

KAJELIJELI

1 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

2

CASE NO.: 98-44A-I

3

THE PROSECUTOR
OF THE TRIBUNAL

4

5

AGAINST

6

JUV NAL KAJELIJELI

7

22 JANUARY 2001

8

0930H
MOTIONS

9

Before: Judge Laity Kama, Presiding
Judge William H Sekule
Judge Mehmet Güney

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11

Courtroom Officer:

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Mr. John Kiyeyeu

13

Courtroom Assistant:

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Mr. Abraham Koshopa

15

For the Prosecution:

16

Mr. Ken Fleming

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Mr. Don Webster

18

Ms. Ifeoma Ojemeni

Ms. Melinda Pollard

19

Mr. Jayantha Jayasuriya

20

For the Defendant:

21

Professor Lennox S. Hinds

22

Court Reporters:

23

Ms. Shannon Fleming

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Ms. Gifty Harding

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P R O C E E D I N G S

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MR. PRESIDENT:

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MR. KIYEYEU:

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This hearing is called to order. Let me note before I begin that I should like to express my wishes for a happy and good year, especially to Lennox Hinds and to the Prosecutor's office. Let it be a fruitful year, a year in which we all work hard. I should like to say I hope that all the plans we have for this year be fulfilled. I should like to reiterate that this year be a year for trials, so that we respect the rights of all the accused to be tried without any undue delay and afford the Defence time to prepare for their defence. This is what I wanted to say.

Now, the Registrar, could you please give us the cause list for this morning.

Thank you, Mr. President. Trial Chamber II of the International Criminal Tribunal for Rwanda, composed of Judge

SHANNON FLEMING - OFFICIAL COURT REPORTER
ICTR - TRIAL CHAMBER II

1 La ty Kama, Presiding, Judge William H.
2 Sekule and Judge Mehmet G ney, is now
3 sitting in open session today, Monday, the
4 22nd of January 2001, in order to consider
5 four motions in the matter of the Prosecutor
6 v Juv nal Kajelijeli, case no.
7 ICTR-98-44A-I.

8
9 Out of the four motions, three have been
10 filed by the Prosecutor and one by the
11 Defence. The motions are as follows:
12 1. Prosecutor's urgent motion for leave to
13 file an amended indictment, filed by the
14 Prosecutor on the 4th of January
15 prosecutor1.
16 2. Defence urgent motion to withdraw as
17 lead counsel, filed by the Defence on 8th of
18 January prosecutor1.
19 3. Prosecutor's motion to correct an
20 indictment dated 22nd December prosecutor0,
21 filed pursuant to the Trial Chamber II order
22 of 12 December 2000, filed by the Prosecutor
23 on 10 January 2001.
24 4. Urgent motion for extension of time
25 within which to file a pretrial brief

1 pursuant to Rule 73bis of the Rules of
2 Procedure and Evidence, filed by the
3 Prosecutor on 8 January 2001.

4

5 I'm most obliged, My Lords.

6 MR. PRESIDENT:

7 Thank you. Thank you, Registry. Should we
8 begin with the motion by Mr. Hinds, or
9 should we begin with the motion for an
10 amendment? Mr. Hinds, would you like to
11 take the floor first?

12 MR. HINDS:

13 Thank you, Your Honour. If it pleases the
14 Court, I would submit that the Court set its
15 own time frame and sequencing for hearing
16 the motions. I am prepared to proceed first
17 if that is the Court's wish, or I would
18 present my motion second if the Court so
19 wishes. It is up to you how you would like
20 to proceed.

21 MR. PRESIDENT:

22 Well, we are so used to you that I would
23 like to make an introduction, but for the
24 records, the parties could kindly appear.
25 The Defence, could you kindly appear.

1 MR. HINDS:

2 Lennox Hinds, representing Juv nal
3 Kajelijeli. And I am assisted by
4 Mr. Baragahoranye, Juv nal Baragahoranye,
5 who is serving both as an interpreter for my
6 client and as an assistant.

7 MR. FLEMING:

8 If the Court pleases. I am Ken Fleming,
9 senior trial attorney. I appear with
10 Mr. Webster, Ms. Ojemeni, Ms. Pollard and
11 Mr. Jayasuria. I apologize for what appears
12 to be an over-representation. It's just
13 that different aspects of today were handled
14 by different people in our office. I
15 promise we won't be here all the time.

16 MR. PRESIDENT:

17 We shall begin with the motion for amending
18 the indictment. Let me make a small
19 observation first on behalf of the Chamber.
20 We regret that once again, and this is not
21 the first time, that we have the impression
22 that the one that is pursuing and that
23 should be diligent has a tendency of
24 delaying procedure. It is very important
25 for to us to come back to this case. The

1 hearing we had the last time the Defence
2 observed that in reality the Prosecutor had
3 filed an amended indictment. The Prosecutor
4 then protested and said that it was not the
5 case; they had simply wanted to bring in
6 clarifications.

7
8 But today we are starting a trial, and at
9 the 11th hour we are given a motion to amend
10 an indictment with all the possible
11 consequences. If the Trial Chamber admits
12 this motion, it is their right; but in the
13 future we should take time consideration so
14 that the Chamber respects the rights of the
15 accused to be tried without delay.

16
17 Now this having been said, I shall now turn
18 to the Prosecutor to introduce their motion
19 for amending the indictment.

20 MR. FLEMING:

21 If the Court pleases. I intend to make a
22 few introductory comments and then
23 Mr. Webster is going to argue for the
24 indictment.

25

1 Your Honours have ruled in respect of the
2 matter as to whether it constituted an
3 amendment previously, and I don't
4 particularly want to go behind that ruling.
5 However, I do want to relate some of the
6 history of the matter so that there is a
7 clear picture of what we are dealing with.

8
9 Your Honours have made or made an order in
10 July of last year that we separate
11 Mr. Kajelijeli from the indictment of eight
12 and we present an indictment with just
13 himself. Our view of that indictment that
14 we presented was that it was precisely the
15 same indictment but with greater
16 particularity.

17
18 There had never been a request for
19 particularity, and I presume that the
20 argument of counsel was going to be
21 something like this: There was no
22 particularity in the original indictment;
23 therefore, you're not entitled to call
24 evidence in respect of that charge.

25

1 Now I presume that's what my learned friend
2 was leading up to. Now we, of course,
3 wanted to provide particularity, which we
4 did in August of 2000. Now, Mr. Hinds said
5 in this Court, when he was last here at the
6 beginning of December, in respect of our
7 indictment which was filed in August, and
8 Your Honours, at page 50 of the transcript,
9 asked him when he first saw it. And at line
10 18, Mr. Hinds says, "I saw it when
11 Mr. Harvey came back. Mr. Harvey came back.
12 He was here on the 30th. Maybe a week later
13 --" that's the 30th of October -- "maybe a
14 week later, maybe the first week of November
15 or something like that, I saw the indictment
16 and also studied the witnesses, the new
17 witness statements. And at that time I
18 asked him: What was Kajelijeli -- was he
19 allowed to plead, and he said "no". He
20 said, 'I think the Chamber has forgotten
21 about it and didn't'. And I said, "Look,
22 I'll deal with that when I get there", in
23 terms of him pleading to the new indictment.
24
25 There are two elements in respect of that.

1 The first is the indictment. The second are
2 what he terms as the new witness statements.
3 Of course he had disclosure in respect of
4 all of the evidence that we intended to
5 call. We had no obligation to give that to
6 him before that point, although we worked
7 hard to ensure that he had it as soon as he
8 possibly could. Now he can't rely upon the
9 latter part of this proposition, the new
10 witness statements, to say that he had never
11 seen the indictment. He, in fact, had seen
12 the indictment when we filed the motion.
13 And that was in July -- I'm sorry, that was
14 in August.

