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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

CASE NO.: 98-44A-T

THE PROSECUTOR
OF THE TRIBUNAL

AGAINST

JUVÉNAL KAJELIJELI

12 MARCH 2001
1513H

PRE-TRIAL BRIEF AND MOTION

Before: Mr. Justice Laïty Kama, Presiding
Mr. Justice William H. Sekule
Mr. Justice Mehmet Güney

Courtroom Officer:
Mr. John Kiyeyeu

Courtroom Assistant:
Mr. Abraham Koshopa

For the Prosecution:
Mr. Ken Fleming
Ms. Ifeoma Ojemeni
Mr. Jayantha Jayasuryia

For the Defendant:
Mr. Lennox Hinds

Court Reporter:
Ms. Geraldine O'Loughlin
Ms. Verna Butler

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I N D E X

Decision.....27

P R O C E E D I N G S

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MR. PRESIDENT:

The Court is now in session. Registrar, you have the floor.

THE REGISTRAR:

Thank you, Mr. President. Trial Chamber II of the International Criminal Tribunal for Rwanda, composed of Judge Laïty Kama, presiding, Judge William H. Sekule and Judge Mehmet Güney is now sitting in open session, today, Monday, the 12th of March 2001, for the commencement of the trial in the matter of the *Prosecutor vs. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T. Thank you, My Lords.

MR. PRESIDENT:

Thank you, Registrar.

So, we are supposed to start with the trial of the Accused Juvénal Kajelijeli. However, there are some preliminary issues that need to be disposed of and dealt with. It is that we have received a motion from Defence Counsel challenging the jurisdiction, the temporal jurisdiction of this Chamber.

1

2

And, so, we shall start by hearing that

3

motion and we shall confine our submissions

4

to the issues of admissibility; in other

5

words, is such a motion admissible in regard

6

to the provisions of the Rules.

7

8

But prior to that, can I ask the parties to

9

appear. Let me start with the Prosecutor.

10 MR. FLEMING:

11

Thank you. If the Court pleases, I am Ken

12

Fleming, Senior Trial Attorney. I appear

13

with Ms. Ojemeni and Mr. Jayasuryia.

14 MR. PRESIDENT:

15

Thank you, Prosecutor. Defence.

16 MR. HINDS:

17

Lennox Hinds, representing Mr. Kajelijeli.

18

And I am assisted by Ms. Lilian Sepulveda,

19

who is a student at Rutgers University in

20

the United States and my assistant.

21 MR. PRESIDENT:

22

Thank you very much. So I was saying that

23

we will start with that motion, and I will

24

give the floor to the parties to only

25

address the issue of the admissibility of

1 the motion: Is that motion admissible? So
2 I'll give the floor to Mr. Hinds to address
3 the Court on the admissibility of the
4 motion. And, subsequently, the Prosecutor
5 will be allowed to take the floor on the
6 admissibility of the motion. And the
7 Chamber will then deliberate on said motion
8 -- on admissibility of said motion.
9 Professor Hinds, you have the floor.

10 MR. HINDS:

11 Thank you, Your Honour. Mr. Kajelijeli
12 brings this motion on two prongs. First, we
13 argue that the Tribunal does not have
14 *in personam* jurisdiction over Kajelijeli,
15 based upon Article 1 and Article 5 of the
16 Statute.

17
18 And we bring this motion because, as this
19 Court knows, an amended indictment was filed
20 in this matter on January 25th. And
21 pursuant to Rule 50(C) Mr. Kajelijeli was
22 entitled to file preliminary motions with
23 respect to the amended indictment.

24

25 Now, the amended indictment, because of the

1 allegations made by the Prosecutor, this
2 Trial Chamber concluded that the allegations
3 were such that it was impossible to
4 extricate the allegations from each of the
5 individual counts; so, therefore,
6 Mr. Kajelijeli was forced to plead to all
7 11 counts of the indictment. And so,
8 therefore, the motion that we have brought,
9 challenging the competence and the
10 jurisdiction of this Tribunal, pursuant to
11 Articles 1 and 5 of the Statute, necessarily
12 implicates all 11 counts of the indictment.

13
14 Now, with respect to our argument: We are
15 aware that this Tribunal ruled with respect
16 to the legality or illegality of
17 Mr. Kajelijeli's original detention and
18 arrest. That matter was, in fact, appealed
19 but it was never heard on the merits before
20 the Court of Appeals. It was dismissed on
21 procedural grounds. We have not raised in
22 this particular motion any of the prior
23 arguments that were made and, therefore, we
24 are not dealing with an issue that is
25 *res judicata* as far as we are concerned.

1

2

What are the issues that we have raised?

3

Subsequent to this Court reaching its

4

decision, we were informed that the

5

Constitutional Court of Benin had rendered

6

an opinion with respect to the legality of

7

Mr. Kajelijeli's arrest under Benin law. As

8

this Court knows, our position with respect

9

to Mr. Kajelijeli's arrest, and thereby the

10

competence of this Tribunal to in fact try

11

him, was that at the time that the

12

Prosecutor issued the decision to arrest

13

Mr. Kajelijeli who was in the house with

14

Mr. Nzirorera there was no competent

15

evidence nor reliable evidence that

16

Mr. Kajelijeli had committed any crime

17

within the jurisdiction of this Tribunal.

