



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

OR: ENG

Before: Judge Laïty Kama, presiding
Judge William H. Sekule
Judge Mehmet Güney

Registrar: Agwu Ukiwe Okali

Decision of: 6 July 2000

THE PROSECUTOR

v.

**CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JEROME BICAMUMPAKA
PROSPER MUGIRANEZA
(CASE NO. ICTR-99-50-T)**

**EDOUARD KAREMERA
ANDRE RWAMAKUBA
(CASE NO. ICTR-98-44-T)**

**JEAN DE DIEU KAMUHANDA
(CASE NO. ICTR-98-54-T)**

**ELIEZER NIYITEGEKA
(CASE NO. ICTR-96-14-T)**

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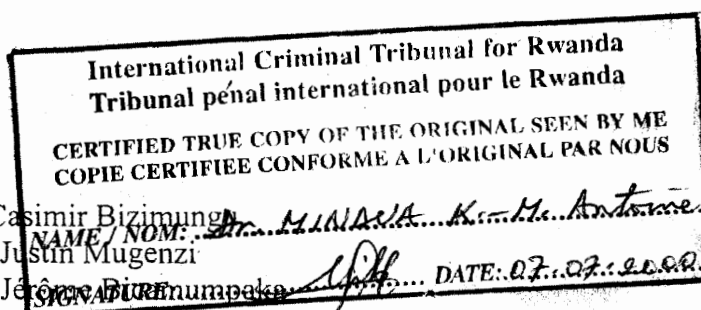
DECISION ON THE PROSECUTOR'S MOTION FOR JOINDER

The Office of the Prosecutor:

Ken Fleming
Don Webster
Ifeoma Ojemeni

Defence Counsel

Judith L. Bourne for Casimir Bizimungu
Howard Morrison for Justin Mugenzi
Francine Vielleux for Jérôme Bicamumpaka
Michael Greaves for Prosper Mugiraneza
Didier Skornicki for Edouard Karemera
David Hooper for André Rwamakuba
Aicha Condé for Jean De Dieu Kamuhanda
Sylvia Geraghty for Eliezer Niyitegeka



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

BEING SEIZED OF the Prosecutor's Motion for Joinder of the Accused ("*Motion for Joinder*") in "*The Prosecutor vs Casimir Bizimungu, Justin Mugenzi, Jérôme Bicamumpaka and Prosper Mugiraneza*" (Case No: ICTR 99-50-T), "*The Prosecutor v Edouard Karemera, André Rwamakuba and Jean De Dieu Kamuhanda*", (Case No.: ICTR-99-44-T), (Case No: ICTR 99-54-T) and "*The Prosecutor vs. Eliezer Niyitegeka*" (Case No: ICTR-96-14-T), filed on 3 March 2000;

BEING SEIZED OF the Prosecutor's Motion to Amend Joinder Motion in "*The Prosecutor vs Casimir Bizimungu, Justin Mugenzi, Jérôme Bicamumpaka and Prosper Mugiraneza*" (Case No: ICTR 99-50-T), "*The Prosecutor v Edouard Karemera and André Rwamakuba*", (Case No.: ICTR-99-44-T), "*The Prosecutor vs Jean De Dieu Kamuhanda* " (Case No: ICTR 99-54-T) and "*The Prosecutor vs. Eliezer Niyitegeka*" (Case No: ICTR-96-14-T), filed on 13 March 2000;

CONSIDERING the oral decision of Trial Chamber II of 27 June 2000 postponing the further appearance of Niyitegeka on the amended indictment and consequently deciding that it will not, at this stage, review the part of the Prosecutor's Motion for Joinder pertaining to Niyitegeka;

BEING SEIZED OF the following Defence Replies to the Motion for Joinder:

- For Accused Bicamumpaka:
 - the "Requête d'extrême urgence en irrecevabilité, soumise par la Défense de Jérôme-Clément Bicamumpaka, concernant la requête du procureur en jonction d'instances du 3 mars 2000, en vertu des articles 48 *bis* et 82 du règlement de procédure et de preuve, et requête en exception préjudicielle, en vertu de l'article 72 (B)(iii) du même Règlement" filed on 29 February 2000,
 - the "Mémoire à l'appui de la requête de Jérôme-Clément Bicamumpaka en irrecevabilité de la jonction d'instances du 2 juillet 1999 en date du 24 février 2000" filed by Bicamumpaka on 21 March 2000,
 - the "Requête d'extrême urgence en irrecevabilité, soumise par la Défense de Jérôme-Clément Bicamumpaka, concernant la requête du procureur en jonction d'instances du 3 mars 2000, en vertu des articles 48 *bis* et 82 du règlement de procédure et de preuve, et requête en exception préjudicielle, en vertu de l'article 72 (B)(iii) du même Règlement" filed by Bicamumpaka on 9 March 2000,
 - the "Mémoire à l'appui de la requête de Jérôme-Clement Bicamumpaka, en irrecevabilité de la jonction d'instances du 3 mars 2000" filed by Bicamumpaka on 30 March 2000,