15
16 If there is a necessity to show that he had
17 seen it, then we refer to two letters which
18 he sent to this Court. The first, on the
19 6th of September 2000, where he wrote to the
20 Registrar in these terms, "I represent
21 Defendant Mr. Kajelijeli in the
22 above-referenced matter. I write in respect
23 of the Prosecutor's motion to correct
24 amended indictment dated August 29, 2000".
25

1 Now of course the original motion to file an
2 indictment and the motion to correct some of
3 the charges in that indictment had annexed
4 to them those indictments. So he then goes
5 on to say -- so he must have had them at
6 that stage and has obviously looked at them
7 because he is writing in respect of them --
8 "I do not object to the Prosecutor's request
9 for leave to correct the said amended
10 indictment. I would only note that,
11 according to the order of Trial Chamber II,
12 dated July 6, 2000, granting the Defence
13 motion for severance and a separate trial,
14 the Prosecutor was ordered to file a
15 separate indictment pertaining only to
16 Mr. Kajelijeli. However, the Prosecutor is
17 referring to this separate indictment".

18
19 May I interpose there. The one which was
20 before the Court from the middle of August
21 2000 and the one which was the subject of
22 discussion in December.

23
24 "As an amended indictment, therefore, it is
25 unclear to me whether the ICTR Rule

1 pertaining to amendment of indictment,
2 Rule 50, is applicable or whether ICTR
3 Rule 47, submission of indictment by the
4 Prosecutor, is applicable. Thus, I request
5 guidance on that issue. Nevertheless,
6 notwithstanding the nomenclature used,
7 Mr. Kajelijeli hereby reserves and preserves
8 his rights under ICTR Rules 47, 50, 72 and
9 73 to challenge the amended or separate
10 indictment if leave to correct is so
11 granted".

12
13 It was said on the 6th of September 2000
14 that his rights to challenge were reserved
15 if leave was granted. Of course leave was
16 granted. On the 5th of October, 2000, a
17 letter was sent to Mr. Webster. And I won't
18 read the whole letter, but the appropriate
19 paragraph is paragraph 2 in respect of the
20 indictment: "Moreover, it is our
21 understanding that the Prosecutor's office
22 has secured additional witness statements in
23 support of the new indictment which has been
24 filed against Mr. Kajelijeli. To date, the
25 Court has not ruled on the Prosecutor's

1 request to modify that indictment and,
2 therefore, Mr. Kajelijeli has reserved his
3 right to challenge the indictment.

4
5 "Also, Mr. Kajelijeli has not been arraigned
6 on the indictment and the Prosecutor has not
7 provided Defence with the new witness
8 statements which has prevented
9 Mr. Kajelijeli from conducting his
10 investigative trip to Kigali. It's
11 extremely important" and so on.

12
13 And then another paragraph, "Further to my
14 letter to the Court of October 5, on which
15 you were carbon-copied we proposed an
16 adjourned date for the status conference for
17 the week of October 30th at which time my
18 co-counsel, Richard Harvey, would be
19 available. Perhaps if we could obtain the
20 witness statements prior to that time we
21 might be able to travel to Kigali during the
22 month of November, December and have the
23 trial scheduled for early 2001".

24
25 Now, what in fact happened is that

1 Mr. Hinds, having already reserved the
2 rights of the Accused in respect of the new
3 indictment, came to this Court at the
4 beginning of December and pretended
5 surprise. He made a comment to this Court,
6 that I've read out before, that he hadn't
7 seen this indictment until maybe a week
8 later than the 30th of October. In fact, he
9 has had the indictment in his hands since
10 the middle of July, has considered it on at
11 least two occasions, and has ample time to
12 take the points that he said he was going to
13 take, or at least had reserved his right to
14 take those points, in the two letters that
15 he sent.

16
17 Now if one looks at the Rules, one can see
18 precisely what was going to happen. Rule 47
19 is the submission of the indictment, and, of
20 course, gives an accused certain rights.
21 Rule 50 deals with the amendment of an
22 indictment and the accused, if there are new
23 charges, "The accused shall have a further
24 period of 30 days in which to file
25 preliminary motions pursuant to Rule 72 in

1 respect of the new charges".

2

3 So instead of doing anything at all, my
4 learned friend sat on his hands and then
5 came to this Court on the 12th or 13th of
6 December and feigned surprise at this new
7 indictment, an indictment that he had had in
8 his hands for some five months, four months
9 by then, and five or six months by now.

10

11 But in fact what we really understand is his
12 real motive in respect of taking these
13 points: He doesn't want a trial to start
14 now. Mr. Harvey said it in no uncertain
15 terms on the 30th of October, "We will not
16 be ready". Mr. Harvey withdrew, or at least
17 applied to withdraw. Mr. Hinds said, "We
18 will not be ready". And as he has said to
19 the press recently, "Even if you order a
20 trial to go on, I won't go on, despite the
21 consequences".

22

23 The real reason why this trial is not
24 proceeding today is not surprise as a result
25 of particularity. It is because he simply

1 doesn't want the trial to go ahead because
2 he is not ready. He says he has an
3 international reputation to protect. He
4 also says to you on last occasion he was
5 here that he has had the case for 22 months.
6 One's international reputation would demand
7 that having a case for 22 months the Defence
8 case would be ready, and it would be simply
9 refined from the point where they had the
10 precise statements that the Prosecution was
11 going to rely upon.

12
13 So we are here now as a result of these
14 unfortunate circumstances. Now Your Honours
15 have made a ruling, and I don't wish to go
16 behind that. However, it leaves us in this
17 position: We have an indictment which we
18 say more fully particularises the
19 allegations against him. And indeed in some
20 instances, we accept there was an inadequate
21 particularisation of some of the charges.
22 That's why we took the initiative to
23 particularise them.

24
25 Your Honours have said that it might well

1 give the impression that it was an amended
2 indictment, and so therefore we should go
3 back to the old indictment. However, we
4 know that the next limb of our learned
5 friend's argument is going to be: There is
6 no particularity in respect of, for example,
7 rape; therefore, you can't bring evidence of
8 that. We will not be placed in that
9 position, of course subject to what
10 Your Honours will say about it.

11
12 So we seek leave to amend for the purposes
13 of ensuring that justice is done fully to
14 the people of Rwanda and that all of the
15 appropriate facts are before the Court. In
16 a recent letter to this Court,
17 Mr. Kajelijeli himself has said he doesn't
18 object to time being given to allow
19 Mr. Hinds to get his house in order and then
20 to go and investigate this matter properly.
21 We also rely upon that declaration. And we
22 say there is no prejudice whatsoever in our
23 more fully particularising the matter as we
24 have in the amended indictment.

25

1 Your Honours, my having made those
2 introductory comments, I'll give the floor
3 to Mr. Webster, who will argue the precise
4 points in respect of the amendment.

5 MR. WEBSTER:

6 Good morning, Your Honours. I'd like to
7 begin by stating that I have a slightly
8 different observation with regard to the
9 last time we gathered here in this
10 Trial Chamber, that was on the 12th of
11 December 2000. At that time the Prosecutor
12 was represented by the Prosecutor herself,
13 Ms. Ojemeni and myself. And we came
14 prepared at 9:30 in the morning to discuss
15 matters germane to a pretrial conference.
16 We were here to discuss the logistics of
17 preparing for trial, the trial date being
18 anticipated for today, the 22nd of January.

19
20 At that time Mr. Hinds appeared and made a
21 series of objections for the first time
22 after having received a copy of the separate
23 indictment that the Prosecutor filed in
24 compliance with the Trial Chamber's order of
25 the 6th of July 2000. Mr. Hinds made a

1 series of objections that consumed the
2 entire day. We were in this courtroom from
3 9:30 that morning until I believe 7:00 that
4 evening, and we discussed nothing that was
5 germane to a pretrial conference. We
6 focused exclusively on the Defence objection
7 to the separate indictment.

8
9 The Prosecutor's position at that time was
10 that we were ready for trial; we wanted to
11 proceed to the trial; that the Defence
12 objections were untimely; that they were not
13 substantive. And after much debate back and
14 forth, this Court ruled in favour of the
15 Defence and supported its objection and
16 required the Prosecutor to re-file a
17 separate indictment based on the original
18 joint indictment against Mr. Kajelijeli and
19 seven others.

