JOINT SEPARATE OPINION OF JUDGE LAL CHAND VOHRAH AND JUDGE RAFAEL NIETO-NAVIA

1. We have reservations in respect of today's Decision[1] only in relation to the finding made as to the Appellants' argument that the amended indictments exceed the temporal jurisdiction of the Tribunal.[2] We wish to explain the reasons why we are unable to agree with the approach taken.

2. Both Appellants have argued that certain of the charges in their respective amended indictments include allegations of crimes that fall outside the temporal jurisdiction of the Tribunal. In particular, they argue that certain counts in the amended indictments specifically refer to events occurring prior to 1994 and that the acts referred to are presented as constituent elements of the crimes with which they are charged.[3] When this matter was raised at first instance, the Trial Chamber found in respect of *Ferdinand Nahimana*:

> 27. The Trial Chamber notes that some of the allegations in the proposed amended indictment do fall outside the period 1 January 1994 to 31 December 1994. However, the Trial Chamber accepts the Prosecutor's submission that she intends to rely on these allegations in proving the ingredients of the offences which were allegedly committed within the temporal jurisdiction of the Tribunal.
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> 28. The Trial Chamber recognises the possibility that these allegations may be subsidiary or interrelated allegations to the principal allegation in issue and thus may have probative or evidentiary value. The Trial Chamber is therefore of the view that it is premature to address the relevance and admissibility of these allegations at this stage of proceedings. The appropriate stage will be at the trial of the accused.[4]

3. It found in respect of *Hassan Ngeze*:

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[1] *Ngeze & Nahimana*, "Decision on Interlocutory Appeals", to which this opinion is appended ("Decision").
[2] Ground 1 in Annex 1 in the *Ngeze Consolidated Brief* and Ground 2 in the *Nahimana Consolidated Brief* (as referenced in the Decision).
[3] *Nahimana Consolidated Brief*, paras. 55-69; *Ngeze Consolidated Brief*, paras. 1-14.
[4] "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", *The Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-T, 5 November 1999, paras. 27 and 28. *See* also, "Decision on the Defence Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence", *The Prosecutor V. Ferdinand Nahimana,* Case No. ICTR-96-11-T, 12 July 2000, p. 4: "The Chamber is fully aware of the temporal limits placed upon it by the Statute. However, information that falls outside the temporal jurisdiction of the Tribunal may be useful in helping the accused and the Chamber to appreciate the context of the alleged crimes, particularly due to the complexity of the events that occurred in Rwanda, during 1994. Furthermore, the Chamber is of the view that the proper stage to determine the admissibility and evidential value, if any, of the paragraphs that contain information about events that occurred prior to 1 January 1994, is during the assessment of evidence. Accordingly, these are matters that the Chamber will consider at the trial of the accused. For these reasons, the above mentioned paragraphs may remain in the indictment, and reference to these paragraphs may remain in the counts."

> After careful review of the [relevant] paragraphs, the Chamber holds that many of the events, while related to a time period preceding 1994, provide a relevant background and a basis for understanding the accused's alleged conduct in relation to the Rwandan genocide of 1994....Thus, such information is directly relevant to events that occurred in 1994. The Chamber has considered the totality of the facts alleged and has noted that the Prosecution does not rely solely on the information in the paragraphs cited by the Defence, but also on facts related to the accused's alleged criminal conduct during 1994. Moreover, the Trial Chamber holds that an assessment of the acts alleged in the indictment is an evidentiary matter, the truth of which must be proved at trial.[5]

4. In the case of both Appellants, the Trial Chamber accepted the Prosecution's assertions and it expressed satisfaction that inclusion of these events in the amended indictments did not fall outside the temporal jurisdiction of the Tribunal because the Prosecution merely intended to refer to them to prove the ingredients of offences which were allegedly committed within the temporal jurisdiction of the Tribunal. Similarly, the Decision briefly notes the Trial Chamber's findings and states that it is satisfied that "the Trial Chamber will not rely upon events occurring prior to 1994 as the independent basis of a count and therefore the temporal jurisdiction has not been exceeded".[6]

5. We do not doubt the ability of the trial Judges to properly apply the law and consider facts and evidence in their appropriate context, including their ability to accurately apply the findings of the Decision and their own of 5 November 1999. Nevertheless, we are of the view that reference to these facts, if any, should henceforth be located outside paragraphs underlying the specific counts of the indictments.