- the “Requête amendée en irrecevabilité, soumise par la Défense de Jérôme-Clément Bicamumpaka, concernant la requête du procureur en jonction d’instances du 3 Mars 2000, en vertu des articles 48 *bis* et 82 du Règlement de procédure et de preuve, et requête en exception préjudicielle, en vertu de l’article 72(B)(iii) du même Règlement”, filed by Bicamumpaka on 9 June 2000,
- the “Mémoire amendé à l’appui de la requête de Jérôme-Clément Bicamumpaka, en irrecevabilité de la requête du procureur en jonction d’instances du 3 Mars 2000; et en disjonction d’instances, selon l’article 82 du Règlement de procédure et de preuve” filed by Bicamumpaka on 8 June 2000 (“Bicamumpaka’s response”);
- the “Defence Reply to Prosecutor Motion for Joinder Dated 3 March 2000” filed by Rwamakuba on 18 April 2000 (“Rwamakuba’s response”);
- the “Response of the Defendant Mugiraneza to Prosecutor Motion for Joinder Filed on 3rd March 2000” filed by Mugiraneza on 11 April 2000 (“Muginazera’s response”);
- the “Mémoire en défense contre la requête en jonction d’instances” filed by Kamuhanda on 2 May 2000 (“Kamuhanda’s response”);
- the “Mémoire en défense contre la requête en jonction d’instances du 24 Mars 2000” filed by Karemera on 16 May 2000 (“Karemera’s response”);
- the “Response of Accused Bizimungu to Prosecutor’s Motion for Joinder of Defendants”, filed by Bizimungu on 18.5.2000 (“Bizimungu’s response”);

CONSIDERING the “Prosecutor’s Response to the Reply of the Accused Rwamakuba to Joinder”, filed on 8 May 2000;

CONSIDERING the “Prosecutor’s Reply to the Response of the Accused Mugenzi to Joinder” filed on 8 May 2000;

CONSIDERING the decision of Trial Chamber II on the Prosecutor’s motion to withdraw the Motion for Joinder of the Accused of 27 April 2000;

NOTING the Trial Chamber II’s Decision on the Prosecutor’s Motion for Joinder of the Accused and on the Prosecutor’s Motion for Severance of the 29 June 2000;

HAVING HEARD the oral submissions of the parties on 28 June 2000 and noting the letter from David Hooper, Counsel for Rwamakuba dated 26 June 2000 indicating that he would not be able to attend the hearing on 28 June 2000, but that he wished the Trial Chamber to consider his above-mentioned written submissions. Noting further the appearance of Michael Greaves, Counsel for Mugiraneza on behalf of Howard Morrison for Mugenzi and noting that Counsel Judith Bourne for Bizimungu did not explain her

absence at the hearing and that therefore the Trial Chamber has relied upon her written submissions;

CONSIDERING the Statute of the International Criminal Tribunal for Rwanda ("the Statute") and the Rules of Procedure and Evidence ("the Rules"), in particular Rules 48, 48 *bis* and 82.

BACKGROUND

1. On 26 August 1998, the Prosecutor filed a joint indictment against the accused Bizimana, Karemera, Nzabonimana, Rwamakuba, Ngirumpatse, Nzirorera, Kabuga and Kajelijeli. The indictment was confirmed by Judge Pillay on 29 August 1998 and case number ICTR-98-44 assigned to the case.

2. On 11 May 1999, the Prosecutor filed a joint indictment against Bizimungu, Mugenzi, Bicomumpaka and Mugiraneza. The indictment was confirmed by Judge Pillay on 12 May 1999 and case number ICTR-99-50 assigned to the case.

3. On 2 July 1999, the Prosecutor filed a motion requesting leave to file an amended indictment against Niyitegeka. The Trial Chamber granted leave to amend in a decision of 21 June 2000. In an oral decision rendered on 27 June 2000, the Trial Chamber decided that it would not, at this stage, review the part of the Prosecutor's Motion for Joinder pertaining to Niyitegeka.

4. On 2 July 1999, the Prosecutor filed a Motion for Joinder to join Niyitegeka (Case No. ICTR-96-14-T) with Bizimungu, Mugenzi, Bicomumpaka and Mugiraneza (Case No. ICTR-99-50-T) with Bizimana, Karemera, Nzabonimana, Rwamakuba, Ngirumpatse, Nzirorera, Kabuga and Kajelijeli (Case No. ICTR-98-44-T). On 3 March 2000 the Prosecutor filed a motion to withdraw the Motion for Joinder filed on 2 July 1999. Trial Chamber II granted the Motion for Withdrawal by decision dated 2 May 2000.

5. On 28 September 1999, the Prosecutor filed an indictment against Kamuhanda and another co-accused, currently the subject of a non-disclosure order. The indictment was confirmed by Judge Pillay on 1 October 1999 and case number ICTR-98-54 assigned to the case.

6. On 3 March 2000, the Prosecutor filed two new Motions for Joinder. The present Motion for Joinder seeks to join Bizimungu, Mugenzi, Bicomumpaka and Mugiraneza (Case No. ICTR-99-50-T) with Karemera and Rwamakuba (Case No. ICTR-98-44-T) with Kamuhanda (Case No. ICTR-99-54-T) with Niyitegeka (Case No. ICTR-96-14-T). The other Motion for Joinder filed by the Prosecutor on 3 March 2000 sought to join Ngirumpatse, Nzirorera and Kajelijeli (Case No. 98-44-T).

7. On 19 April 2000, the Prosecutor filed as an alternative to the Motion for Severance to sever Ngirumpatse, Nzirorera and Kajelijeli from the other accused Karemera, Rwamakuba, Bizimana, Nzabonimana and Kabuga in case no. ICTR-98-44-T.