20
21 What I would urge the Court or what I would
22 like to bring to the attention of the Court
23 today is that the Prosecutor has made every
24 effort to push this case ahead for trial.
25 When we received an adverse ruling on the

1 12th of December, we reviewed the case-law,
2 revisited all of the issues that the Court
3 addressed in its decision and that Defence
4 raised in its motion, and on the basis of
5 that filed this present motion to amend. So
6 what we are requesting this Court to do is
7 to substitute the separate indictment that
8 was originally filed on the 15th of August
9 and to consider that separate indictment as
10 an amendment.

11
12 Now that's not a position that we wanted to
13 be in. That's a position that we were
14 placed in because the Court ruled favourably
15 on the Defence objection. The Court ruled
16 on a Defence objection that took everyone by
17 surprise. We came to address issues of a
18 pretrial conference and instead were
19 confronted with a substantive motion. We
20 debated that motion without any regard for
21 the case-law, without any reference to the
22 established jurisprudence of this Tribunal,
23 without any guidance from any established
24 learning on the law. And since the delivery
25 of that decision or that judgement, the

1 Prosecutor went back and investigated the
2 case-law.

3
4 And it's on the basis of our investigations
5 and our review of the jurisprudence that we
6 generated this motion to amend. So it
7 certainly isn't an attempt on our part to
8 retard matters or to be dilatory in the
9 matters that are before this Tribunal. It's
10 our attempt to take our obligation seriously
11 and take the jurisprudence of this Tribunal
12 seriously and to conduct a judicial debate
13 on the basis of precedent, established
14 learning, and established procedure, which I
15 would suggest that the Defence has been
16 wanting in this regard.

17
18 Even with respect to this motion, which was
19 well researched and placed before this
20 Tribunal during the first week of January,
21 the response from the Defence appears in the
22 form of a certification which was served on
23 us on the 17th of January. This
24 certification is simply a recitation of
25 Mr. Hinds' opinion and Mr. Hinds'

1 characterisation of the Prosecutor's motion.
2 There is no case-law. There is no reference
3 to judicial precedent. There is no
4 reference to policy. The only
5 considerations that are raised in the
6 Defence response is the opinion unsupported
7 by any sort of legal argument of the Defence
8 and mischaracterisations of the Prosecutor's
9 motions and positions in this case.

10
11 As you recall, this Tribunal was on a
12 judicial recess from the 14th of December to
13 the 14th of January. We filed this motion,
14 I believe it was on the 3rd of January,
15 during the period of judicial recess. Our
16 filing a motion, our researching the law and
17 our attempt to come before this Tribunal
18 with arguments that are based on precedent
19 and established learning is certainly not
20 an attempt to delay procedure.

21
22 Our position has consistently been that we
23 were ready for trial; we wanted to proceed
24 with trial; and the only thing that has
25 slowed the trial down in this regard has

1 been the Defence objections and the Court's
2 ruling in favour of those objections.

3
4 With respect to this amendment, I think the
5 issues that the Court must confront today is
6 whether an amendment is legally required in
7 order for the Prosecutor to proceed with the
8 case that it intends to lead against
9 Mr. Kajelijeli. On the one hand, which is
10 echoing the argument or the statements by
11 Mr. Fleming earlier, we have a case that we
12 intend to present to this Court at trial
13 against Juv nal Kajelijeli. It is the same
14 case, whether we proceed on the basis of the
15 joint indictment, whether we proceed on the
16 basis of the separate indictment, which is
17 closely aligned to that joint indictment, or
18 whether we proceed on the separate
19 indictment that is now presented to this
20 Court as an amendment. It is the same case
21 regardless.

22
23 If Mr. Kajelijeli was sitting in front of us
24 with seven co-accused, we would still be
25 presenting the same case. If we proceed on

1 the basis of the separate indictment that
2 was filed on the 22nd of December, which
3 closely or more closely parallels the
4 original joint indictment, it would be the
5 same case that we wish to present on the
6 basis of this separate indictment that we
7 introduced today as an amendment.

8
9 That is to say, Juv nal Kajelijeli was a
10 direct participant in the events in Mukingo
11 and Nkuli communes in Rwanda during the
12 period April 6th of 1994 through July of
13 1994. He was operating on the ground; he
14 was leading crowds, distributing weapons,
15 inciting local civilian militia to rape
16 Tutsi women. His activities or the
17 accusations against him are what he did to
18 perpetrate the genocide in Rwanda.

19
20 The case against the other ministers and the
21 case that is incorporated in that first
22 joint indictment is -- anticipates proof of
23 genocide on a national scale. He was
24 grouped initially with the national
25 secretary of the MRND, the president of the

1 MRND, a minister of the interior, a minister
2 of defence, several high level government
3 officials. And the theory of that case was
4 that the activities of someone like
5 Mr. Kajelijeli and Mr. Kajelijeli himself,
6 the activities of those who actually
7 perpetrated the killing was linked to the
8 men at the top who were making policies and
9 issuing directives and organising the
10 genocide on a national scale.

11
12 That same set of allegations is what we
13 intend to introduce at a separate trial of
14 Mr. Kajelijeli. When this Court ordered us
15 to file a separate indictment, it made
16 little sense, and it seemed more efficacious
17 to focus specifically on his acts and
18 activities on the ground since that was the
19 basis that would frame the evidence that the
20 Prosecutor would lead a trial.

21
22 In terms of articulating or documenting or
23 submitting to this Court a document, an
24 accusatory instrument that would accuse Mr.
25 Kajelijeli individually, it made little

1 sense to incorporate all of the structure
2 and the baggage of the joint indictment,
3 which was really premised on a theory of
4 joint criminal liability of persons acting
5 in concert in a joint criminal enterprise.
6 That is the reason that this office filed a
7 separate indictment that was much more
8 concise and much more pointed.

9
10 We argued on the 12th of December that there
11 was no change in the case, that the same 11
12 counts from the original indictment were
13 conserved and repeated in the separate
14 indictment. We argued that the greater
15 factual elaboration was simply providing
16 particulars that were not included in the
17 first joint indictment. The Court rejected
18 that argument.

19
20 The case-law of this Tribunal provides some
21 support for the position taken by the
22 Defence and also some support for the
23 position taken by the Prosecutor. This
24 Tribunal has not ruled conclusively on that
25 discrete issue. In the Musema judgement, I

1 believe it was of the 18th of November 1998,
2 there is some language from Trial Chamber I
3 which states that, "Supplying additional
4 factual material in an indictment does not
5 require an amendment".

6
7 That Trial Chamber also suggested that if
8 there were additional factual allegations
9 that went beyond the scenarios described in
10 the original indictment, that it may not be
11 necessary to file an indictment or to
12 request leave to file an amended indictment,
13 but that those allegations could be
14 incorporated in a pretrial brief. And as
15 long as they were incorporated in a pretrial
16 brief or addressed in a motion or in filings
17 to establish contested matters of law or
18 fact, that it would be permissible to lead
19 evidence along those lines at trial.

20
21 Now that was not a ruling of the Court.
22 That was the Court opining on issues that
23 were raised in the context of that
24 proceeding without giving a definitive
25 ruling on that discrete issue. So it is not

1 resolved as far as the jurisprudence of this
2 Tribunal is concerned, or even with respect
3 to the proceeding in Musema before Trial
4 Chamber I.

5
6 There is additional jurisprudence coming
7 from the ICTY. I believe it is the
8 Kovacevic case. I can provide you with the
9 citation. The case is fully discussed in
10 the motion papers that were submitted to
11 this Court on the 4th of January.

12
13 But in that case -- actually, it's not the
14 Kovacevic, it is the Krajisnik case. And
15 there are two decisions, one on the 11th of
16 May of 2000, and the other on the 20th of
17 May 1999. And in those cases, the Court
18 discussed the same issue that this Trial
19 Chamber confronts, which is: Is an
20 amendment necessary when it appears that the
21 theory of the case is changing. In the ICTY
22 case, that was a case where the allegations
23 against the accused were that he directly
24 participated in the events that he was
25 charged with, and the Prosecutor attempted

1 to change those set of accusations from one
2 of direct participation to acting in concert
3 in a joint criminal enterprise.

4

5 And in order to change the theory of the
6 case from one of direct participation to
7 vicarious criminal liability of joint actors
8 in a common criminal enterprise, an
9 amendment was required.