6. The essential point to be noted is that this Tribunal has a restricted and clearly defined temporal jurisdiction. This applies without exception to all crimes charged, including inchoate or continuing crimes. Temporal jurisdiction is defined in the Statute in Article 1 (Competence of the International Tribunal for Rwanda),[7] Article 7 (Territorial and Temporal Jurisdiction)[8] and Article 15(1) (The Prosecutor)[9] which provide that the temporal

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[5] "Decision on the Prosecutor's Request for Leave to Amend the Indictment", *The Prosecutor v. Hassan Ngeze,* Case No. ICTR-97-27-I, 5 November 1999, para. 3.

[6] Decision, p. 6.

[7] "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute."

[8] "The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994."

jurisdiction of the Tribunal is limited to adjudication of crimes within the subject-matter jurisdiction of the Tribunal committed between 1 January and 31 December 1994.

7. The Tribunal's subject-matter jurisdiction includes not only war crimes, crimes against humanity and genocide[10] but also the separate and independent crimes of conspiracy to commit genocide and direct and public incitement to commit genocide, so-called inchoate or continuing offences, with which the Appellants have been charged.[11] In addition, Article 6(1) of the Statute provides for individual criminal responsibility in respect of a person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the...Statute." With inchoate crimes in particular, it can be difficult to ascertain when all of the constituent elements of the offence exist so that a potential problem arises if it is intended that a conviction will be based upon not just one defined event occurring on a specific date but upon a series of events or acts which took place over an extended period of time.

8. Conspiracy is an example of an offence that may be carried out over an extensive period of time. In such cases (as the instant), what weight should be placed on events which occurred before 1 January 1994? What is the impact of a statutory limitation to the temporal jurisdiction of the Tribunal on offences such as conspiracy or incitement to commit genocide? Is it intended that the limitations to the Tribunal's jurisdiction should apply in relation to these crimes such that evidence of pre-1994 incitement or conspiracy to commit genocide is excluded even when the alleged crimes were completed in 1994?

9. The Statute does not expressly define how its jurisdiction should be interpreted in relation to continuing or inchoate offences such as conspiracy or incitement. At the same time, there is no provision providing an exception to the temporal limitation in respect of these offences.

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[9] "The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."

[10] Articles 2-4 of the Statute provide for prosecution of genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, respectively.

[11] Article 2(3) provides: "The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide."

10. On a plain reading of the language of the Statute, the limitation on the Tribunal's temporal jurisdiction is clear: "The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994."[12] The "ordinary meaning" of this phrase is to us unambiguous and stipulates a precise period of time over which the Tribunal exercises this jurisdiction.[13] Therefore, an accused may not be charged with or convicted of a crime that took place before 1 January 1994 or after 31 December 1994, regardless of its nature.

11. There is no express guidance in relation to the temporal limitation on inchoate crimes, and therefore the intention of the Security Council, as a confirming indicator of the object and purpose of the Statute should guide the Tribunal in interpreting *lacunae* or ambiguities, if any.[14]

12. In construing this intention, it is helpful initially to consider certain views expressed in the Security Council meetings relating to the crisis in Rwanda which were held prior to the establishment of the Tribunal. The delegate of Rwanda repeatedly emphasised that October 1990 was when the war began. In May 1994, he stated before the Security Council that "perpetrators must be identified and punished. But this applies to the entire duration of the war, that is, since 1 October 1990."[15] Again, in June 1994, the delegate asserted that a military solution to the crisis "would only perpetuate the suffering endured by the Rwandese people for nearly four years"[16], thus again reminding the members of the Security Council that the Government of Rwanda deemed the conflict to have begun in 1990.