18

And, therefore, we raise this initial issue

19

at the onset, not having the benefit of the

20

Constitutional Court of Benin.

21

22

Now, Mr. Kajelijeli had indicated that he

23

had complained and he had sought

24

intervention by the authorities in Benin,

25

with respect to the legality of his arrest.

1 To no avail. We now have a court, a
2 competent court, making a determination with
3 respect to the legality. Article 18,
4 paragraph (4) of the Benin Constitution, in
5 fact, addresses the issue with respect to
6 the length of time that an individual can be
7 held without being brought before a
8 magistrate, which was 48 hours.

9
10 Mr. Kajelijeli was held in Benin from June
11 until August. And then he spent several
12 more months here, amounting to a total of
13 over 246 days before he was actually brought
14 before the Tribunal for his first
15 appearance.

16
17 So the very essence that we have asked this
18 Court to take a look at is whether or not,
19 given this new information that we have
20 provided, does this Court now see a basis
21 for reviewing its decision that was taken,
22 because now we have newly admissible
23 evidence that we are putting before the
24 Court. And we believe that that evidence is
25 persuasive. We believe that that evidence,

1 when we look at the Constitution of Benin,
2 and the applicable law that they applied was
3 no different than the provisions within the
4 Statutes here. And so that is the first
5 prong of our challenge.

6
7 I would like to correct a statement I made
8 when I said that Mr. Kajelijeli was held for
9 246 days before being presented for his
10 arraignment. It was 211 days and not
11 246 days, as I have stated.

12
13 The argument I make with respect to the
14 temporal jurisdiction of the Tribunal makes
15 a distinction between the conspiracy charge,
16 because we concede that the holdings of the
17 Appeals Chambers have indicated that by its
18 very nature a conspiracy is a continuing
19 violation.

20 MR. PRESIDENT:

21 Mr. Hinds, please. We want to hear you on
22 the admissibility. You filed your
23 preliminary motion pursuant to Rule 72,
24 following the amendment of the indictment,
25 Rule 50. Now, on the admissibility, do you

1 think your motion is admissible? If yes,
2 why -- before you go to the merits.

3
4 Secondly, let me further state that the
5 Chamber had already ruled on the legality of
6 the detention. You had made an appeal and
7 in the meantime you had received a document
8 from the Benin Constitutional Court and you
9 had forwarded the said document to the
10 Appeals Chamber for information, and you
11 were talking about us reviewing or
12 reconsidering our decision. But you had
13 sent that document to the Appeals Chamber
14 and they had sent a copy to us. So with
15 respect to your motion, under Rule 72 do you
16 think it is admissible? That is the
17 preliminary issue to be addressed.

18 MR. HINDS:

19 Yes, Your Honour. I think it is admissible,
20 and I thought that I was addressing that
21 issue. The Court has now brought my
22 attention to the fact that the Appeals
23 Chamber had sent you a copy of the Benin's
24 court decision. I was not aware that this
25 Trial Chamber had received a copy of the

1 Benin Constitutional Court's decision until
2 you have just indicated such to me. Am I
3 incorrect in the translation, because I
4 thought -- okay.

5 MR. PRESIDENT:

6 No. I said that following our decision you
7 made an appeal; you brought an appeal from
8 that decision. You asked the Appeals
9 Chamber which -- I don't quite recall. I
10 don't know whether I rejected that appeal.
11 But in the meantime, you received a document
12 from the Benin Constitutional Court and each
13 Judge received a document from you with
14 respect to that document of the Benin
15 Constitutional Court. The Chamber was not
16 formally seized with respect to a review.
17 The matter is pending before the Appeals
18 Chamber. I thought this is a matter I
19 should inform you of in passing, so the
20 matter still stands: Is your motion
21 admissible and if it is, why?

22 MR. HINDS:

23 Your Honour, the matter is not now before
24 the Appeals Chambers. This Court may not be
25 aware of it, but the Appeals Chambers

1 dismissed Mr. Kajelijeli's appeal on
2 procedural grounds, and the procedural
3 grounds were that Mr. Kajelijeli was out of
4 time with respect to responding to a
5 scheduling order.

6
7 Given the fact that that matter was
8 dismissed -- is not now pending -- and if it
9 was now pending, it would have been
10 inappropriate for me to now bring the same
11 matter or even a collateral matter before
12 you. It would be appropriate for me to
13 bring that information to the Appeals
14 Chambers; but the matter has been dismissed.

15
16 Now, I am arguing that this information is
17 admissible, and my argument is that (A) it
18 is not *res judicata*; that this Trial Chamber
19 has not ruled on any issues with respect to
20 either (A) the applicability of the Benin
21 Constitutional Court's decision with respect
22 to any issues that you have taken. And so,
23 therefore, any decision that you may make
24 now would not be *res judicata*. That is the
25 argument that I am making. And I attempted

1 to preface it by laying out what I thought
2 was the historical background.

3
4 Does the Court need any clarification on
5 that issue? Does the Court need any
6 clarification on that issue?