10

11 Our case is the inverse. Here we have a
12 case where the initial set of allegations
13 were one of a joint criminal enterprise.
14 Even stating that, and even admitting that,
15 in order to prove this joint criminal
16 enterprise, it is the direct activities of
17 Mr. Kajelijeli that this Prosecutor's office
18 intended to lead evidence on in order to
19 incriminate those that were above him. So
20 Mr. Kajelijeli, by the terms of that first
21 indictment, was always on notice that his
22 direct participation in the events in
23 Ruhengeri and in Nkuli and Mukingo communes
24 were going to be the basis of the
25 Prosecutor's case against him.

1

2

But in respect of this Trial Chamber's

3

ruling on the 12th of December, we have gone

4

ahead and filed what the logical consequence

5

of this Trial Chamber ruling which is to

6

file that separate indictment as an

7

amendment. That's not what we intended.

8

Our position is that we shouldn't have to do

9

that. We do that now because we are urged

10

in that direction by this Trial Chamber.

11

12

The bottom line is that we will lead

13

evidence at trial of Mr. Kajelijeli

14

distributing weapons, calling people

15

together, having meetings, raping women,

16

ordering other people to rape women. This

17

whole series of particular acts that are

18

alluded to in the separate indictment would

19

be the basis. That is the evidence that we

20

will lead at trial of Mr. Kajelijeli.

21

22

It is for this Court to determine whether

23

leading that evidence requires an amendment,

24

requires granting an amendment at this stage

25

or proceeding on the separate indictment

1 that was filed on the 22nd of December,
2 which is more in line with the joint
3 indictment that was filed back in August of
4 1998.

5
6 If we can proceed to trial on the basis of
7 the old indictment or an indictment that's
8 more in line with the joint indictment and
9 the pretrial brief, so that evidence at
10 trial will go to the particular acts of
11 Kajelijeli, then amendment may not be
12 required. What is required at this stage
13 before the trial begins is some decision and
14 clear indications from this Court that the
15 Prosecutor's office can lead evidence that
16 Mr. Kajelijeli directly participated in the
17 acts that resulted in the genocide and the
18 killings of thousands of people in Mukingo
19 and Nkuli communes in April of 1994.

20
21 I would suggest, and the Prosecutor's office
22 would take the position, that the better
23 indictment, or the more appropriate
24 instrument to go forward with that case, is
25 the separate indictment which was filed back

1 in August which is re-filed today as an
2 amendment. That indictment is more pointed;
3 it is clearer; it is a more appropriate
4 accusatory instrument for the trial of a
5 single accused.

6
7 When we address the issue of prejudice to
8 the accused, that is a non-argument. As I
9 stated before, both indictments put forth
10 the same case. The Defence is actually at
11 an advantage going forward with this
12 separate indictment, because it more
13 specifically guides the Court and the
14 parties as to the substance of the evidence
15 that will be led at trial.

16
17 This is an instrument in terms of the
18 separate indictment that the Defence has had
19 in its possession since the middle of
20 August, that was well over six months ago.
21 If there were objections to it, those
22 objections should have been submitted in
23 writing; it should have been placed before
24 this Court formally as a motion, and the
25 Prosecutor in this Court should not have

1 been surprised during the course of a
2 pretrial conference to address objections to
3 the substance of the form of the indictment.
4

5 I'd also like to bring to this Court's
6 attention or remind the Court of how we got
7 before -- how we got to this stage in the
8 proceedings. If you recall, this motion,
9 this separate trial of Kajelijeli goes
10 forward because of a Defence motion to
11 sever. That motion to sever was filed
12 almost a year after the Accused made an
13 initial appearance on the original joint
14 indictment.

15
16 When this Court granted a separate trial for
17 Kajelijeli by its decision of the 6th of
18 July 2000, it included in its decision a
19 rather lengthy discussion of the timeliness
20 of that Defence motion. The Defence filed a
21 motion for severance that was well out of
22 time. It was months after the 60-day period
23 in which it should have filed a motion to
24 sever pursuant to Rule 72, because it was in
25 the nature of a preliminary motion. The

1 Rules of Procedure have since been amended
2 to shorten that period to 30 days. But when
3 the Defence filed that motion he had 60 days
4 within which to file a motion of that
5 nature. He did not even honour the 60-day
6 period of time, a window of time in which to
7 raise those objections. His motion was
8 filed almost a year later. And this Court,
9 on its own initiative, considered that
10 motion because his application was not even
11 framed by a request or a demonstration of
12 good cause of why that motion should be
13 considered even though it was out of time.

14
15 So even in order to get before the Court at
16 this stage in a separate trial of
17 Mr. Kajelijeli, there was a delay in the
18 proceedings that was occasioned by a lack of
19 initiative on the part of the Defence. We
20 face that same lack of initiative when we
21 consider on the 12th of December another
22 motion, raising yet another objection to the
23 accusatory instrument that would form the
24 basis of the trial of this accused.

25

1 The Defence has had full disclosure of all
2 the materials that will be used in the trial
3 of Mr. Kajelijeli since the 30th of October
4 of the year 2000. So in terms of the issue
5 of fairness and prejudice to the Defence, it
6 seems hardly a tenable argument to suggest
7 that the Defence is being disadvantaged or
8 being taken by surprise or is being treated
9 unfairly by the Prosecutor's office simply
10 because we wish to proceed to trial on the
11 basis of an instrument that complies with
12 the jurisprudence of this Tribunal.

13
14 I'd also like to go back to a slight point
15 that I neglected earlier, which is that in
16 terms of the indictment that we submit today
17 is an amendment. There are one or two other
18 changes that make it different from the
19 original joint indictment, but those changes
20 were introduced in compliance with the
21 developing jurisprudence of this Tribunal.

22
23 The original joint indictment was filed in
24 August of 1998. That was prior to the
25 judgement of this Tribunal in the Akayesu

1 case; it was prior to the judgement of this
2 Tribunal in the Musema case. We filed our
3 separate indictment, the first one, in
4 August of the year 2000. We had to take
5 into consideration the developing
6 jurisprudence of this Tribunal. And on that
7 basis the lead count in the original joint
8 indictment, which was conspiracy to commit
9 genocide, was replaced by genocide as the
10 lead count; and complicity to genocide was
11 pleaded alternatively to genocide, and the
12 count of conspiracy was relegated to the
13 third count on the indictment.

14
15 Now that was in response to the developing
16 jurisprudence of this Tribunal, which is
17 what any litigant in the context of a
18 criminal proceeding would be urged to do,
19 which is to take into consideration the
20 developing law, the developing jurisprudence
21 in making filings before this Tribunal.
22 That's an aside. I neglected to mention
23 that earlier.

24
25 But going back to the issue of prejudice to

1 the Defence and delay: There is no
2 prejudice to the Defence. The Defence has
3 had all these materials at its disposal for
4 well over a year. With respect to undue
5 delay, it is the obligation of the Defence,
6 the burden is on the Defence to establish
7 undue delay as a basis to contest this
8 motion for amendment.

9
10 That is the jurisprudence established
11 previously by this Tribunal on previous
12 decisions to amend the indictment in the
13 Butare cases, specifically the case against
14 Pauline Nyiramasuhuko. All of the case-law
15 has been reiterated, cited, explained and
16 discussed in the motion papers that were
17 submitted earlier this year. I won't repeat
18 it here. I'll simply state for the record
19 or during this oral proceeding that the
20 case-law is established within the context
21 of this Tribunal, that the issue of undue
22 delay is the Defence burden. It is up to
23 the Defence to demonstrate that there is
24 undue delay to establish in making an
25 argument that this motion should not be

1 denied.

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The Defence can hardly meet its burden on that score when it has repeatedly requested that this trial be delayed. Every time Mr. Hinds or Mr. Harvey have appeared before this Tribunal, before this Trial Chamber, they have stated they are not ready for trial. One was engaged in another matter in another jurisdiction. Mr. Hinds' most recent correspondence is that his shortage of staff at his law firm would force him to delay his focus on this trial. At every turn the Defence has tried to delay the proceedings, formally by appealing to this Tribunal and informally, by the very manner in which they lead their preparation of this case.