13. Finally, although the Government of Rwanda had requested that the Tribunal be established there were several provisions in the Statute that resulted in Rwanda voting against Resolution 955 establishing the Tribunal and adopting the Statute. The delegate of Rwanda cited the limited temporal jurisdiction as the first of several reasons why it was voting against the Statute of the Tribunal:

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[12] Article 7 of the Statute.
[13] In interpretation, the Tribunal is guided by the principles which may be drawn from Article 31(1) of the Vienna Convention on the Law of Treaties (1969), U.N. Doc. A/CONF.39/27: "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." These principles are considered today as general principles to be applied in the interpretation of all international instruments.
[14] Article 32 of the Vienna Convention on the Law of Treaties.

> In spite of many meetings with the sponsors of the draft resolution, and despite some amendments to the initial text, my Government is still not satisfied with the resolution or with the statute of the International Tribunal for Rwanda as it stands today, for the following reasons. First, my delegation regards the dates set for the *ratione temporis* competence of the International Tribunal for Rwanda from 1 January 1994 to 31 December 1994 as inadequate. In fact, the genocide the world witnessed in April 1994 was the result of a long period of planning during which pilot projects for extermination were successfully tested. For example [massacres, exterminations, torture, rape and other crimes were committed in 1990, 1991, 1992, and 1993.] . . . My delegation proposed that account be taken of the period from 1 October 1990, the beginning of the war, to 17 July 1994, the end of the war. This proposal was rejected without any valid reason. An international tribunal which refuses to consider the causes of the genocide in Rwanda and its planning, and that refuses to consider the pilot projects that preceded the major genocide of April 1994, cannot be of any use to Rwanda.... In this respect, there is a contradiction between articles 6 and 7 of the statute.[17]

14. The 1994 genocidal regime was considered to have taken place between 6 April 1994 and 17 July 1994. The Security Council was well informed about allegations of serious crimes perpetrated in Rwanda prior to 6 April 1994.[18] It decided, however, not to extend the jurisdiction to cover all serious violations of international criminal law committed in Rwanda but, instead, to limit the jurisdiction of the Tribunal exclusively to crimes committed during the 1994 genocide and war. It extended the jurisdiction to 1 January 1994 instead of 6 April 1994 precisely in order to capture the planning stages of the crimes. In the Security Council meeting which brought about the establishment of the Tribunal, the delegate of France stated: "The Tribunal will be competent to deal with offences committed between 1 January and 31 December 1994. *The choice of this time period makes it possible to take into account possible acts of planning and preparation of genocide which took place beginning on 6 April of this year.*"[19] The delegate of New Zealand concurred: *"The temporal jurisdiction of the Tribunal has been expanded backwards, from April, as originally proposed, to January 1994, so as to include acts of*

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[15] UN SCOR, 49th Sess., 3377th Mtg., UN Doc. S/PV.3377, 16 May 1994.
[16] UN SCOR, 49th Sess., 3392nd Mtg., UN Doc. S/PV.3392 and Corr.1, 22 June 1994.
[17] UN SCOR, 49th Sess., 3453rd Mtg., UN Doc. S/PV.3453, 8 November 1994.
[18] Additionally, the Security Council had before it the report of the Commission of Experts. The Commission of Experts on Rwanda established to investigate serious violations of international humanitarian law in Rwanda and to make recommendations as to holding responsible individuals accountable provided detailed information to the Security Council. The Final Report of the Commission of Experts twice stressed that there was overwhelming evidence indicating that the genocide had been planned *months* in advance of its actual execution. The Commission of Experts was sufficiently knowledgeable about violence occurring prior to 1994. In providing background information leading up to the 1994 genocide, the Final Report noted: "A number of massacres have been perpetrated in Rwanda in the last 45 years. In particular, the years 1959, 1963, 1966, 1973, 1990, 1991, 1992 and 1993 were marked by massacres in Rwanda." However, the Commission of Experts concluded that the *1994* genocide was not planned years in advance, but months in advance. See *Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994),* S/1994/1405 (Annex), 9 December 1994, at paras. 31, 101-08, and 156.

planning for the genocide that occurred in April."[20] No other member of the Security Council expressed a differing opinion as to the scope of the temporal jurisdiction or as to the reasons for restricting the temporal jurisdiction to the year 1994.