7 MR. PRESIDENT:

8 Please, focus on the admissibility, Rule 72.

9 MR. HINDS:

10 Right. Rule 72(D) clearly establishes that
11 -- decisions with respect to preliminary
12 motions, and the Rule distinguishes
13 preliminary motions that are jurisdictional
14 in basis, as opposed to other preliminary
15 motions, that those motions that relate to
16 jurisdiction -- and we submit that this
17 motion that we brought challenging the
18 *in personam* jurisdiction of this Court, with
19 respect to Mr. Kajelijeli, falls squarely
20 within the Rules. And we are saying that
21 that -- the provision under 72(D) -- provides
22 for a very unique remedy, and that is in the
23 event that there is an adverse decision with
24 respect to that type of motion, there is an
25 interlocutory appeal process that is

1 available. And the history behind that is
2 very clear.

3
4 Now, I would like to go forward with respect
5 to why we believe that our challenge on
6 temporal jurisdiction is admissible. The
7 issue with respect to temporal jurisdiction
8 obviously goes to the heart of whether or
9 not the allegations and the charges brought
10 by the Prosecutor are beyond the
11 jurisdiction of this Tribunal. And we
12 believe that that issue is relevant and the
13 motion is admissible under the Statutes,
14 certainly 1, 5 and 7 of the Statutes of the
15 Tribunal.

16
17 We have argued that the Prosecutor, in
18 amending her indictment, made allegations
19 going back to 1990 and in so doing broadened
20 illegally the scope and the temporal
21 jurisdiction of this Tribunal, if this
22 Tribunal decides to allow and to hear that
23 evidence which in fact goes that far. Now,
24 the Tribunal may make a decision not to
25 allow it, but if the Tribunal does allow the

1 Prosecutor to, in fact, adduce that
2 particular evidence, we believe that we now
3 end up with a serious problem involving
4 violation of the temporal jurisdiction.

5
6 And I had said earlier that I distinguish
7 the conspiracy charge, because it is clear
8 that the conspiracy by its very nature is
9 continuing -- that is to say, a conspiracy
10 could begin prior to 1994 and continue,
11 within the jurisdiction of the Tribunal,
12 from January to December of 1994. But with
13 respect to the other allegations, of
14 kidnappings, exterminations and so on, we
15 believe that those allegations that predate
16 January of 1994, in fact, seriously impair
17 the jurisdiction of this Tribunal. And
18 those are the arguments that we make,
19 Your Honour.

20
21 And we believe that the mere fact that the
22 Prosecutor amended the indictment does not
23 mean that we cannot bring these particular
24 motions challenging the competency of the
25 Tribunal, because, as the Prosecutor has

1 argued in their response brief, that our
2 comments must be limited to the new charges.
3 But by the very nature of the amendments in
4 this case, all of the new charges are
5 implicated within the 11 counts, so it's
6 impossible to address any of these
7 challenges without challenging all of the
8 counts of the indictment.

9
10 Thank you, Your Honour.

11 MR. PRESIDENT:

12 Mr. Hinds, can I just insist a little bit,
13 at least to remind you -- or you will recall
14 there was an amendment to the indictment and
15 that we told you that as from that amendment
16 you were given an additional period of
17 30 days to file any preliminary motions in
18 connection with the said amendment, and it
19 is in that respect that you filed that
20 preliminary motion.

21
22 My question with respect to the
23 admissibility was whether this was filed
24 within the 30 days. I do fully well
25 understand. Did you comply with the

1 30 days? That's my question.

2 MR. HINDS:

3 I didn't know that that was exactly the
4 issue raised. Thank you, Your Honour. Yes,
5 we complied. And I think that the Registry
6 would, in fact, certify to the fact that we
7 filed our motion on the 21st. We had
8 confirmation that it was received by the
9 Registry. Then some -- a week later, we
10 were told that the copies that came through,
11 there was a problem with the fax of the
12 Registry and that they came out all
13 distorted in colours and so on and so forth.
14 We then resent the document and, as far as
15 we are aware, we complied with the 30-day
16 requirement.

17 MR. PRESIDENT:

18 Thank you very much. Prosecutor?

19 MR. FLEMING:

20 Thank you, Your Honours. We don't know
21 whether they complied or not, because the
22 material that we got was filed, at least
23 received, by the ICTR on the 2nd of March
24 2001. But that certainly appeared to be a
25 second filing by the Accused.

1 I didn't take the point because I didn't
2 know whether or not it was filed before the
3 date.

4
5 It would appear that the ICTR received the
6 material on the 2nd of March under cover of
7 a letter which had some 29 pages. The
8 letter then had behind it "message
9 confirmation" dated the 22nd of February
10 2001, with 25 pages. And I don't know
11 whether they have complied.

12
13 Obviously, if they did comply the first
14 time, we have no point to take. If they
15 didn't comply the first time, then it's
16 obviously out of time, pursuant to Rule 72,
17 when one takes into account that the
18 amendment was filed on the 25th of January.
19 We really can't take the matter any further
20 than that. Thank you.

21 MR. PRESIDENT:

22 Mr. Hinds, do you have something to add?

23 MR. HINDS:

24 No, I don't have anything to add except that
25 we sent three motions. We filed three

1 motions at the same time. The motions were
2 of different lengths in terms of pages. We
3 attempted to, when we found out, after
4 speaking to Dr. Mindua, that he had received
5 only one of the motions and had not received
6 the other two, we then began calling and the
7 Registry then told us that we used the wrong
8 fax; that the fax number that we used, in
9 fact, there was some problem with the
10 machine back on the 21st or 22nd, and the
11 copies that came out were all discoloured,
12 or they couldn't make out the copies. And
13 so, therefore, they did not circulate any of
14 the documents to anyone.