Both the Motions for Joinder and for Severance of Ngirumpatse, Nzirorera and Kajelijeli were denied by this Trial Chamber in a decision dated 29 June 2000.

PROSECUTOR'S MOTIONS

Joinder is justified in law

8. The Prosecutor cites Rule 48 and Rule 2(a) and interprets those rules in line with the decision of Trial Chamber I on the Motion of the Prosecutor to Sever, Join in a Superseding Indictment and to Amend the Superseding Indictment in *The Prosecutor v. Kayishema* (ICTR-95-1-T), *Ntakirutimana* (ICTR-96-17-T) and *Ruzindana* (ICTR-95-1-T and ICTR-96-10-T), of 27 March 1997 ("*Kayishema Decision on Joinder and Severance*") to mean that "there must be a showing of one or more crimes and these crimes must have been committed through one or more acts following a common scheme, strategy or plan".

Same Transaction

9. The Prosecutor submits that there is no separate requirement to show that the accused acted in concert in order to support joinder. The Prosecutor relies on the words "[...] prove the existence of a common scheme strategy or plan *and* the accused therefore acted together in concert" (emphasis added) in the *Kayishema Decision on Joinder and Severance* to support this construction.

10. The Prosecutor proposes a literal definition of "same transaction" as a series of acts that are connected in some way, by proximity in time, place or common purpose or design.

Joint Trial For Co-Conspirators

11. The Prosecutor cites the case of *R v Miller and Others*, Winchete Summer Assizes [1952] 2 All ER 667, 37 Cr App Rep 169 to support the proposition that co-conspirators are typically charged together, even where their contribution to the execution of the object of conspiracy vastly differs.

12. The Prosecutor refers to the practice of the Nuremberg Tribunal of applying a broad basis for joint trials, jointly trying persons who participated as leaders, organisers, instigators or accomplices in the formulation or execution of a common plan or conspiracy. The basis for joint trials accepted by the Nuremberg Tribunal included crimes which became embraced in the common plan or conspiracy as it was executed.

Joinder is justified on evidence

13. The Prosecutor submits that the accused are all charged with the same crimes – genocide, conspiracy to commit genocide, complicity in genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of

Additional Protocol II thereto - and submits that these crimes were committed in furtherance of the same transaction.

14. The Prosecutor asserts that the accused were involved in the same plan which included promoting hatred and violence, the distribution of weapons, recruiting training and indoctrinating militiamen and preparing lists of political opponents and Tutsis to be eliminated.

15. The Prosecutor further submits that the evidence will show a systematic *modus operandi* in the way in which massacres were carried out, which they argue is proof of a common scheme and plan by government authorities.

16. The Prosecutor maintains that the evidence will show that the accused were all government Ministers during the relevant period and that they planned and issued directive to their subordinates and to militiamen to massacre the Tutsi civilian population. She maintains that she has eyewitness testimony placing the accused in the same temporal proximity. Regarding the common charge of conspiracy to commit genocide, the Prosecutor submits that all the accused are involved in the planning and the preparation of the acts defined as genocide and that such a concerted effort on the part of each accused, specifically at the level of a coordinated government plan among government Ministers, is proof of conspiracy to commit genocide. It is the Prosecutor's contention that all accused specifically charged with conspiracy to commit genocide participated in the same conspiracy and acted together, as well as with others, in the execution of the same conspiracy and that therefore they should be tried together.

Joinder is justified in the interests of justice

17. In support of her Motion, the Prosecutor points to the *Kayishema Decision on Joinder and Severance* and the Separate Opinion of Judge Shahabudeen in the Appeals Chamber Decision Stating Reasons for the Appeals Chamber's Order of 29 May 1998, of 2 July 1998 in *The Prosecutor v. Kovacevic*, (IT-97-24-AR73), which enumerate the other justifications for joinder, such as the mental and physical security of witnesses, the use of the Tribunal's resources, the fair administration of justice and the right of the accused to a trial within a reasonable time.

18. In relation to the security of witnesses, the Prosecutor maintains that she has many witness statements that implicate all of the accused. If joinder is not granted, each witness will have to travel from their homes to Arusha several times and repeat their testimony several times, which will be physically and mentally exhausting, and will increase the safety risk. In addition, repeated appearances would cost significantly more than requiring witnesses to appear once.

19. In relation to the fair administration of justice, the Prosecutor cites several decisions of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY), *inter alia*, the Decision on the joinder of the accused and setting a date for trial, 6 November 1996 in *The Prosecutor v. Kayishema et al.* (ICTR-95-1-T), and the Decision on Motions for Separate Trial Filed by

the Accused Zejnil Delalic and the Accused Zdravko Mucic, 25 September 1996 in *The Prosecutor v Delalic et al.* (IT-96-21-T) ("*Delalic*") where the risk of contradictions in decisions rendered on the same set of facts was taken into account when granting joinder.