We have in our possession a letter from Mr. Kajelijeli himself dated the 15th of January of this year, where he himself states that he is prepared to delay the proceedings in this trial in order to maintain his relationship or the

1 relationship of his counsel to this Tribunal
2 and to his case.

3
4 So at every turn the Defence has prepared to
5 delay the proceedings of this trial and has
6 requested that the trial date of this matter
7 be postponed and be postponed for as long as
8 six months. So on that score alone, there
9 can be no serious argument that there is
10 undue delay that will prejudice the Defence
11 and will compromise the Defence right to
12 trial without undue delay as a basis for
13 contesting this motion for amendment of the
14 indictment.

15
16 Now I am not suggesting to this Court that
17 that concludes the issue that is before the
18 Court. I'm not suggesting that the only
19 issue that this Court confronts is one of
20 undue delay. But on that particular issue
21 there is no argument that the Defence can
22 argue as a basis to oppose this motion.

23
24 Moving towards my conclusion of this
25 discussion, I would simply like to remind

1 the Court of a passage that was actually
2 quoted in the motion papers, and it comes
3 from the decision by the Appeals Chamber in
4 the matter of the Prosecutor v Kovacevic,
5 which is an ICTY Appeals Chamber decision.
6 It's the decision stating reasons for
7 Appeals Chamber's order of the 29th of May
8 1998. And in that Appeals Chamber decision,
9 what the Court stated was that the
10 timeliness of the Prosecutor's request for
11 leave to amend the indictment must be
12 measured within the framework of the overall
13 requirement of fairness of proceedings.

14
15 In other words, there was an expanded
16 discussion in that decision that the Court
17 should consider all the circumstances that
18 develops the litigation before the
19 Trial Chamber in deciding whether a motion
20 is timely or not and whether there is a
21 legitimate issue of undue delay. And in the
22 context of this specific litigation where
23 the Defence at every moment has filed its
24 motions late, has filed its motions out of
25 time, where every motion has delayed the

1 proceedings of this Court, first with the
2 motion for severance, then with its most
3 recent motion, objecting to the separate
4 indictment that had been filed six months
5 prior to the Defence appearance in a
6 pretrial conference, then when this Court
7 considers how this litigation proceeds
8 before it, this is the case the Prosecutor
9 intended to try as a joint indictment. We
10 were prepared, for reasons of judicial
11 economy, to try seven defendants together in
12 order to expedite matters. And instead,
13 this Court has ruled to separate one of
14 those litigants and has slowed down that
15 whole process in terms of pushing that whole
16 series of cases to conclusion.

17
18 So in that context, when the issues germane
19 to Mr. Kajelijeli are considered globally,
20 there can be no reasonable argument that
21 delay should be a basis for delaying this
22 motion. The only issue before this Court on
23 this motion is whether it is legally
24 required or advisable for the indictment to
25 be amended in order to lead proof through

1 the trial of all of the evidence that the
2 Prosecutor intends to amass and demonstrate
3 or place before this Court in regard to
4 Juv nal Kajelijeli.

5
6 It's not necessary to repeat myself at this
7 stage. I've provided both earlier today and
8 on the 12th of December the reasoning of the
9 Prosecutor for why the joint indictment and
10 Kajelijeli's inclusion in that joint
11 indictment is the same case with respect to
12 him that we put forward before this Court in
13 the separate indictment.

14
15 But having said that, the Prosecutor and
16 this Court has the discretion to amend an
17 indictment in the interest of justice. Here
18 we have the same 11 counts. I would suggest
19 to this Court that the trial would proceed
20 much more smoothly with fewer distractions
21 of baseless objections to the form of the
22 indictment that are definitely rephrased to
23 upset the proceedings, which is what the
24 Defence has done at every turn, that in
25 order to streamline the procedures for

1 trial, that the Court grant the Prosecutor's
2 request for leave to amend the indictment.

3

4 The Prosecutor has that discretion. It's
5 established in the case-law. The Court may
6 exercise its discretion to allow that.

7 There is no legal impediment to admit this
8 separate indictment as an amendment. There
9 is no question of undue delay. And on that
10 basis we ask the Court to rule in favour of
11 the Prosecutor's motion and grant the
12 amendment. Thank you.

13 MR. PRESIDENT:

14 Thank you, very much, Prosecutor. Allow me
15 to point out, since you've repeated it, that
16 perhaps the Chamber now independence in
17 sovereignty, it was not only independence
18 and sovereignty that we pointed out the fact
19 that that motion was out of time. In our
20 sovereignty we said that there should be a
21 separate trial for Kajelijeli. Please allow
22 the Chamber to exercise its sovereignty and
23 independence.

24

25 Mr. Hinds, now you have the floor.

1 MR. HINDS:

2 May it please the Court. I'd like to thank
3 Your Honours for giving us this opportunity
4 to respond to the Prosecutor's motion to
5 amend.

6
7 In its argument, the Prosecutor seems to
8 criticize the Defence because we moved to
9 challenge a joint indictment against
10 Mr. Kajelijeli, and we move for a separate
11 trial and for severance. We did so because
12 from the very inception of this case, our
13 position has been that Mr. Kajelijeli had
14 not committed the offences charged and that
15 he was inappropriately joined with other
16 defendants against whom there was more
17 evidence of involvement, if any, in the
18 offence. Now that has been our position
19 from the very beginning.

20
21 The Prosecutor suggests to you today that
22 they all along had evidence of
23 Mr. Kajelijeli's involvement in a range of
24 activities. That is what they are telling
25 you as we stand here today, that back in

1 August of 1998 they knew that Kajelijeli was
2 involved in making speeches and inciting
3 people to genocide and to crimes against
4 humanity.

5
6 If that was so, why, pray tell us, didn't
7 the Prosecutor in paragraphs 5.4 to 5.11 of
8 the original indictment mention
9 Mr. Kajelijeli once being involved in
10 inciting anyone to commit genocide or
11 inciting anyone for crimes against humanity?

12
13 Mr. Webster has said that was their case all
14 along. He said that what they were thinking
15 of doing now is just simply providing
16 supplemental information. The question is:
17 Where is the initial information charging
18 Mr. Kajelijeli with respect to making
19 speeches and inciting anyone to commit
20 genocide?

21
22 Mr. Fleming gets up and he makes certain
23 statements. I would ask him to point out to
24 this learned Tribunal where in the 1998
25 indictment, when they specifically organized

1 it, under subtext speeches and incitement,
2 where Mr. Kajelijeli was in fact mentioned
3 specifically in inciting anyone.

4
5 With respect to distribution of weapons:
6 They claim that Mr. Kajelijeli -- they had
7 information that Mr. Kajelijeli was involved
8 in distributing weapons that was used to
9 commit genocide, crimes against humanity.
10 Paragraphs 5.25 to 5.37 in the original
11 indictment.

12
13 And I do not have to remind this Tribunal
14 that the Prosecutor has the burden in this
15 particular case. They have the burden and
16 the burden never shifts to the Defence.
17 They have had all of the time; they have all
18 of the resources; they have all of the
19 manpower; they made the decision to indict
20 Mr. Kajelijeli. And the question now is:
21 Have they proceeded with enough
22 particularity so as to provide sufficient
23 notice to Mr. Kajelijeli of the charges
24 against them?

25

1 Back in 1998 there was, in fact, not a
2 single allegation that Mr. Kajelijeli was
3 involved in distribution of weapons. So it
4 is not a question of supplementing. What we
5 are dealing now with is new allegations and
6 charges. With respect to propagating and
7 establishing lists of individuals, targeting
8 individuals to be killed, they say that they
9 had evidence all along of that. Yet, if you
10 look at the original indictment, why didn't
11 they say Kajelijeli was involved in
12 preparing lists?

13
14 Now, according to Mr. Webster, their theory
15 of the case was that Kajelijeli was the
16 individual who was involved in all of these
17 activities and upon his shoulders they were
18 going to build a case involving others.
19 That's a strange way of doing it, with no
20 evidence, no allegations with respect to
21 him. And that is precisely the reason why
22 we moved to sever.

23
24 With respect to the charge of rape: It is
25 true that Mr. Kajelijeli under count 7 of

1 the original indictment, that count 7 of the
2 indictment speaks to a crime against
3 humanity; in particular, rape. Not one
4 single allegation specific to
5 Mr. Kajelijeli, not one. Now suddenly they
6 say they had planned to do that all along.

