearing, argued that the Trial Chamber ought to expunge all allegations not strictly relating to the elements of the crimes.

17. Third, Counsel for Kabiligi asserts that, because of references to the Rwandan Armed Forces, eight paragraphs, as follows: 5.35, 5.36, 6.7, 6.8, 6.32, 6.33, 6.34, 6.46, of the indictment's concise statement of facts violate the jurisdiction over

natural persons under Article 5. These paragraphs also violate Rule 47(C) as to the form of the indictment.

18. Fourth, Counsel for Kabiligi submits that the indictment is improper because the new counts were not confirmed pursuant to Article 18 and Rule 47(H) and because there exist two indictments, one of 15 October 1997 and one of 13 August 1999.

19. Counsel for Kabiligi, at the hearing, adopted the arguments made on behalf of Anatole Nsengiyumva, including the argument that the crime of conspiracy is completely committed once the agreement is entered into. Consequently, if a conspiracy was committed before 1994, it falls outside the jurisdiction of the Tribunal. These arguments also contend that the indictment may contain only matters that disclose an offence, not matters that are merely relevant or linked.

20. Counsel for Kabiligi prays that the Trial Chamber: (1) adjourn the hearing of the Prosecutor's Motion for Joinder until after deciding Kabiligi's Motion; (2) find that the indictment does not comply with the jurisdictional requirements of Articles 5 and 7, and that the Tribunal, consequently, lacks jurisdiction; (3) find that the indictment violates Article 18 and Rule 47 in the absence of confirming new counts; (4) find that the Tribunal cannot be seized of unconfirmed counts and of two indictments against Kabiligi; (5) order the Prosecutor to withdraw one of the two indictments; (6) find the Tribunal lacks jurisdiction over the Prosecutor's Motion for Joinder, and; (7) order "the Prosecutor to bring a proper motion" for joinder.

SUBMISSIONS OF THE PROSECUTION

Regarding Ntabakuze's Motions

21. The Prosecution submits that the Counsel for Ntabakuze's interpretation of the notion of temporal jurisdiction under Articles 1 and 7 is incorrect. Allegations dating before 1994 are not independent crimes charged in and of themselves, they clarify crimes charged during 1994, and "have their place in the amended indictment." Prosecutor's Response to Ntabakuze's Motion, at para. 52. The Prosecution cites the Vienna Convention on the Law of Treaties, Rule 89, and case law from the ICTR, ICTY, and Nuremberg military tribunals.

22. The Prosecution argues that the arguments submitted on behalf of Ntabakuze are untenable in fact and law because the indictment charges Ntabakuze, not the Rwandan Armed Forces, based on individual and superior responsibility under Articles 6(1) and 6(3).

23. The Prosecution represents that the Ntabakuze's Motion on Jurisdiction is not timely. *See* Transcript of 8 February 2000, at page 149.

24. The Prosecution argues that the Defence objections are premature because the alleged facts will be proved at trial.

25. Regarding Ntabakuze's Motion to Declare the Indictment Void Ab Initio, the Prosecution submits that the Trial Chamber properly granted the amendment of the indictment against Ntabakuze and Kabiligi, and that it is valid. The Tribunal confirmed indictments against the Accused and *prima facie* evidence exists. See Transcript of 2 December 1999, at pages 142-43, 148-49. All issues related to the amendment of the indictment are irrelevant and without merit. *See id.*

26. The Prosecution submits the Trial Chamber ought to deny Ntabakuze's Motion on Jurisdiction.

Regarding Kabiligi's Motion

27. The Prosecution, on Counsel for Kabiligi's first ground, contends that Trial Chamber II already decided these same factual and legal issues, and they are, therefore, *res judicata*. See *Prosecutor v. Kabiligi & Ntabakuze*, ICTR-97-34-I, (Decision on the Defence Motion for Nullity of Proceedings and Release) (4 November 1999). Subsequently, this ground is moot and without merit.

28. The Prosecution, on Counsel for Kabiligi's second ground, asserts that the Defence interpretation of Articles 1 and 7 is incorrect. Allegations dating before 1994 are not independent crimes charged in and of themselves, they clarify crimes charged during 1994, and "have their place in the amended indictment." Prosecutor's Response to Kabiligi's Motion, at para. 52. The Prosecution cites the Vienna Convention on the Law of Treaties, Rule 89, and case law from the ICTR, ICTY, and Nuremberg military tribunals.