20. In relation to the right to a trial without undue delay, the Prosecutor submits that cases relating to the requirement for a trial within a "reasonable time" under various International Conventions should be considered in interpreting the requirement of the right to a trial without undue delay under Article 20(4)(c) of the Statute. The Prosecutor submits that pre-trial detention, complexities of investigations, and the legal issues raised in the given case, conduct of the parties and acts of national authorities are all factors that may be taken into consideration when determining whether a trial has been conducted within a reasonable time. The Prosecutor concedes that separate trials may be required when the case against one accused seriously impedes or delays the case against the co-accused, but that even if joining trials means that the trial of any given accused may last longer than it would if he were tried separately, it may still be considered reasonable to try all of the accused together. In this regard, the Prosecutor notes that proceedings lasting as long as 6 years and 3 months have been considered acceptable. The Prosecutor contends that the pre-trial detentions of all of the accused are within acceptable human rights standards. In addition, the Prosecutor submits that the length of pre-trial detention should not be a factor mitigating against joinder, as the accused are likely to face a lengthy sentence in any case.

21. The Prosecutor argues that the economy of a joint trial outweighs the disadvantage of a delay in final judgment in the case of any single accused that may be caused by trying the accused jointly.

DEFENCE REPLIES

Common submissions

22. Defence Counsel for the various accused make a number of similar arguments against the Motion for Joinder. In addition, the arguments raised by Defence Counsel in the motions for severance and separate trials are similar to those made in response to the Motion for Joinder. A summary of the most substantial arguments follows.

23. Many of the Defence responses point out that the Prosecutor's Motion for Joinder refers both to "joinder" and "joint trials" and that joinder (provided for under Rule 48) and joint trials (provided for under Rule 48 *bis*) are not the same. The Defence submit that joinder of accused does not necessitate a joint trial and submit that even if joinder is considered appropriate, a joint trial should not be ordered.

24. Many of the Defence responses submit that the joint trial of eight accused will not expedite judgment as asserted by the Prosecutor. Rather, they submit it will prolong the trial in breach of Article 20(4)(c) of the Statute.

25. In particular, some Defence responses note that Kamuhanda has only recently made his initial appearance and is still waiting for disclosure of supporting material,

pursuant to Rule 66(A)(i), and that this will unreasonably delay trial if the joinder is granted.

26. Some of the Defence responses argue that because of the complexity of the proceedings it will be difficult to give separate consideration to each individual accused and that this may impinge on the right of the accused to a fair trial.

27. Several Defence Counsel submit that the fact that the Prosecutor refers to the cases as the "Government Case" could create the impression of a "show trial" of the Interim Government and that this could give the impression of justice not being seen to be done for individual accused.

28. Some Defence Counsel refer to the joint trials of accused conducted at the ICTY and submit that experience shows that such joint trials do become unwieldy. They point to difficulties in scheduling and to practical difficulties in accommodating eight accused and their counsel as well as other practical and resource related difficulties.

29. Several Defence Counsel argue that different Defence Counsel may have different strategies and that this could prejudice the case of an individual accused.

30. Many Defence Counsel submit that the facts in the indictment are not sufficient to support the charges against the accused. Moreover, some Defence Counsel argue that the Prosecutor simply asserts that the accused all acted in concert without providing the evidence to support the assertion. Some Defence Counsel accuse the Prosecutor of over-generalising actions attributed to the accused, simply because they were members of the Interim Government. They assert that the facts in the various indictments are too general to be attributed to individual accused or to allow for a fair trial of individual accused. In this regard, Counsel for Karemera contends in his oral arguments that the Prosecutor's Motion for Joinder is based upon vague and general allegations about the participation of all the accused in a conspiracy to commit genocide. He asserts that the sole basis of these allegations is the fact that the accused were all Ministers in the Interim Government. Counsel for Bizimungu similarly asserts at para. 7 of her Response, with respect to Bizimungu, that "[he] is charged with conspiracy on the legally untenable theory that his guilt arises simply by reason of his position as Minister of Health in the Interim Government". Counsel for Karemera argues furthermore, with respect to all of the accused, that this amounts to an unfair "globalisation" of the allegations and that the Prosecutor does not show how each accused participated in the alleged conspiracy. He relies on the decision in *The Prosecutor v. Kanyabashi* (ICTR-96-15-T) on Defence Preliminary Motion for Defects in the Form of the Indictment, dated 31 May 2000, in which this Chamber held, at par. 5.17, that the general introductory formulation of each count in the indictment, by way of its lack of specificity, "expands the Indictment without concretely identifying precise allegations against the Accused".

Bicamumpaka's response

31. Counsel for Bicamumpaka argues that the Motion for Joinder is a preliminary motion under Rule 72 and as such should have been filed within 30 days following

disclosure of the supporting materials envisaged under Rule 66(A)(i) and that this was not done.

32. Counsel for Bicomumpaka filed four motions with supporting briefs requesting that the Trial Chamber find the Prosecutor's motion for Joinder inadmissible. In those motions she reviews the indictment and supporting material in detail and submits, *inter alia* that the facts contained in the indictment against Bicomumpaka are based on the affidavit of a witness who is known to be unreliable and that she has not had the opportunity to contest the veracity of the affidavit. She further asserts that a number of paragraphs in the indictment against Bicomumpaka and the witness statements upon which the indictment is based, do not refer to Bicomumpaka and should be removed. In response to a question from the bench about the relevance of her motions to the Prosecutor's Motion for Joinder, she asserts that, as the facts in the indictment are relied upon by the Prosecutor to show that the acts of the accused are part of the same transaction, in that they are *connexe* and indivisible, her motions are a response to the Prosecutor's Motion for Joinder.