15. Consequently, in establishing the Tribunal, the Report of the Secretary-General provides:

> The temporal jurisdiction of the Tribunal is limited to one year, beginning on 1 January 1994 and ending on 31 December 1994. Although the crash of the aircraft carrying the Presidents of Rwanda and Burundi on 6 April 1994 is considered to be the event that triggered the civil war and the acts of genocide that followed, the Council decided that the temporal jurisdiction of the Tribunal would commence on 1 January 1994, *in order to capture the planning stage of the crimes.*[21]

16. Clearly, in adopting the Statute, even crimes involving planning and preparation were specifically anticipated and debated among members of the Security Council. Aware of this fact and also of the view expressed by the Rwanda delegate that the temporal jurisdiction of the Tribunal should commence in 1990, the Security Council nevertheless decided to limit the jurisdiction to crimes committed during the 1994 genocide. It extended the temporal jurisdiction of the Tribunal to January instead of April 1994 in order to capture crimes that may have involved planning and preparation. Extending it back further was rejected – thus only crimes committed after 1 January 1994 may be prosecuted before the International Tribunal.

17. The fact that the Security Council specifically considered the impact of a limitation to the temporal jurisdiction of the Tribunal on such crimes and the fact that it extended the jurisdiction of the Tribunal to include any criminal planning that took place in the months before April 1994 indicate that the Security Council intended that reference to events which occurred prior to 1 January 1994 (irrespective of the crime to which they pertain) was to be excluded from forming the basis of charges for 1994 crimes. In our view, this intention of the Security Council is a confirming indicator of the "object and purpose" behind the provisions of the Statute relating to temporal jurisdiction. As is within our competence, we

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[19] UN SCOR, 49th Sess., 3453rd Mtg., UN Doc. S/PV.3453, 8 Nov. 1994 [emphasis added].
[20] *Ibid.* [emphasis added]. The jurisdiction was extended to the end of 1994 in order to capture crimes that continued to be committed after the cease-fire in July 1994, especially in refugee camps. *Ibid.* (delegate of France).
[21] *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, S/1995/134, 13 February 1995, at para. 14 [emphasis added].

believe that the relevant provisions of the Statute should be interpreted in a restrictive fashion in order to fulfil this intention.[22]

18. In accordance with this interpretation, no reliance should be placed on events that took place before 1 January 1994 to support and prove the gravamen of substantive offences.

19. On a reading of the amended indictments in this matter, it is unclear if it is intended that these pre-1994 facts and events – which are stated as facts and indeed referred to as crimes but which have not been proved and will not need to be proved at trial as they occurred prior to 1994 – will be relied upon to form the basis of a subsequent finding of individual criminal responsibility. In the event, the inference can be drawn that the Appellants might be expected to defend themselves in relation to pre-1994 allegations. This would be in breach of the terms of the temporal jurisdiction of the Statute and Article 20(4)(a) of the Statute, according to which an accused will be entitled, in full equality: "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."[23]

20. The latter statutory requirement includes an obligation to ensure that an accused can fairly anticipate the charges in relation to which he or she will be required to defend himself or herself at trial.[24] An accused does this by consulting the indictment, which should:

[22] It is a principle of international law that the Tribunal has the competence to interpret its own jurisdiction, without departing from the express terms of the Statute. *See,* "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *The Prosecutor v. Duško Tadić,* Case No. IT-94-1-AR72, 2 October 1995, para. 13 *et seq.* This accords also with Article 36.6 of the Statute of the International Court of Justice: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Because this is such a wide-ranging power, international tribunals should interpret their jurisdiction in a restrictive fashion. In this regard, the International Court of Justice has on many occasions refused to entertain cases following a decision that it lacked competence to do so. *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question),* Judgement of 15 June 1954, I.C.J. Reports (1954), p. 19, *East Timor (Portugal v. Australia)* Judgement, I.C.J., Reports (1995), p. 90. *See* also, *Status of Eastern Carelia,* P.C.I.J., Series B, No. 5 and *Interpretation of Peace Treaties,* Advisory Opinion, I.C.J. Reports (1950), p. 65.