15
16 We then proceeded to write a letter to the
17 registrar and sending it to another fax
18 number in which we, in fact, said this is
19 our second attempt and we are attaching
20 hereto copies of confirmations indicating
21 that we had filed the documents back on the
22 21st or 22nd. The 30-day rule would have,
23 in fact, lapsed some time around the 25th or
24 26th and so, therefore, in an attempt to, in
25 fact, at least register with the Registry

1 the fact that we had made that attempt, we
2 sent a second letter.

3
4 The Registry said to me that they were
5 prepared to prepare an affidavit or some
6 other method of confirming the fact that we
7 had -- that is Mr. Kajelijeli -- had, in
8 fact, complied with the Rules, in that we
9 attempted to file by telefax on the 21st or
10 22nd.

11
12 I can say parenthetically, Your Honour, that
13 we have three different fax numbers for the
14 Registry, the Prosecutor's Office, and we
15 then would send the copy to the coordinator
16 of this Trial Chamber, Dr. Mindua.

17
18 Trying to fax documents from New York by way
19 of the fax has been extremely problematic.
20 Sometimes it takes us a whole day because
21 the lines are busy. But we got through. We
22 generally are able to get the direct number
23 to the Registry without much problem. But
24 we didn't know that that fax machine was
25 defective until we were told a week later.

1 So the Court may want to contact someone
2 from the Registry to find out about this.
3 But what I am saying to you is, in fact,
4 what occurred in the conversation I had in
5 New York with a representative of the
6 Registry. And it might be that because we
7 attempted to send so many copies, someone
8 may, in fact, have received some copies, and
9 I'm not sure whether the Prosecutor's Office
10 received anything at all from us.

11 MR. FLEMING:

12 No. I can confirm that's the case,
13 Your Honour, because I tried just now to
14 check that again and we have two copies of
15 the document, which is under a letter dated
16 21st February 2001 -- at least the first
17 copy is -- and it has a fax date at the top
18 of 1 March 2001. But that appears to be
19 precisely the same document as we received a
20 second time, which bears the date 2nd March
21 2001. That is the official stamp. So I
22 can't throw any more light on it at all.

23 MR. PRESIDENT:

24 We would like to ask the Registry to provide
25 an explanation. Professor Hinds stands by

1 what he has said -- namely, that he sent the
2 motion in time -- and then there is the fax
3 message which he said is stamp dated 2nd of
4 March, and apparently it would appear the
5 Registry had promised some affidavit. I can
6 see Dr. Mindua in the public gallery. Maybe
7 he would wish to provide us with further
8 information.

9 (Dr. Mindua entered the courtroom)

10 MR. PRESIDENT:

11 Dr. Mindua, you have the floor. It would
12 appear you were the counterpart, as it were,
13 of Professor Hinds. At least you should
14 tell us exactly what happened, because there
15 is a document date stamped 2nd of March, and
16 apparently that is outside time, and
17 apparently there was the first one, which
18 was there since the 25th of March or
19 earlier. You could sit down and explain.

20 DR. MINDUA:

21 Thank you, Mr. President. First I must
22 apologise to your Chamber because I'm not
23 wearing my ropes. I was in the public
24 gallery and I was called upon to come.

25

1 MR. PRESIDENT:

2 In fact, I just caught sight of you.

3 DR. MINDUA:

4 Now regarding the filing of the three
5 motions by Defence Counsel -- that's, three
6 motions regarding Kajelijeli with the
7 Registry -- Registry can certify that there
8 was a first posting of, if I do recall
9 properly, which arrived on the 22nd of
10 February, but not to the fax number of the
11 Court Management Section, nor to the fax
12 number of the general Registry, which we
13 usually use for the entire Tribunal. It got
14 to the fax number of the office of the
15 Registrar.

16

17 Now, having noticed that the three motions
18 -- because I'm in regular contact on phone
19 with Professor Hinds, he promised he would
20 be sending me three motions. But since I
21 noticed that I didn't have all three motions
22 I asked him why these were not sent and he
23 told me that he had already sent them since
24 the 22nd of February.

25

1 After verification in the Court Management
2 Section, we checked and we didn't have those
3 motions, and I got in touch with Mr. Hinds
4 and he said, "Well, why don't you check with
5 other services of the Tribunal", and I
6 sought some explanation from Mr. Manoj who
7 is in charge of the central Registry and he
8 told me that, in the course of March, that
9 he had received a pile of documents from the
10 office of the Registrar. Among those
11 documents there were the three motions.

12
13 So it would appear, therefore, that those
14 motions were sent in February but not to the
15 proper address.

16
17 And even at the hearing today I heard
18 Professor Hinds say that he didn't send
19 those motions to the usual address because
20 those lines were not operating, they were
21 out of order. I think he would be the only
22 one to answer for that. I can say no
23 further. Thank you, Mr. President.

24

25

1 MR. PRESIDENT:

2 Well, the position of the Tribunal is that
3 the motion filed by Professor Hinds were
4 submitted within the time limit. And so
5 we're going to ask Professor Hinds to dwell
6 and submit on the merits briefly, because we
7 have received your written submissions. We
8 don't have time.