Kamuhanda's response

33. Counsel for Kamuhanda argues that, as Kamuhanda was only appointed to the Interim Government on 25 May 1994, allegations in the indictment before that date cannot be attributed to him. She further argues that, although Kamuhanda was appointed as a Minister to the Interim Government on 25 May, he did not carry out the functions of that Ministry and that, therefore, allegations pertaining generally to Ministers of the Interim Government should not extend to Kamuhanda.

34. Counsel for Kamuhanda notes that the latter is not charged with direct and public incitement to commit genocide and that therefore the Prosecutor's argument supporting joinder on the basis that all of the accused are charged with all of the same counts is untenable.

35. Counsel for Kamuhanda contends that the supporting material to Kamuhanda's indictment was not disclosed within the time specified under Rule 66, that is 30 days after his initial appearance which was on 24 March 2000. She submits that because of this, she has been unable to respond fully to the Prosecutor's Motion for Joinder.

36. Counsel for Kamuhanda argues that the Prosecutor has not provided proof that Kamuhanda was an influential member of the MRND, as alleged in the indictment. She notes that the allegation that Kamuhanda was a Senior Advisor to then President Sindikubwabo does not appear in the French version of the indictment, which accounts for the lack of relevancy of this allegation.

PROSECUTOR'S RESPONSES

37. In response to arguments of two of the accused, Rwamakuba and Mugenzi, that the accused Rwamakuba and Karemera have not been severed from other accused in Case No. ICTR-98-44-T, not the subject of the present Motion for Joinder, the Prosecutor

argues that a motion for severance of two or more accused from a joint indictment may not be required where a new motion for joinder that groups the same accused in a different way is filed, as the severance is implicit in the new joinder request.

38. The Prosecutor notes the issue of “joinder” and “joint trial” raised by the Defence and clarifies that she is seeking a joint trial.

39. The Prosecutor submits that, if it were necessary to move to sever the accused she seeks to join in the present Motion for Joinder from other co-accused jointly indicted, she would do so, even if this issue is not addressed in her Motion, in order to effect the joinder sought in the said Motion.

40. The Prosecutor submits that Rule 48*bis* could apply to effect the joinder of confirmed indictments after such a severance, as Rule 82 provides for severance from joint trial and not from a joint indictment and that severance under Rule 82 does not destroy the joint confirmed indictment. She concludes that therefore the confirmed indictments of the remaining accused are unaffected and can be joined for the purposes of trial.

41. As to the Defence assertion that a joint trial will lengthen the proceedings, the Prosecutor submits that it is only the cross examination of witnesses that will be lengthened, not any other aspect of trial.

42. The Prosecutor rejects the Defence assertion that the case has been promoted as “the Government Case” and asserts that this is simply a shorthand way of referring to the trial against the Interim Government Ministers. Further, the Prosecutor argues that the link between the eight accused is their common interest and their common purpose as members of the Interim Government.

43. The Prosecutor notes that there will have to be careful consideration given to the issue of courtroom and support facilities for the joint trial of eight accused.

44. In response to Counsel for Bicomupaka’s submissions requesting that several paragraphs of the indictment be removed, the Prosecutor submits that this is really a motion for defects in the form of the indictment and as such, it is properly characterised as a preliminary motion under Rule 72(B). She submits that it is not proper or lawful to bring such a motion at this stage.

AFTER HAVING DELIBERATED,

45. As a preliminary issue, the Trial Chamber notes that several of the accused argue that joinder cannot be justified as there is insufficient proof to support the facts as alleged in the indictments. The Trial Chamber agrees with the Prosecutor’s response that the indictments have met the standards required for confirmation, that is, they have established a *prima facie* case against the accused, which is sufficient at the pre-trial stage of the proceedings. The Trial Chamber considers that arguments as to whether the

charges in the indictment are sufficiently supported by the evidence are properly to be reviewed during the trial on the merits.

46. As to the request made by Counsel for Bicomumpaka that several paragraphs be removed from the indictment, the Trial Chamber holds that such a motion is properly categorised as a motion for defects in the form of the indictment. The Trial Chamber finds that in her motions and oral arguments purportedly in response to the Prosecutor's Motion for Joinder, Counsel for Bicomumpaka went beyond the scope of a response and raised issues pertaining to defects in the form of the indictment. Motions for defects in the form of the indictment should be filed as preliminary motions. The Trial Chamber notes that the time limit for filing preliminary motions in respect of the Accused Bicomumpaka has expired and, therefore, such motion is inadmissible. The Trial Chamber emphasises that it is not appropriate to raise issues pertaining to defects in the form of the indictment under the guise of a response to a Prosecutor's motion and that it will not admit such motions. Consequently, the Trial Chamber has only considered the elements of the Defense motion and the supporting brief entitled "Requête d'extrême urgence en irrecevabilité, soumise par la Défense de Jérôme-Clément Bicomumpaka, concernant la requête du procureur en jonction d'instances du 3 mars 2000, en vertu des articles 48*bis* et 82 du règlement de procédure et de preuve, et requête en exception préjudicielle, en vertu de l'article 72 (B)(iii) du même Règlement" filed by Bicomumpaka on 9 March 2000, and the "Mémoire à l'appui de la requête de Jérôme Clément Bicomumpaka en irrecevabilité de la jonction d'instances du 3 mars 2000" filed on 30 March 2000, that pertain to the Prosecutor's Motion for Joinder.