29. The Prosecution, on Counsel for Kabiligi's third ground, submits that the Defence argument is untenable in fact and law because the indictment charges Kabiligi, not the Rwandan Armed Forces, based on individual and superior responsibility under Articles 6(1) and 6(3).

30. The Prosecution, on Counsel for Kabiligi's fourth ground, argues that the indictment was properly amended under Rule 50, and that the indictment, as amended, need not be withdrawn under Rule 51. Amended charges need not be confirmed and, therefore, the Defence arguments are without merit.

31. The Prosecution submits the Trial Chamber should deny Kabiligi's Motion.

DELIBERATION

General Observations

32. The Trial Chamber interprets "jurisdiction" under Rule 72(B)(i) exclusively within the meaning of Articles 1 through 7 of the Statute. The Tribunal must satisfy itself that it has personal (Articles 1, 5, and 6), territorial (Articles 1 and 7), temporal (Articles 1 and 7), and subject-matter jurisdiction (Articles 2, 3, and 4).

33. Rule 47(C) reads (in part): "[t]he indictment shall set forth . . . a concise statement of the facts of the case and of the crime with which the suspect is charged".

The Trial Chamber interprets that the Prosecution may include in an indictment allegations that are not strictly related to the elements of the crimes themselves. Here, it is important to distinguish between the words “crime” and “case” as they appear in Rule 47(C). The “crime” means any of the offences enumerated in Articles 2 to 4 of the Statute. The “case” has a broader meaning and includes relevant allegations of facts or circumstances that relate to the Prosecution’s entire theory of a case that paint a more full picture of the events of a given case for other purposes, including *inter alia* providing context, showing relationships, and demonstrating the large-scale nature of the crimes. The Prosecution legitimately also may seek to prove elements of the crimes by inference to acts dating before 1994. The Trial Chamber finds that the Defence submission that the indictment’s concise statement of the facts is limited strictly to the crimes is erroneous. The Trial Chamber finds that under Rule 47(C) the Prosecution may allege facts of its case which go beyond the more limited scope (temporal or otherwise) of the crimes.

34. The Trial Chamber finds that the Defence can file a preliminary motion under Rule 72(B)(i) challenging a lack of jurisdiction of the Tribunal only in regard to an alleged deficiency in the indictment. When a Defence motion challenges the jurisdiction of the Tribunal to dispose of some other motion, the Defence motion cannot be regarded as a preliminary motion filed pursuant to Rule 72(B)(i).

35. The Prosecution submits that Counsel for Ntabakuze’s Motion on Jurisdiction was not timely. The Prosecution, however, failed to produce any further information or evidence. The Trial Chamber, thus, does not make any finding with regard to the timeliness of this motion.

36. The Trial Chamber decides the three motions at bench at the same time because the objections of the motions overlap, and for purposes of judicial economy.

37. The Trial Chamber, in its deliberations, has not considered the Prosecutor’s Response to the Motion to Declare the Indictment Void Ab Initio, filed 27 March 2000, because it is untimely and because the Defence did not have an opportunity to respond to it.

Temporal Jurisdiction

38. The parties do not dispute that the temporal jurisdiction of the Tribunal is limited to crimes committed in the year 1994. Articles 1 and 7 of the Statute are clear in this regard. The matter in dispute is whether the indictment’s concise statement of facts may or may not include allegations dating before 1994 and, subsequently, whether such allegations are admissible at trial. The Trial Chamber accepts the Prosecution’s submission that allegations dating before 1994 do not constitute independent crimes, but merely represent what the Prosecution intends to offer as relevant and admissible evidence of crimes occurring in 1994, or relate to the continuation of events, clarify, and are supplementary to the substantive charges.

Temporal Jurisdiction and Conspiracy Charge

39. As to the conspiracy charge, the Trial Chamber finds that the limited temporal jurisdiction of the Tribunal does not bar evidence of an alleged conspiracy of which

the agreement was made before 1994. To the contrary, evidence of a pre-1994 conspiracy may be admissible and relevant in showing the commission of a conspiracy in 1994. Conspiracy is a "continuing crime." See generally Peter Gillies, Criminal Law, at page 702 (4th edition 1997). Because conspiracy is a continuing crime, then events that took place outside the period of the Statute can be taken into account if it can be shown that the conspiracy continued into the relevant period of the Statute. Evidence before 1994 may show when the conspiracy actually commenced. All activities prior to 1 January 1994, so far as they related to the conspiracy, may be relevant.