9 MR. HINDS:

10 Your Honour, I am not going to repeat what I
11 have said before. I thought that I was
12 addressing the issue of the admissibility of
13 evidence, but apparently I was arguing on
14 the merits. I will now submit what I have
15 stated before for my arguments on the
16 merits.

17 MR. PRESIDENT:

18 Very well then. Prosecutor, on the merits
19 of that motion, substance of that motion --
20 if you do have any comments, of course.

21 MR. FLEMING:

22 Thank, Your Honours. Your Honours, the only
23 two issues that I want to deal with is the
24 issue of *res judicata* and the issue of the
25 new charges. Our learned friend has said

1 that there is a new fact and therefore it
2 cannot be *res judicata*. The problem with
3 that argument is simple: The issue that was
4 ventilated previously and was decided was
5 the fact that this Chamber has no control
6 over the Beninian legal process and,
7 therefore, it is in no position to review
8 it.

9
10 All that has happened is that our learned
11 friend has produced a further document in
12 respect of that Beninian process.
13 Therefore, nothing is going to change. The
14 issue against which there is *res judicata* is
15 whether or not this Tribunal is affected by
16 the Beninian process. It concluded that it
17 wasn't; no new facts can actually change
18 that decision. Therefore, the matter is,
19 in fact, *res judicata*.

20
21 The second proposition relates to the new
22 charges. Those new charges are set out in
23 Your Honours' decision of the 25th of
24 January. And it is our simple submission
25 that it is only in respect of the new

1 charges that any preliminary motion can be
2 brought. The new charges were stipulated by
3 Your Honours. The preliminary motion
4 purports to be in response to the whole of
5 the indictment and, therefore, it must fail.

6
7 The merits in respect of jurisdiction we
8 have raised in our written argument, and I
9 won't repeat those. We simply refer to the
10 decision of *Ngeze* and *Nahimana* in the Appeal
11 Chamber, dated the 5th of September 2000.

12 Thank you, Your Honours.

13 MR. PRESIDENT:

14 Thank you, Prosecutor. The Defence, do you
15 have any further comments?

16 MR. HINDS:

17 No, Your Honour. I think that I addressed
18 those issues raised by the Prosecutor before
19 he took the stand.

20 MR. PRESIDENT:

21 Very well. I thank all the parties. The
22 Chamber should immediately withdraw to
23 deliberate on this matter.

24

25 We shall come back at 5 o'clock to hand down

1 our decision and see if we can begin the
2 trial immediately. We shall now rise.

3

4 (Court recessed at 1555H)

5 (Pages 1 to 26 by Geraldine O'Loughlin)

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1 (Court resumed at 1746H)

2 MR. PRESIDENT:

3 The Court now resumes.

4

5 The Trial Chamber has elaborated on the
6 motion filed by Defence. I now give the
7 floor to Judge Sekule, to read out the
8 decision adopted by the Chamber, and it's in
9 English. Judge Sekule has the floor.

10 JUDGE SEKULE:

11 Thank you, Presiding Judge.

12

13 The Chamber has deliberated, and this is the
14 oral decision as we are rendering right now;
15 but the formal, written decision will be
16 available shortly.

17

18 And this is the decision: The Defence
19 submissions are brought pursuant to Rule
20 72(B) of the Rules as preliminary objection.
21 As regards the preliminary objection that
22 the Defence is allowed to raise at this
23 stage of the proceedings, the Trial Chamber
24 agrees with the Prosecutor that the Defence
25 cannot challenge the indictment as a whole,

1 but only pursuant to Rule 50 of the Rules in
2 respect of new charges. See the decision of
3 25 January 2001 at paragraph 38 and 41,
4 where the Trial Chamber expressly relies on
5 Rule 50(C) to grant the Defence with 30 days
6 to file any preliminary motion only with
7 respect to the new charges.

8
9 Nevertheless, the Defence submits in this
10 respect that, because the indictment was
11 read out entirely at the Accused's further
12 appearance, all the charges in the new
13 amended indictment are new charges.

14
15 The Trial Chamber does not agree with these
16 arguments because the Accused's amended
17 indictment was read in its entirety during
18 the further appearance only to enable the
19 Accused to understand the totality of the
20 charges brought against him.

21
22 The Trial Chamber notes that the motion is
23 twofold: It lays to both the lack of
24 competence, *ratione temporis*, of the
25 Tribunal -- that is, a temporal jurisdiction

1 -- and the lack of competence *ratione*
2 *personae* of the Tribunal; that is, personal
3 jurisdiction.

4
5 The Trial Chamber notes that the issue
6 raised by the Defence, that of the reference
7 in the indictment and at trial to crimes
8 committed outside of the temporal
9 jurisdiction of the Tribunal, is now settled
10 in the case of the Tribunal as confirmed by
11 the Appeals Chamber. The Trial Chamber
12 wishes to emphasise in this respect that the
13 indictment may refer to events or crimes
14 which occurred prior to 1994, for which
15 evidence may be admissible at trial and on
16 which the Trial Chamber may rely in its
17 judgment for historical purposes or as
18 information. See the case *Hassan Ngeze and*
19 *Ferdinand Nahimana v. The Prosecutor*, Case
20 No. ICTR-97-27, AR72, and
21 ICTR-96-11, AR72, decision on the
22 interrogatory appeal, 5th September 2000,
23 considering that it shall not render
24 verdicts on crimes allegedly committed by an
25 accused prior to '94 and in any event will

1 not hold any accused accountable for crimes
2 committed prior to 1994.