47. The Trial Chamber holds that the costs and expenses in relation to the preparation and filing of repetitive and frivolous motions, supported by briefs, partially based on defects of the form of the indictment or presented as preliminary motions brought under Rule 72 (B)(iii), should not be paid to Counsel for Bicomumpaka.

48. As a further preliminary issue, the Trial Chamber considers Counsel for Bicomumpaka's contention that the Motion for Joinder is a preliminary motion. The Trial Chamber agrees with the Prosecutor that motions for joinder are not preliminary motions, under Rule 72, and can be brought at any stage.

49. The Prosecutor brings her motion for joinder under Rule 48. In the present case, the eight accused who are the subject of the Prosecutor's Motion for Joinder pleaded to four separate confirmed indictments. The Prosecutor does not intend to join these indictments, but simply wants to have them tried together. In her oral submissions, the Prosecutor clarified that the joinder motion was also on the basis of Rule 48 *bis*, which provides for the joining of confirmed indictments of persons accused of the same or different crimes committed in the course of the same transaction for the purposes of joint trial. In the specific circumstances of the case, the Trial Chamber considers it permissible to bring the application for joint trials under Rule 48. Jurisprudence of the Tribunal has established that Rule 48 can apply to effect the joint trials of accused persons in separate confirmed indictments. In the Decision on the Prosecutor's Motion for Joinder in *The Prosecutor v. Bagosora* (ICTR-96-7), *The Prosecutor v. Kabiligi and Ntabakuze* (ICTR-97-34 and ICTR-97-30), *The Prosecutor v. Nsengiyumva* (ICTR-96-12) of 29 June 2000, Trial Chamber III, having reviewed the jurisprudence of the Tribunal and the legal basis

for joinder in common and civil law systems, stated at para. 107 that: "under the interpretation of Rule 48 advanced in the *Kanyabashi* Appeal, accused persons can be jointly tried, even if they were not jointly charged. Further, joinder of indictments is possible under both civil and common law systems."

50. The Trial Chamber considers that the Prosecutor's Motion for Joinder could also have been brought under Rule 48 *bis*. However, given the established jurisprudence of the Tribunal allowing motions for the joint trial of accused confirmed in separate indictments to be brought under Rule 48, the Trial Chamber will, in the present case, review the Prosecutor's Motion for Joinder under Rule 48.

51. The decision to grant or to refuse joinder lies within the discretion of the Tribunal (*The Prosecutor v. Ntagerura* (ICTR-96-10-T) and *The Prosecutor v. Bagambiki, Imanishimwe, Munyakazi* (ICTR-97-36-T), Decision on the Prosecutor's Motion for Joinder of 11 October 1999). In the exercise of this discretion, the Trial Chamber must weigh the overall interests of justice and the rights of the individual accused.

52. The Trial Chamber therefore must consider the advantages of granting a motion for joinder, and weigh the benefits against the possibility of prejudice to individual accused.

53. Under Rules 48 and 48 bis and established by numerous case law of the Tribunal, joinder of accused and joint trials may be granted where the acts of the accused form part of the same transaction. However, in addition to showing that the acts of the accused form part of the same transaction, the Trial Chamber must also consider the overall interests of justice and the rights of the accused, in accordance with Article 20 of the Statute and well-established general principles of law relating to fair trials.

54. The Trial Chamber holds that the consideration of fairness provided for under Rule 82 in respect of severance can properly be applied in joinder cases. Rule 82 stipulates that co-accused can be tried separately if the Trial Chamber considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice. In *The Prosecutor v. Kovacevic et al.*, (IT-97-24) Decision on Motion for Joinder of Accused and Concurrent Presentation of Evidence, 14 May 1998, ("*Kovacevic*") the ICTY Trial Chamber applied the "conflict of interest" test under Rule 82(B) in deciding to deny the motion for joinder, stating "[h]ad the four accused been jointly indicted in this case, the Trial Chamber would have had to consider separating their trials." The Trial Chamber agrees with the application of the "conflict of interest" test as provided for under Rule 82 and as interpreted by case law to motions of joinder and considers it appropriate to balance the arguments in favour of joinder with the rights of the accused when considering applications for joinder.

55. As the Trial Chamber decided in an oral decision of 27 June 2000 that it would not review the part of the Prosecutor's Motion for Joinder pertaining to Niyitegeka at this stage, the Trial Chamber now proceeds to consider the submissions of the parties for each of the other six accused in the other three indictments that the Prosecutor seeks to join for the purposes of joint trial.

Karemera and Rwamakuba (ICTR-98-44-T)

56. The Trial Chamber notes that the status of the Accused Karemera and Rwamakuba is distinct from the other accused that the Prosecutor seeks to join in the instant case. They have been jointly charged with another six accused making a total of eight co-accused in Case No. ICTR-98-44-T. The proposed joinder, therefore, first involves severing the two accused from the other six co-accused in ICTR-98-44-T. The Trial Chamber is of the view that where accused have been properly joined, the Prosecutor must show good cause when seeking to sever and regroup them with other accused.