40. In *Liangsiriprasert v. U.S. Government & another*, (1990) 2 AER 866, Privy Council, at page 875 (emphasis added), Lord Griffiths in his speech stated as follows:

I agree that the convictions for conspiracy against those respondents can be supported on another ground, namely, that they conspired together in this country notwithstanding the fact that they were abroad when they entered into the agreement which was the essence of the conspiracy. That agreement was and remained a continuing agreement and they continued to conspire until the offence they were conspiring to commit was in fact committed.

41. In *Director of Public Prosecutions v. Doot & Others*, (1973) A.C. page 807, House of Lords, Viscount Dilhorne in his speech stated as follows:

... though the offence of conspiracy is complete when the agreement to do the unlawful act is made and it is not necessary for the prosecution to do more than prove the making of such an agreement, a conspiracy does not end with the making of the agreement. It continues so long as the parties to the agreement intend to carry it out. It may be joined by others, some may leave it.

Lord Salmon in his speech stated as follows:

That agreement was and remained a continuing agreement and they continued to conspire until the offence they were conspiring to commit was in fact committed.

Lord Pearson in his speech stated as follows:

But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be.

The Trial Chamber notes that the Defence, at the hearing, cited the Appeal Court decision in *Doot*, which was overruled by the above decision of the House of Lords.

42. The Trial Chamber also finds persuasive the case of *Josef Alstötter and Others*, before the United States Military Tribunal, Nuremberg, in 1947, in which that Tribunal admitted evidence beyond its temporal jurisdiction because "such acts are relevant upon the charges [and] [n]one of these acts is charged as an independent offence in this particular indictment." See Prosecution Reply to Kabiligi's Motion, Annex 4 (citing 6 Law Reports of War Criminals, at page 73). The Military Tribunal in *Alstötter* continued:

. . . either prosecution or defence [has] the right to offer in evidence any fact or circumstance occurring before [outside the Tribunal's temporal jurisdiction] or after September, 1939, if such facts or circumstances tend to prove or to disprove the commission by any defendant of war crimes or crimes against humanity *Id.*

43. It is clear from the authorities and the nature of the offence of conspiracy that there is a conspiracy once an agreement is made but a conspiracy does not end with the making of the agreement, as was submitted by Counsel for the Defence. It will continue so long as there are two or more parties to it intending to carry out the design. That agreement was and remained a continuing agreement while they continued to conspire.

44. The Trial Chamber also notes the present pre-trial stage of the proceedings. The indictment's concise statement of facts contains allegations of the Prosecution's case and the crime of conspiracy that the Prosecution seeks to prove at trial, and which the Defence will have the opportunity to challenge. As the finder of fact, the Trial Chamber ultimately will decide which facts occurred in 1994 and constitute the crime of conspiracy, and which facts occurred outside 1994, at judgement.

Personal Jurisdiction

45. The parties also dispute whether the indictment may allege an association to the military and whether such reference violates the Tribunal's jurisdiction over natural persons because Article 5 of the Statute reads (emphasis added):

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

46. As to jurisdiction over natural persons under Article 5, the Trial Chamber finds that all of the counts charge the two Accused persons individually and fall within the scope of Articles 2 to 4 of the Statute. The indictment does not charge the Rwandan Armed Forces; it charges Kabiligi and Ntabakuze, who were members of the Rwandan armed forces; hence, the reference to that force. The indictment, however, charges them solely as individuals. The Trial Chamber finds that the counts in the indictment satisfy the requirement of Article 5 of jurisdiction over natural persons.

Alleged Lack of Jurisdiction based on Nullity of Prior Proceedings

47. Counsel for Kabiligi's contends that there is a lack of jurisdiction based on the nullity of prior proceedings. The Trial Chamber finds this contention without merit and that it in no way touches upon the issue of jurisdiction. *See supra*, at para. 32. Trial Chamber II already has decided the same factual and legal issues raised by Counsel for Kabiligi on 4 November 1999. *See Prosecutor v. Kabiligi & Ntabakuze*, ICTR-97-34-I, (Decision on the Defence Motion for Nullity of Proceedings and Release) (4 November 1999). It is not for this Trial Chamber to adjudicate on, or review, a decision already given by another Trial Chamber. This Trial Chamber will not revisit the issue.