[23] *See* also Article 17(4) of the Statute, which provides *inter alia*: "[T]he Prosecution shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute"; and Rule 47(C).

[24] *See,* for example: "Decision on the Form of the Indictment", *Prosecutor v. Dragoljub Kunarac and Radomir Kovač,* Case No. IT-96-23-PT, 4 November 1999, paras. 5-7; "Decision on the Defence Preliminary Motion on the Form of the Indictment", *Prosecutor v. Milorad Krnojelac,* Case No. IT-97-25-PT, 24 February 1999, paras. 12-13: "What must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility" and, "Decision on Defence

> ...make clear to an accused (a) the nature of the responsibility alleged against him and (b) the material facts by which his particular responsibility will be established....In other words, the capacity in which the accused allegedly committed the charged offence must be clearly defined.[25]

21. It is our view that indictments in this Tribunal should be more explicit by including any pre-1994 events exclusively in an historical or introductory section. In this way, an accused would be more fully informed and could distinguish between those material facts by which it is intended that their particular individual criminal responsibility will be established and those facts which are being brought simply for historical or introductory purposes.

22. In reviewing Section 8 of the amended indictments, headed "The Charges", each count commences with the following statement: "By the acts or omissions described in paragraphs [numbered paragraphs included]...and more specifically in the paragraphs referred to below:". In several instances, the paragraphs refer to events or acts by the accused that took place before 1 January 1994, and in some instances, they refer exclusively to events or acts – including crimes – that occurred prior to 1994.[26] Each count continues by naming the accused and charging him with a specific offence. The format and placing of these references used by the Prosecution could suggest that the Prosecution intends to rely on these events to prove the charges.

23. Pre-1994 acts or events should not, in our view, be included to support the specific counts of the indictments. The assurance provided to both Appellants in today's Decision wherein the Appeals Chamber notes it is satisfied that "the Trial Chamber will not rely upon events occurring prior to 1994 as the independent basis of a count"[27] does not, we think, provide a sufficient guarantee to adequately protect the accused's rights and expectations. We would have preferred if the Decision had determined that the Trial Chamber was prevented from taking these facts and allegations into account and that reference to them should have been removed from the specific counts of the amended indictments. In fairness

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Preliminary Motions on the Form of the Indictment", *Prosecutor v. Miroslav Kvočka et al.,* Case No. IT-98-30-PT, 12 April 1999.

[25] "Decision on the Form of the Indictment", *Prosecutor v. Dragoljub Kunarac and Radomir Kovač,* Case No. IT-96-23-PT, 4 November 1999, para. 6 (footnote reference omitted).

[26] *See* for example, Amended Indictment in respect of *Hassan Ngeze,* paras. 5.3, 5.4, 5.6, 5.7, 5.8, 5.9, 5.11, 5.21, 5.22, 5.27, 5.28, 5.29, 6.7, 6.8, 6.9, 6.11, and 6.12.

[27] Decision, p. 6.

to the Appellants this would remove any ambiguity and uncertainty and would have informed them in greater detail of the "nature and cause of the charge against [them]."[28]

24. Nevertheless, the reasons we have given do not, in our view, suffice to require us to register a dissent to this part of today's Decision. Although the Decision, in our considered opinion, could have gone further, we understand it in essence to preclude the facts and events occurring prior to 1994 from forming the underlying basis of the charges in the amended indictments.

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

Judge Lal Chand Vohrah

Judge Rafael Nieto-Navia

Done this fifth day of September 2000
At The Hague
The Netherlands

[Seal of the Tribunal]

[28] Article 20(4)(a) of the Statute.