57. The Trial Chamber notes that the Prosecutor initially submitted that there is no need for her to file a separate motion for severance prior to seeking to join the trials of the two accused in ICTR-98-44-T, as the severance is implicit in the motion for joinder. The Prosecutor then submitted that if this is considered inadequate, then she moves to first sever Rwamakuba and Karemera from ICTR-98-44-T and then join them with the other proposed co-accused. The Trial Chamber finds that it is necessary to first sever Rwamakuba and Karemera from ICTR-98-44-T before they can be joined with any other accused. Therefore, the Trial Chamber will now consider whether the severance is justified or not.

58. Rwamakuba and Karemera are jointly charged with six other accused in indictment ICTR-98-44. However, The Trial Chamber may order severance or separate trial of the two accused under Rule 82 if (1) there is a conflict of interests that might cause serious prejudice to an accused, or (2) it is necessary to protect the interests of justice. In *Prosecutor v. Ngirumpatse, Nzirorera and Kajelijeli*, ICTR-98-44-T, this Trial Chamber, at para. 31 of its Decision on the Prosecutor's Motion for Joinder and on the Prosecutor's Motion for Severance of the Accused of 29 June 2000 identified three issues to be considered when assessing whether the severance is in the interest of justice. Those three issues are: (1) the right of accused to be tried without undue delay; (2) the right of accused to be tried fairly; and (3) the length and complexity of cases.

59. The Trial Chamber finds that the Prosecutor has not indicated that the joint trial of the accused in Case No. ICTR-98-44-T would violate the right of the accused to a fair trial or the right to be tried without undue delay. Nor has the Prosecutor demonstrated that there is a conflict of interest between the two accused and the other six co-accused that might cause serious prejudice to an accused or that the trying of all eight accused under indictment ICTR-98-44 will be too lengthy or too complex. Therefore, The Trial Chamber is not convinced that the severance of Rwamakuba and Karemera from indictment ICTR-98-44 is necessary in order to avoid a conflict of interests that might cause serious prejudice to the accused, or to protect the interests of justice. In this case, the proposed joinder cannot be effected if severance is denied. Therefore, the Trial Chamber finds it unnecessary to review arguments pertaining to joinder in respect of Rwamakuba and Karemera.

Kamuhanda (ICTR-99-54-T) with Bizimungu, Mugenzi, Mugiraneza and Bicamumpaka (ICTR-99-50-T)

60. Given that the joinder of Niyitegeka will not be considered in this decision in accordance with an oral decision of Trial Chamber II on 27 June 2000 and that the Trial Chamber has found *supra* that there is no good cause to sever Rwamakuba and Karemera from ICTR-98-44, it only remains to the Trial Chamber to consider the joinder of Kamuhanda with the four co-accused in ICTR-99-50-T, that is Bizimungu, Mugenzi, Mugiraneza and Bicamumpaka.

61. According to Rule 48, persons accused of the same crime or different crimes committed in the course of the same transaction may be jointly charged and tried. Rule 2 defines the term "transaction" as "a number of acts or omissions whether occurring as one event or a number of events at the same or different locations and being part of a common scheme, strategy or plan."

62. Jurisprudence on "same transaction" has established in the *Kayishema Decision on Joinder and Severance* of 27 March 1997, at para. 5, that: "involvement in a same transaction must be connected to specific material elements which demonstrate on the one hand the existence of an offence, of a criminal act which is objectively punishable and specifically determined in time and space, and on the other hand prove the existence of a common scheme, strategy or plan, and that the accused therefore acted together and in concert."

63. The Trial Chamber in *The Prosecutor v. Ntabakuze, Kabiligi* (ICTR-97-34-T) Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998 ("*Ntabakuze, Kabiligi*") clarified that the "acts or omissions" that constitute a "transaction" as defined by Rules 2 and 48 do not have to be criminal or illegal in themselves. The Trial Chamber in *Ntabakuze, Kabiligi* then set out a three pronged test that the acts of the accused should satisfy in order to constitute a transaction. The test states that (1) the acts must be connected to material elements of a criminal act; (2) the criminal acts which the acts of the accused are connected to must be capable of specific determination in time and space, and; (3) the criminal acts which the acts of the accused are connected to must illustrate the existence of a common scheme, strategy or plan.

64. This test was also applied in the Decision on the Prosecutor's Motion for Joinder of Trials in *The Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-97-21-T), *The Prosecutor v. Nsabimana and Ntezirayayo* (ICTR-97-29A and B1), *The Prosecutor v. Kanyabashi* (ICTR-96-15-T), *The Prosecutor v. Ndayambaje* (ICTR-96-8-T), 5 October 1999.

65. In *Ntabakuze, Kabiligi* in deciding whether the evidence demonstrated the same transaction, Trial Chamber II stated at page 2 that it would "consider the facts and evidence as a whole using the above guidelines for direction" and that "in the absence of evidence to the contrary, [it would] act upon the Prosecutor's factual allegations as contained in the indictment and related submissions". The Trial Chamber applies the same standards in examining the evidence supporting a same transaction in the present case.

66. The Prosecutor alleges that the evidence shows that Kamuhanda and others, in their capacity as Ministers in the Interim Government, participated in acts such as planning and preparation of genocide, distribution of weapons, recruitment, training and indoctrination of militiamen, preparation of lists of those targeted for extermination, the adoption of directives and instructions by Interim Government members used to incite, aid and abet the massacres. The Prosecutor alleges that this evidence demonstrates that the accused, including Kamuhanda, were all involved in the same transaction.