Alleged Lack of Jurisdiction based on an Improper Indictment

48. Counsel for Kabiligi's contends that the indictment is invalid because the amendment of the indictment was invalid. The Trial Chamber finds this defence contention without merit and that it in no way touches upon the issue of jurisdiction. *See supra*, at para. 32. There is only one indictment, which is valid and which was amended properly under Rule 50. There is no provision in Rule 50 that an amended indictment must be remitted to a judge for confirmation. In any event, the issue with respect to the 1999 amendment of the Indictment is closed and will not be re-opened under the pretext of a lack of jurisdiction. No issue concerning the validity of the indictment can now be properly raised. Those issues were already decided when the decision to grant the amendment was delivered. Issues concerning the amendment of the indictment were raised at the hearing on the Prosecutor's motion to amend and already have been adjudicated upon. This subject cannot now be reopened.

Ntabakuze's Motion to Declare the Indictment Void Ab Initio

49. The Trial Chamber finds that Rule 50 is a perfectly valid Rule and is in no way ultra vires. The Trial Chamber finds that the submission that it should apply Rule 50 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) with respect to a matter before this Tribunal when this Tribunal has its own Rule 50 to be totally without merit. The Trial Chamber rejects such a submission.

50. The Trial Chamber finds that the Motion to Declare the Indictment Void Ab Initio, in essence and despite its title, challenges the 13 August 1999 decision of Trial Chamber II to grant the Prosecution's motion to amend the indictment and constitutes a motion for review or an appeal. This Motion does not plead a lack of jurisdiction, within the meaning of Rule 72(B)(i). *See supra*, at para. 32.

51. A party may not file a motion for review of a Trial Chamber's decision, in the absence of a newly discovered fact. *See Prosecutor v. Ngirumpatse*, ICTR-98-44-I, at para. 71 (Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items) (10 December 1999) (finding that the Trial Chamber will not allow a motion for review of an earlier decision in the absence of the discovery of a new fact); *Prosecutor v. Akayesu*, ICTR-96-4-T, at 4 (Decision on the Prosecutor's Motion to Reconsider and Rescind the Order of 28 January 1997) (6 March 1997) (same). Here, the Trial Chamber declines to review a decision of Trial Chamber II (granting the amendment of the indictment) in the absence of any new fact.

52. The Motion to Declare the Indictment Void Ab Initio also raises, in substance, the same arguments as Counsel for Ntabakuze's appeal of the 13 August 1999 decision granting the Prosecution's motion to amend the indictment. On 21 January 2000, the Appeals Chamber denied this appeal on procedural grounds, holding that the decision granting the amendment did not relate to "a lack of jurisdiction." See *Ntabakuze v. Prosecutor*, ICTR-97-34-A, at para. 16 (Decision Rejecting Notice of Appeal) (21 January 2000). The Appeals Chamber found that the Accused had no right to appeal. *Id.* at para. 17.


53. The Trial Chamber finds that Ntabakuze's Motion to Declare the Indictment Void Ab Initio is frivolous, an abuse of process, and without merit; it raises issues already determined by Trial Chamber II. This issue will not be revisited. The motion is misconceived. The Trial Chamber further finds that this motion is not necessary or reasonable and, in the exercise of its inherent powers, directs the Registrar not to award any costs including fees to Defence Counsel for Ntabakuze with respect to the Motion to Declare the Indictment Void Ab Initio. In the alternative, the Trial Chamber applies Rule 73(E) with respect to the denial of costs. Rule 6(C), with regard to the prejudice of the rights of the accused, does not arise in these circumstances. There is no prejudice to the accused's rights since the accused is being represented by assigned Counsel. This sanction is against Defence Counsel for acting in an irresponsible manner.


54. The plethora of motions with which the Chambers are being swamped tends to indicate that delaying tactics are being employed. If this is so, such tactics are unacceptable, and should be discontinued.

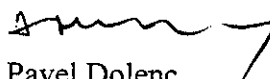
55. For the above reasons, the Trial Chamber:

- (a) **DENIES** Ntabakuze's Motion Based on Lack of Jurisdiction;
- (b) **DENIES** Kabiligi's Extremely Urgent Motion on Objection Based on Lack of Jurisdiction;
- (c) **DENIES** Ntabakuze's Preliminary Motion to Declare the Indictment Filed 13 August 1999 Void Ab Initio, and;
- (d) **DIRECTS** the Registrar not to award any costs including fees to Defence Counsel for Ntabakuze with respect to the Motion to Declare the Indictment Void Ab Initio.

Arusha, 13 April 2000.


Lloyd George Williams
Judge, Presiding


William H. Sekule
Judge


Pavel Dolenc
Judge

Seal of the Tribunal