3
4 Indeed, to paraphrase the Appeals Chamber,
5 the Tribunal's temporal jurisdiction is not
6 exceeded as long as the Trial Chamber will
7 not rely upon events occurring prior to 1994
8 as the independent basis of account.

9
10 Further, the Trial Chamber considers that
11 the admissibility of evidence regarding
12 specific events predating 1994 may, in any
13 case, be raised at trial. See also *The*
14 *Prosecutor v. Anatole Nsengiyumva*,
15 Case No. ICTR-96-22-1, decision on the
16 Defence motion objecting to the jurisdiction
17 of the Trial Chamber on the amended
18 indictment, 13th April 2000, para 27 to 33;
19 and also *The Prosecutor v. Ferdinand*
20 *Nahimana*, Case No. ICTR-96-11-T, decision on
21 the Defence motion pursuant to Rule 72 of
22 the Rules of Procedure and Evidence,
23 12th July 2000, and also to *The*
24 *Prosecutor v. Gratien Kabiligi and Aloys*
25 *Ntabakuze*, Case No. 96-34-I, decision on the

1 Defence motion objecting to lack of
2 jurisdiction and seeking to declare the
3 indictment void *ab initio*, 13th April 2000,
4 para 38-44. See also *The Prosecutor v.*
5 *Eliezer Niyitegeka*, Case No. ICTR-96-14-T,
6 decision on Defence motion on matters
7 arising from the Trial Chamber's decision
8 and preliminary motion based on the defects
9 in the form of the indictment and lack of
10 jurisdiction of 20th November 2000, para 38.

11
12 Lack of personal jurisdiction: Turning now
13 to the other objection, that of the loss of
14 personal jurisdiction of the Tribunal on the
15 basis of the illegality of two periods of
16 detention undergone by the Accused, one at
17 the central police station in Cotonou, Benin
18 in 1998 and the other at the UNDF. The
19 Trial Chamber notes that these issues are
20 *res judicata* and they were decided upon by
21 the Trial Chamber in its decision of 8th May
22 2000. This decision was appealed against by
23 the Defence.

24

25 For these reasons, the Trial Chamber

1 therefore, dismisses the Defence motion.

2 The date -- that's today's date,

3 12th March 2001.

4

5 And as I said earlier on, this is an oral

6 decision and a formal written decision will

7 be made available soon. That's the

8 decision, and thank you, Presiding Judge.

9 MR. PRESIDENT:

10 Thank you. Thank you, Judge Sekule. So,

11 that is our decision with respect to the

12 motion filed by Defence.

13 THE INTERPRETER:

14 The Presiding Judge's microphone is off. It

15 is off. It is off.

16 MR. PRESIDENT:

17 So, we have just rendered our decision

18 following the motion by Defence counsel who

19 was challenging the jurisdiction of the

20 temporal jurisdiction and the personal

21 jurisdiction of the Chamber. Of course, it

22 lies with the Defence, if it so desires, to

23 lodge an appeal against said decision.

24

25 We will then start the trial of Kajelijeli.

1 Now, with respect to the opening statements
2 to be made by the Prosecutor, can I ask the
3 Prosecutor if he's ready to do so now, or
4 would he want us to start tomorrow morning.

5 MR. FLEMING:

6 I am ready to do so now, but I would love
7 you to start tomorrow morning, Your Honour.

8 MR. PRESIDENT:

9 Comments of the Defence? Sometimes I am
10 trying to speak English with Professor
11 Hinds.

12 MR. HINDS:

13 I certainly appreciate the effort,
14 Judge Kama, and I'm having some difficulty
15 with the French, myself.

16

17 Your Honour, let me just make a couple of
18 preliminary statements. I have no problems
19 with us proceeding with opening statements.
20 I know it is 6 o'clock and I don't know how
21 long Mr. Fleming intends to speak. But I
22 feel that I must, at this point, preserve
23 the rights of my client under the Rules of
24 the Tribunal. And for that purpose, I'd
25 just simply like to put on the record that

1 Mr. Kajelijeli intends to take advantage of
2 the Rules of this Tribunal and specifically
3 Rule 72(D) and 108(B).

4

5 Now, these Rules, I have taken the
6 opportunity to look at the legislative
7 history and looking at the whole question of
8 whether or not a stay is, in fact, implied
9 within 72(B) and 108 -- 72(D) and 108(B).

10 And I looked at the case of *The*
11 *Prosecutor v. Joseph Kanyabashi*. In the
12 *Kanyabashi* case, the issue was not addressed
13 because the Defendant proceeded and plead
14 and so, therefore, that did not come up.
15 But it is clear to me that the legislative
16 history behind Rule 72(D) and the reason why
17 an interlocutory appeal process was
18 established was precisely to set aside and
19 to separate out preliminary motions that
20 will raise fundamental questions for which
21 there had to be some resolution of the
22 matter prior to the Chamber going forward.