7
8 The Prosecutor's office with its staff have
9 the duty to formulate an indictment with
10 proper specificity to put the defendant on
11 notice on the principles of due process, so
12 that he could prepare to defend himself.
13 The Defence has no burden in this respect.
14 The burden is on them and not us.

15
16 They seem to criticise us because we, in
17 fact, A, pointed out shortcomings and moved
18 and said if you want to try this man, try
19 him separately. They criticise the Tribunal
20 for ruling in our favour. They now move to
21 criticise us because they did not comply
22 with the order of the Tribunal. They have
23 the burden; they are the ones who in fact
24 caused this man to be arrested. They are
25 the ones who must proceed with the evidence

1 against him.

2

3 With respect to the crime of rape: If you
4 look at the original indictment, and when
5 you look particularly of crimes that
6 allegedly took place in Ruhengeri, there are
7 two paragraphs addressing Mr. Kajelijeli.
8 Kajelijeli at paragraphs 6.84, 6.85, 6.86.
9 Now that is the extent. That is the extent
10 that the Prosecutors speak with any
11 particularity of what they claim
12 Juv nal Kajelijeli was involved with. I
13 have no problems with them saying they put
14 us on notice with respect to those
15 allegations.

16

17 Now if you turn now to the so-called
18 proposed amended indictment and what they
19 call "concise facts and events in
20 Ruhengeri", and you look at the nine
21 paragraphs there, in terms of concise
22 statements, you have, for the first time,
23 they find themselves realising that, A, now
24 that this Tribunal has said to them "you
25 must follow the letter of the law, and you

1 must follow the letter of this Tribunal's
2 directives and prepare a separate indictment
3 for Mr. Kajelijeli based upon the indictment
4 that was confirmed by Judge Pillay. You
5 can't add new elements; you can't add new
6 charges. Look at the old indictment and
7 what is contained in there, that is what you
8 are bound by".

9
10 They now realise that they have no evidence
11 with respect against Kajelijeli in the old
12 indictment. So, therefore, they are now
13 talking about for the first time that
14 Kajelijeli was involved in organizing,
15 attacking, abducting, raping, massacring
16 individuals; that he witnessed the raping
17 and other sexual assaults of Tutsi females,
18 in 5.5. In 5.3, that he commanded,
19 organized, supervised and participated in
20 rapes.

21
22 Now when we talk about fairness, should the
23 Defence after close to the amount of time
24 that the Prosecutor has had with respect to
25 this case, where they brought an indictment

1 in August of 1998, and assuming that they
2 presented to us an indictment in August of
3 2000, it doesn't matter. After two years is
4 that the first time that they suddenly
5 realise that they have no evidence on rape
6 against Mr. Kajelijeli? And based upon
7 Mr. Webster's analysis, they had planned all
8 along to produce evidence that
9 Mr. Kajelijeli had organized and supervised
10 rapes.

11
12 How were they going to introduce that at
13 trial? Were they just going to come into
14 this Tribunal and suddenly present witnesses
15 without any allegations in the indictment
16 itself? How were they going to proceed?
17 They created their own dilemma. They
18 created their own problems. It is not for
19 the Defence to help them solve that. They
20 have the staff; they have the resources;
21 they brought the indictment. And now we
22 find ourselves in a situation where
23 Mr. Kajelijeli, after two years -- assuming
24 we deal with the same time frame suggested
25 by Mr. Fleming, August of 2000 -- after two

1 years we have Mr. Kajelijeli suddenly faced
2 for the first time with rape, an allegation
3 that he in fact organized, supervised rapes;
4 that he in fact was involved in giving
5 speeches and inciting. None of those were
6 contained, those allegations, in 1998.

7
8 Now, Mr. Webster suggests that there is no
9 prejudice to Mr. Kajelijeli, that because
10 the Defence is having problems with its
11 staff and had required and requested
12 enlargement of time and adjournment that
13 there is no prejudice. He misses the point.
14 The point is that when we deal with fairness
15 the Prosecutor cannot at the last minute
16 change the rules of the game. They cannot
17 at the last minute change the allegations in
18 the indictment. And say, "Well, you are
19 better off today than you were yesterday.
20 Guess what? We have told you what the
21 charges are, Professor Hinds; you ought to
22 be happy".

23
24 That is not the rules. The rules are that
25 the Defence, the defendant must be given

1 sufficient particularity with respect to the
2 allegations so that he can defend himself.
3 Now if the Prosecutor proceeds with an
4 inadequate indictment, that is his problem.
5 He cannot later on attempt to bring in
6 evidence that is not contained in the
7 original indictment.
8
9 The problem that the Prosecution faces is
10 that they started off in December saying
11 that they did not intend to amend. They now
12 realize that unless they amend, there are
13 certain charges that they have brought
14 against Mr. Kajelijeli where there is no
15 evidence to support it. That's their
16 dilemma. But they are the individuals who
17 are the architects of these proceedings.
18 They have initiated it, and they have the
19 burden of proceeding forward. We as the
20 Defence are raising issues and we think
21 properly so, and this Tribunal is exercising
22 its authority in ruling on the
23 appropriateness of the motions that are
24 being made.
25

1 At this late date, the Prosecution should
2 not be allowed to amend this indictment
3 which will only cause more delays, because
4 to amend this indictment to introduce these
5 allegations of rape, and they now say, well,
6 you've gotten these witness statements and
7 you've gotten it since October -- yes, we
8 got these witness statements in October for
9 the first time, laying out some horrible
10 allegations with respect to rape. We now
11 have a situation of trying to locate
12 witnesses. If they had that information
13 back in August of 1998, why did it take them
14 this long to present it to us? Women who,
15 according to those allegations, were raped
16 with instruments of sticks, and so on.

17
18 To allow the Prosecution to introduce all of
19 these new elements dealing with distribution
20 of weapons, dealing with incitement
21 speeches, dealing with establishment of
22 lists, dealing with rape, all of these are
23 new allegations, new charges, because they
24 are not contained in the original
25 indictment.

1

2

And I would ask any of them to step forward and tell us where they have so set forth in the elements that they say Mr. Kajelijeli was involved in in Ruhengeri. Where? Where have they set it forward in their paragraphs that I've cited before? Where?

8

9

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15

We would urge that this Tribunal, so that we could proceed without any unnecessary delay, deny the motion. If this motion is granted, it would further delay the proceedings beyond what the Defence has argued on other papers and applications that we have made. Thank you.

16

MR. PRESIDENT:

17

Thank you, Mr. Hinds. Prosecutor?

18

MR. WEBSTER:

19

20

21

22

23

24

25

With all due respect to the Defence, if we were to accept, which we don't, Mr. Hinds' representations and his argument before this Court, he has made a convincing argument of why the amendment should be amended and why this Court should amend that indictment. It is precisely that issue that we are

1 addressing: What evidence will be lead
2 before this Court during the trial of the
3 Defence.

4
5 If the initial indictment, the joint
6 indictment against Kajelijeli and seven
7 others were deficient, that motion should
8 have been filed within 60 days of the
9 initial appearance of the Accused back in
10 April of 1999. He had ample opportunity --
11 the Defence has had ample opportunity to
12 contest the original indictment for defects
13 in form to contest the prima facie case of
14 the eleven counts of that original
15 indictment.

16
17 If that's the motion the Defence wants to
18 make, that motion should have been made
19 sometime last year. Every time the Defence
20 has appeared before this Tribunal, it makes
21 the same motion in other clothing. He
22 continued focus on the original indictment
23 and its facial insufficiencies. That is not
24 the appropriate motion; that is not the
25 discussion that is before this Court today.

1 The discussion before this Court today is:
2 Does the separate indictment go forward as
3 an indictment or does the Prosecutor have to
4 rely on the separate indictment that was
5 filed on the 22nd of December.