67. Counsel for Kamuhanda submits that Kamuhanda was appointed as a Minister of the Interim Government only on 25 May 1994 and, as such, acts allegedly committed by Interim Government Ministers before that date cannot be attributed to him. She argues that even when Kamuhanda was appointed as a Minister, he did not assume the functions of a Minister.

68. The Trial Chamber firstly notes that Kamuhanda is not charged with direct and public incitement to commit genocide, a charge which is common to all the other accused. Further, the Trial Chamber notes that the indictment against Kamuhanda refers to the same paragraphs in the concise statement of facts to support each of the charges against him. The Trial Chamber is not satisfied that the Prosecutor has shown that the acts allegedly committed by Kamuhanda or those allegedly under his control, form part of the same transaction as the acts allegedly committed by the other accused in ICTR-99-50.

69. Many of the paragraphs in the indictment against Kamuhanda appear to be general statements that do not refer to any time period. Some of the paragraphs refer to specific acts of Interim Government Ministers prior to 25 May 1994, and therefore refer to a period of time when Kamuhanda was not a minister.

70. The Trial Chamber notes that paragraphs 6.44 and 6.45 refer to acts allegedly committed directly by Kamuhanda in April 1994. However, the Trial Chamber finds that these acts alone do not meet the standard required to show that the acts of the accused were part of the same transaction as the acts of the proposed co-accused in indictment ICTR-99-50-T.

71. In the context of the review of the Motion for Joinder, the Trial Chamber notes that the Prosecutor cannot rely only on the status of an accused (in this case, a Minister of the Interim Government) to establish that he may have contributed or otherwise participated in a common scheme, strategy or plan to commit a crime together with other accused. Rather, the Prosecutor must rely on the specific alleged acts of the accused that could establish his participation in such a common scheme, strategy or plan. This is consistent with both the definition in Rule 2 of a "transaction", which relies on a conjunction of "acts or omissions" and the fundamental principle of individual criminal responsibility enshrined in Article 6 of the Statute.

72. Bearing this in mind, and considering all of the above, the Trial Chamber is not satisfied that the Prosecutor has shown that all of the alleged acts of Kamuhanda form part of the same transaction as all of those of the Accused Bizimungu, Mugenzi, Mugiraneza and Bicomumpaka, as alleged in indictment ICTR-99-50, in their position of Ministers of the Interim Government. Furthermore, even had the Prosecutor been able to satisfy the Trial Chamber as to Kamuhanda's involvement in the same transaction as the other four accused in indictment ICTR-99-50, in order for joinder to be granted, the Trial Chamber would still have to be convinced that the proposed joinder is in the interests of justice.

73. In this regard, the Trial Chamber notes with concern the Prosecutor's submission that the length of pre-trial detention is not a valid consideration because the accused will receive lengthy sentences in any case. The Trial Chamber finds that pre-trial detention is a valid concern and stresses that the presumption of innocence is a fundamental right of the accused. The Prosecutor's argument cannot be tolerated in this regard. The Trial Chamber also finds the submissions of several Defence Counsel in relation to the excessive globalisation of the assertions by the Prosecutor in her motion to be of substance and finds that the Prosecutor's strategy may impinge on the rights of individual accused to a fair trial. Therefore, the Trial Chamber finds that the proposed joinder is not in the interests of justice.

74. Therefore, The Trial Chamber finds that the requirements for joinder are not satisfied in respect of any of the accused that the Prosecutor seeks to join.

**FOR ALL OF THE ABOVE REASONS,
THE TRIAL CHAMBER**

DENIES the Prosecutor motion for Joinder;

DIRECTS the Registry not to award any costs and expenses to Counsel for Bicomumpka for the following motions and briefs:

- The "Requête d'extrême urgence en irrecevabilité, soumise par la Défense de Jérôme-Clément Bicomumpaka, concernant la requête du procureur en jonction d'instances du 3 mars 2000, en vertu des articles 48*bis* et 82 du règlement de procédure et de preuve, et requête en exception préjudicielle, en vertu de l'article 72 (B)(iii) du même Règlement" filed on 29 February 2000;
- The "Mémoire à l'appui de la requête de Jérôme-Clément Bicomumpaka en irrecevabilité de la jonction d'instances du 2 juillet 1999 en date du 24 février 2000", filed on 21 March 2000;

- The “Requête amendée en irrecevabilité, soumise par la Défense de Jérôme-Clément Bicamumpaka concernant la requête du procureur en jonction d’instances du 3 mars 2000, en vertu des articles 48*bis* et 82 du Règlement de procédure et de preuve, et en exception préjudicielle, en vertu de l’article 72 (B) (iii) du même Règlement”, filed on 9 June 2000;
- The “Mémoire amendé à l’appui de la requête de Jérôme-Clément Bicamumpaka, en irrecevabilité de la requête du procureur en jonction d’instances du 3 mars 2000; et en disjonction d’instances, selon l’article 82 du règlement de procédure et de preuve”, filed by Bicamumpaka on 8 June 2000.

Arusha, 6 July 2000,



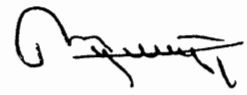
Laïty Kama

Judge, Presiding



William H. Sekule

Judge



Mehmet Güney

Judge

Seal of the Tribunal