23

24 And I would urge this particular Chamber,
25 notwithstanding the temptation to proceed

1 with the trial, not to do so and establish
2 bad precedent, bad law, because what the
3 Chamber essentially would be doing, would be
4 ruling that interlocutory appeals do not, in
5 fact, have the force that we believe the
6 legislative history suggests. And if you
7 treat interlocutory appeals like any other
8 appeal, then I think what we are doing is
9 making a very serious mistake.

10

11 Now, what would I suggest as a remedy? The
12 remedy lies in Rule 117, because 117
13 provides specifically for an expedited
14 process with briefs are not even required.
15 What would we lose? We may lose 24 hours.
16 What is the upside on it? The upside is
17 that we don't trample upon the procedures
18 and Rules promulgated by this Tribunal and
19 we don't trample on the Defendant's rights;
20 we give him an opportunity to file an
21 expedited appeal. The case can go forward
22 on an expedited basis, but we don't do so by
23 setting bad law.

24

25 But I say to the Court that I am prepared to

1 listen to Mr. Fleming's open statements, if
2 the Court so rules, and I will sit here and
3 do that; but I am suggesting that it would
4 not be in the best interests of justice and
5 fair play to abrogate the Rules at this
6 time.

7 MR. PRESIDENT:

8 Any comments?

9 MR. FLEMING:

10 We have given some preliminary consideration
11 obviously to this question, and it will be
12 our argument that, just because a matter is
13 appealed, it doesn't imply a stay; however,
14 if we are to argue that, and if our learned
15 friend is suggesting that he intends to
16 bring a motion to that effect, then we would
17 prefer to argue that in the morning.

18 MR. PRESIDENT:

19 Professor Hinds, if I have understood you
20 fully, you have made an oral motion in which
21 you would wish that we suspend the trial.

22 MR. HINDS:

23 Quite frankly, Your Honour, I had not
24 anticipated the Court moving forward. If I
25 had anticipated this, I would have prepared

1 a motion. First of all, I couldn't make a
2 decision on how you would decide, but I
3 certainly have given some thought in the
4 event that if you did decide whether or not
5 we could go forward. I read the Rules. My
6 interpretation of the Rules was that we were
7 entitled to an interlocutory appeal. I then
8 looked at the Rules with respect to whether
9 or not there was a stay. I then went to the
10 library and looked at what I thought were
11 some of the treaties dealing with the
12 legislative history, and it appeared to me
13 that the process of moving the trial forward
14 expeditiously was Rule -- was for us to
15 bring a motion pursuant to Rule 117, which
16 is an expedited appeal where no briefs are
17 required. But it is clear to me that an
18 interlocutory appeal, by its very nature and
19 all of discussions about it, anticipates
20 delay.

21
22 That was one of the reasons why there were
23 no provisions for an interlocutory appeal
24 under the ICTY. If you look at the history,
25 they didn't have interlocutory appeals, and

1 the discussion was the delay that they
2 generally would occasion. So, my analysis
3 was that if we were to proceed, it would
4 have to be after the Appeals Chambers'
5 either hearing an expedited appeal, deciding
6 on it without briefs or papers, and then we
7 could move forward.

8
9 Now, I only raise this with the Chambers
10 because, as I sat here, I understood that
11 the Chamber was asking Mr. Fleming to begin
12 his opening statements, and so I thought
13 that I should just to protect the record and
14 to protect myself in terms of competency
15 that I raise this issue, and it not be
16 considered that I waived it.

17 MR. PRESIDENT:

18 Mr. Fleming, can I draw your attention to
19 the fact that it was the Chamber, itself,
20 that said -- that rendered its decision. It
21 said that the Defence was at liberty to
22 lodge an appeal if it deems it is necessary.
23 That notwithstanding, we are going to start
24 with the trial. It was on those grounds, I
25 suppose, that Mr. Fleming said that he would

1 be ready to start with his opening remarks.
2 That did not, as it were, obviate or rule
3 out the possibility for having an
4 interlocutory appeal. The appeals
5 notwithstanding, we intend to start with the
6 trial.

7
8 So, the Chamber, therefore, decides to start
9 with the trial tomorrow morning, the appeal
10 notwithstanding. And in any case if a
11 decision were to be rendered by the Appeals
12 Chamber, be that as it may, the Trial
13 Chamber will comply with the decision of the
14 Appeals Chamber. For now, we will start
15 with the trial tomorrow morning with the
16 opening statement of the Prosecutor, and it
17 seems to me that we will need to also hear
18 some investigator.

19 MR. FLEMING:

20 Yes. One witness, Your Honour, who won't
21 take very long. It's a series of
22 photographs and a couple of sketches.
23 That's all he has.

24 THE INTERPRETER:

25 Microphone.

1 MR. PRESIDENT:

2 So, we shall rise. We will resume tomorrow
3 morning at 9.30 a.m. We now rise.

4 MR. HINDS:

5 Your Honour, there's only one matter that I
6 would like to raise, and I will raise it
7 tomorrow morning, but I don't want anyone to
8 think that I am raising something that
9 should have been raised today. So, I don't
10 want any surprises.