6
7 Mr. Hinds' argument is precisely the reason
8 why this Court should grant this amendment.
9 We intend to produce evidence of Kajelijeli
10 distributing arms, inciting people to
11 massacres, inciting people to rape,
12 organising meetings. All of the things that
13 are contained in the separate indictment,
14 that is the evidence that will be presented
15 before this Court at trial, and that is the
16 evidence that the Prosecutor should be
17 allowed to lead. We have the discretion.
18 The rules and the Rules of Evidence and
19 Procedure gives the Prosecutor, if allowed
20 by the Trial Chamber, an opportunity to
21 amend an indictment to include new evidence.

22
23 If Mr. Hinds sees all of these allegations
24 as new, that is precisely the reason why
25 this amendment should go forward and the

1 Court should grant the Prosecutor's motion
2 to amend.

3
4 There is no reason the Defence should not be
5 allowed to trip this Tribunal and
6 substantial justice should not be allowed to
7 deftly turn issues around, turn issues on
8 their head to avoid this Tribunal being --
9 to avoid the eventuality of evidence of all
10 of these acts of Mr. Kajelijeli being placed
11 before this Tribunal to be considered in
12 relation to the eleven counts of the
13 indictment.

14
15 Every step of the way, from back in August
16 of 1998, the Defence has been aware that
17 there are eleven counts in the indictment,
18 incitement is charged in the indictment,
19 rape is charged in the indictment. All of
20 those things are in the counts of the
21 indictment. If he had problems -- if the
22 Defence has problems with those counts on
23 the basis of the paragraphs in the
24 indictment, the appropriate motion should
25 have been made months ago, over a year ago,

1 and that's the motion that should have been
2 argued -- or these arguments should have
3 been presented at that time. These are
4 inappropriate arguments for the motion that
5 is before the Court at this time.
6
7 Even with respect to the specific
8 allegations that were made, in Mr. Hinds'
9 certification, the certification of January
10 17th, when he alleges that the separate
11 indictment is for the first time raising
12 issues of Kajelijeli's control of the
13 communal police and civil servants within
14 his jurisdiction, his bourgmestre of Mukingo
15 commune, all of those things are repeated
16 verbatim in the original indictment. If you
17 look at paragraph 3.4, the same paragraph
18 that he takes issue with, look at 3.4 in the
19 original indictment, and you will see the
20 same allegation that is made in one of the
21 paragraphs of -- I don't recall the specific
22 number, but it has to do with Kajelijeli's
23 authority over civil servants and communal
24 police and gendarmes.
25

1 I am not disputing that the separate
2 indictment provides greater particularity
3 which advances matters before this Tribunal,
4 which advances and facilitates this
5 litigation. If the Court agrees with
6 Mr. Hinds that these additional facts are
7 new facts -- which is not what we are
8 supporting -- but if the Court should choose
9 to accept the Defence representation that
10 these are new facts, then that is a reason
11 why this indictment, the separate
12 indictment, should be amended. We have that
13 discretion. The rules give us that
14 discretion. And the only impediment and the
15 only objection should be one of undue delay.
16 That is not a valid objection in the context
17 of this litigation, given all of the
18 dilatory tactics that the Defence has
19 employed and the fact that they, themselves,
20 are not ready to go to trial and have
21 requested a delay of the proceedings. I
22 surrender the floor to my colleague.

23 MR. FLEMING:

24 Your Honours, some propositions that are
25 general: My learned friend, Mr. Hinds, has

1 exhibited considerable confusion about the
2 matters of law about which he has been
3 speaking. May I quote one sentence from
4 him: "That the Prosecution realizes that it
5 has no evidence in the old indictment".

6
7 We've known forever that there is no
8 evidence in the old indictment, because
9 that's not the purpose of an indictment.
10 The purposes of the indictment is set out
11 clearly in the Rules. It is not the place
12 where the evidence resides.

13
14 Another confusion: What my learned friend
15 is seeking to do is to in fact review the
16 president's decision to confirm the
17 indictment. My learned friend, Mr. Webster,
18 has already touched upon that. The
19 indictment was confirmed, and it was said at
20 that time there was sufficient evidence to
21 put the Accused on his trial. Now somehow
22 or another our learned friend says that over
23 the next 22 months, we are not entitled to
24 accumulate further evidence. We are stuck
25 with the evidence which was available when

1 this indictment was first confirmed in 1998.
2 That of course is nonsense. We are entitled
3 to accumulate further evidence.

4
5 Now the Rules are sensible. The Rules say
6 that the indictment must be confirmed at
7 that point it is established that there is
8 sufficient evidence to put the accused on
9 his trial. Judge Pillay decided that a long
10 time ago, and that includes rape, that
11 includes incitement, and all of the other
12 charges that are there. So there was enough
13 evidence; there is enough evidence in the
14 initial material. Our learned friends
15 didn't challenge that, so they are stuck
16 with that.

17
18 But then the rules go on to protect their
19 interest. Now our learned friend is
20 confused again because he suggests we have
21 to produce all of the evidence to him when
22 the indictment is confirmed. No rule says
23 that. His client's interests are protected
24 by, of course, him, because he goes out upon
25 the strength of the indictment and starts to

1 make his own investigations. Ah, but of
2 course he tells this Court that he hasn't
3 done that yet and he wants more time to do
4 it. So he can't really complain that he
5 hasn't had all of the material, to which he
6 is not entitled in any event.

7
8 What do the Rules say about disclosing the
9 evidence which our learned friend continues
10 to say should have been in the indictment?
11 The evidence, of course, is disclosed under
12 Rule 66, "No later than 60 days before the
13 date set for trial copies of the statements
14 of all witnesses whom the Prosecutor intends
15 to call to testify at the trial must be
16 disclosed". Sixty days.

17
18 Now let us look objectively at this. Our
19 learned friend has had an indictment for two
20 years that he didn't challenge in respect of
21 the adequacy of the evidence. He challenged
22 it in other ways; took appeals. And of
23 course they were dismissed because time
24 limits were not met. Then he asked us what
25 evidence was available. If we had had to

1 answer the substance of the appeal -- and we
2 didn't because the time limits were not met
3 and it was dismissed on that ground -- we
4 would have referred him to the five public
5 documents that have been in existence from
6 periods of time from 1995 through until 1997
7 which clearly states that his client is
8 suspected of war crimes.

9
10 Now those are still available and that could
11 be one of the issues he wants to raise if he
12 wants to see those. We can show him any
13 time he wishes. He's never asked us.

14
15 Second, the evidence itself, that is, the
16 witness statements, are to be disclosed no
17 later than 60 days. Now the particularity
18 that we provided in the indictment was given
19 six months ago. Our learned friend stands
20 here today and pretends that all of this has
21 happened today or in December. Even if it
22 happened in December, he's had six or seven
23 weeks to prepare a case. But he hasn't,
24 because he puts his own personal financial
25 circumstances before that of his client, and

1 we come to that in the next application that
2 he makes to be relieved of his
3 responsibilities as counsel.

4
5 So he's had the indictment with all the
6 particularities since August. He's had
7 every word that we intend to call at trial
8 from all of our witnesses since the 30th of
9 October. October to November to December:
10 He's had those for 10 weeks. And he's
11 feigning surprise. He's entitled to have
12 them, in fact, 60 days before the date set
13 for trial. He had them well within that
14 time.

15
16 He had the temerity to say to this Court on
17 the last occasion that there has not been a
18 single other accused in this court or any
19 other court in this Tribunal who has had to
20 meet the time limits that he's had to. We
21 say of course "balderdash", because the
22 rules say that he has to get the statements
23 within 60 days, must have the statements
24 within 60 days. And if he thinks that there
25 is some injustice in that, then the Rule

1 goes on to say that he can come to this
2 Court and upon good cause shown, a Trial
3 Chamber may order the copies of statements
4 within a particular time. He does none of
5 that.

6
7 So there has been evidence, always has been
8 evidence -- Judge Pillay found that two
9 years ago -- sufficient to put this man on
10 his trial. We have no obligation to give
11 evidence until 60 days before trial. Now
12 that's a very sensible rule, and I'll
13 explain in our submission why.

14
15 (Pages 1 to 65 by S Fleming)

16
17
18
19
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24
25

1 1050H.