11

12 On January 26th, and I am reading from the
13 transcript of the proceedings where Judge
14 Güney presided, I raised some issues after
15 my client took the pledge. And I will read
16 from it. I said: "Thank you, Your Honour,
17 for your indulgence. The comments I was
18 about to make are not altered at all by the
19 decision. As you recall, in a conference on
20 Tuesday at 4 o'clock, Mr. Fleming indicated
21 that, when the trial is to be resumed,
22 presumably the week of March 12th, he would
23 make his opening remarks. In addition, he
24 planned to put on maybe one or two
25 investigators."

1 I indicated then that "If he planned to put
2 on these investigators, I needed to have
3 their statements and any other exhibits that
4 they planned to introduce before I left
5 Arusha today, January 26, and maybe they
6 will provide me with the information. But I
7 plan to leave, with the Court's indulgence,
8 in the next 15 minutes to catch a plane."

9
10 I have received no documents. I have not
11 received a statement. I don't know whether
12 or not we would be objecting with respect to
13 the relevancy of any of whatever this
14 investigator will say.

15
16 Now, I am not attempting to delay the
17 proceedings, but I believe that we should be
18 proceeding according to certain rules and
19 understanding. The Prosecutor said he was
20 going to provide us with certain information
21 so that we would be prepared and not delay
22 these proceedings. We accepted it. I am
23 now being told that he will be calling the
24 witness. I still don't know who it is, or
25 what he will say. I don't know what

1 exhibits are going to be introduced, nor
2 whether or not we will raise any objections
3 or no objections.

4
5 It may be that I will have no objections to
6 the witness. But January 26, over a month
7 ago, we were told that we would have the
8 information. I don't have it, and I just
9 want to bring it to your attention because,
10 tomorrow, when they attempt to introduce the
11 witness, I'm going to object.

12
13 Now, I don't want the Tribunal to think I am
14 just being pedantic. But I have indicated
15 that there are certain rules; we have
16 reached agreement; and we should be
17 proceeding according to those Rules so we
18 can move forward expeditiously.

19 MR. PRESIDENT:

20 Mr. Fleming, if you intend to bring here an
21 investigator, we assumed that you would have
22 sent the necessary documents, in advance, to
23 the Defence.

24 MR. FLEMING:

25 Your Honour, I always said that when we had

1 it we would give it to him. I have it now.
2 It came down just before Your Honours came
3 back in. There have been a couple of
4 problems. We have photographs on a disk.
5 We were unable to get those photographs, and
6 I think I have raised this at the same time
7 as the other comment that my learned friend
8 has read out. We now have the photographs
9 on disk. We have a disk for my learned
10 friend here and we have from the Evidence
11 Unit now the various pieces of equipment --
12 sorry, evidence that the investigator will
13 refer to. I was going to walk over, the
14 moment Your Honours went out of the room, to
15 my learned friend and take him through all
16 of this so that he would, in fact, then be
17 in a position tomorrow either to object to
18 it or to do something else with it.

19
20 Now, there is a second problem. We had two
21 hard-copy sets delivered, over the weekend,
22 of the photographs. We got two copies; one
23 for the Court and one for our learned
24 friends. We discovered -- because we were
25 going to use the technology in court, this

1 morning we discovered that this court has no
2 technology. So, we have, in fact, had to
3 send out to get another dozen or so copies
4 of the photographs. Now, if we had decent
5 support in various areas, including
6 technical support, we may be able to comply
7 with these things. Until such time as we
8 have decent technical support -- whether
9 that be technical support within our various
10 offices or technical support so that we can
11 run a proper case -- then we can only do our
12 best. I said I would do my best. I have
13 the material here which I shall take my
14 learned friend through, step by step, and
15 show him exactly what it is that we intend
16 to call tomorrow. He may, or may not,
17 object, first, to the lateness of it and,
18 second, to the admission of it in any event.
19 I'm sorry, Your Honours. That's our
20 position.

21 MR. HINDS:

22 I take Mr. Fleming's statement at face
23 value. I don't really take any issue with
24 it. I never anticipated any cyberspace
25 technology. I was simply looking for

1 photographs that we all understand and can
2 see. But I understand that they are up on
3 technology, and whatever he has, I will look
4 at. I, certainly, at this late stage, would
5 reserve my rights to cross-examine this
6 person if he is put on. And, quite frankly,
7 none of this may be an issue after I look at
8 it. We may just say, "Look, no problem;
9 have the person testify". So, I will meet
10 with him and see what we have.

11 MR. PRESIDENT:

12 No further comments from any party?

13 MR. FLEMING:

14 No further comments.

15 MR. PRESIDENT:

16 Okay. Thank you very much.

17 MR. PRESIDENT:

18 So, we will now rise. We will resume
19 tomorrow morning, 9.30 a.m.

20

21 (Court adjourned at 1820H)

22 (Pages 27 to 45 by Verna Butler)

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C E R T I F I C A T E

We, Geraldine O'Loughlin and Verna Butler, Official Court Reporters for the International Criminal Tribunal for Rwanda, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand (stenotype) and thereafter transcribed by computer under our supervision and control; that the foregoing pages contain a true and correct transcription of said proceedings to the best of our ability and understanding.

We further certify that we are not of counsel nor related to any of the parties to this cause and that we are in nowise interested in the result of said cause.



Geraldine O'Loughlin

(Pages 1 to 26)



Verna Butler

(Pages 27 to 45)