2 MR. FLEMING: (Continuing)

3 We could have gone to Mr. Kajelijeli with a
4 truckload of material and said, here you
5 are, there it all is, you sift through it,
6 you sort it out; but we don't. Because my
7 view of this rule, and I would submit that
8 it should be the Court's view as well, is
9 that by the time you are ready for trial and
10 by the time you can announce that you are
11 ready for trial, you have refined the case
12 to specifically those witnesses that you
13 intend to call at trial.

14

15 Now that's the purpose of the rule so that
16 in Mr. Hinds' mind the case, when he is
17 given full disclosure, is fully
18 particularised then, that's when he gets the
19 witness statements, not back, as he says, in
20 some confusion when the indictment is
21 confirmed, or not back, as he says, with
22 some further confusion, within the
23 indictment itself. That's just not the law.
24 The law is he has the indictment, it is
25 confirmed by a judge of this Tribunal saying

1 that there is sufficient evidence to put him
2 on his trial, the matter is refined and
3 refined, we took the initiative to
4 particularise. The allegations, they are
5 not new allegations, they are a
6 particularity in respect of those
7 allegations. We give him the forty-one
8 statements that we intend to use. Now we
9 can say, still, that we hope we can refine
10 that down further so that we don't have
11 forty-one statements, but these are the ones
12 which will prove our case.

13
14 So he's had our case fully particularised
15 from August last year. He's had all of our
16 witness statements since the 30th of
17 October, and he is here crying foul as
18 though these things happened today. And
19 with the greatest of respect, there is no
20 substance to what our learned friend just
21 said; they are entirely outside of the
22 jurisprudence of this Tribunal, and our
23 learned friend is simply playing for time
24 and he's made no bones about that either.
25

1 He said to the press that he doesn't intend
2 to be here to run a trial even if Your
3 Honours order a trial on and he is prepared
4 to take the consequences of that because
5 first, his partner went off and did
6 something else - may we just deal with that
7 for a moment - his partner took another
8 brief when he knew --

9 MR. HINDS:

10 Objection, Your Honour, clearly
11 inappropriate.

12 MR. FLEMING:

13 When he knew that the matter -- I'm sorry.

14 MR. PRESIDENT:

15 Please, Mr. Hinds, just let him finish.
16 I'll give you the floor, Mr. Hinds.

17 MR. FLEMING:

18 His partner took another brief when he knew
19 that this matter was coming on for trial,
20 something of course which is an outrageous
21 proposition in any reasonably developed
22 jurisprudence. Second, he lost his two
23 interns and says that he's got to do the
24 work himself and if he has to leave his
25 practice then this would cause him --

1 MR. PRESIDENT:

2 Yes, you will be free to deal with this
3 matter when we get to that motion.

4 MR. FLEMING:

5 I understand what you're saying to me, but
6 it's relevant.

7 MR. PRESIDENT:

8 And may I also point out you've already said
9 what you are repeating now. I would want us
10 to move faster.

11 MR. FLEMING:

12 Yes, thank you. Your Honour, the fact is
13 that they seek time and they have sat on
14 their hands, they have allowed time to run,
15 they have ignored their own propositions
16 stated to us and they come and they feign
17 surprise, and with the greatest respect, we
18 would submit that there is no substance to
19 their opposition to this amendment, and I
20 simply adopt what my learned friend has said
21 in respect of the delays -- alleged delays
22 that might be caused. Thank you, Your
23 Honours.

24 MR. PRESIDENT:

25 I will give the floor to Judge Sekule who

1 wishes to put a question to the Prosecutor.

2 JUDGE SEKULE:

3 I have a small question, I suppose for
4 clarification. I don't know who is going to
5 answer this whether it's Mr. Webster or Mr.
6 Fleming, but when I read the motion for --
7 seeking for leave to amend and supporting
8 material thereon, there is an attached,
9 there is an attached -- Attachment A which
10 is supposed to be the proposed amendment, I
11 suppose?

12 MR. FLEMING:

13 Yes, Your Honour.

14 JUDGE SEKULE:

15 But -- because I see it is signed at the end
16 and it had been signed on the 24th of
17 October 2000.

18 MR. FLEMING:

19 Yes. May I explain?

20 JUDGE SEKULE:

21 Yes.

22 MR. FLEMING:

23 Your Honour, going back to the indictment
24 which we filed as the new indictment or the
25 separate indictment in August, it was our

1 view that we were particularising.

2

3 Now, Your Honours dealt with that in your
4 decision on the 12th of December and you
5 said it wasn't particularising; it could
6 appear to somebody that they were in fact
7 new charges. So what we do is to bring
8 precisely that same indictment. It is the
9 same in every particular, every word, and we
10 say if you say it is in fact amending
11 charges, then we will have to take the step
12 of seeking an amendment of the old
13 indictment, that is, the original
14 indictment.

15

16 So, it is that indictment that we seek to
17 now put forward as an amended indictment
18 because Your Honours basically told us it
19 was an amended indictment. I mean, you
20 didn't tell us to seek an amendment of it,
21 but you did tell us that it was in fact an
22 amended indictment. So we now seek to have
23 that amended indictment against the Accused.

24 JUDGE SEKULE:

25 Okay. In other words, the Attachment A is

1 your proposed amendment or the way the
2 amendment -- or rather, the amended charge
3 will look like?

4 MR. FLEMING:

5 Yes, precisely, Your Honour and that's the
6 document that's been in our learned friend's
7 hands since August of 2000.

8 JUDGE SECULE:

9 So the signature at the end should -- can be
10 ignored at this stage?

11 MR. FLEMING:

12 Yes, it can be ignored at this stage because
13 that was the indictment that we did file in
14 October, yes.

15 JUDGE SEKULE:

16 Thank you. That's the small clarification I
17 wanted.

18 MR. FLEMING:

19 Thank you.

20 MR. PRESIDENT:

21 Mr. Hinds, you have any observations?
22 Brief, please.

23 MR. HINDS:

24 Just to point out what is --

25 INTERPRETER:

1 Your microphone, Mr. Hinds.

2 MR. HINDS:

3 -- obvious to this Tribunal that in both Mr.
4 Webster's and Mr. Fleming's statements to
5 the Court, they have not responded in any
6 way and shared with this Tribunal not a
7 single allegation that was contained in 1998
8 with respect to rape involving Mr.
9 Kajelijeli, nor any allegations with respect
10 to incitement, distribution of weapons or
11 lists. They've ignored it because it does
12 not exist. Just one other comment.

13

14 Mr. Webster says that the Defence could have
15 proceeded with a motion to dismiss the
16 indictment if we found that it was
17 insufficient. That is obviously true. We
18 chose not to do so because we knew that at
19 the end of the Prosecutor's case they would
20 not be able to overcome a motion to dismiss
21 at that point.

22

23 So we knew that there was insufficient facts
24 and allegations to support the charges and
25 that is why we did not move to dismiss.

1 They cannot simply move at this stage to
2 bring new charges under the indictment and
3 say that this is acceptable. And it's for
4 those reasons that we believe that they
5 should be held to proceed based upon the
6 indictment that they filed on December 27th.
7 They say that they feel that they could
8 proceed on that basis, that is what they
9 should be held to; the indictment that was
10 filed on December 27th of 2000. Thank you.

11 MR. PRESIDENT:

12 I give the floor to Judge G ney.

13 JUDGE G NEY:

14 Professor Hinds, I want you to develop on
15 one point which was emphasised by Mr.
16 Fleming during his submission. He said that
17 the indictment was confirmed, it is a
18 confirmed indictment. We are not obliged to
19 offer evidence until 60 days before the
20 trial, and this is the rule. I want you to
21 develop on this point because you didn't
22 make any reference on it. Thank you.

23 MR. HINDS:

24 I did not make any reference with respect to
25 that issue because it --

1 INTERPRETER:

2 Microphone.

3 MR. HINDS:

4 -- is self-evident, Your Honour, that with
5 respect to when you look facially at the
6 indictment, the indictment should set forth
7 at least allegations that in fact pointed to
8 the defendant's actions to support the
9 charges. They in fact attempted to do so
10 with respect to other allegations and with
11 respect to other individuals. The
12 indictment is absent, absent any
13 allegations, any allegations setting forth
14 any charges with respect to rape with
15 respect to Mr. Kajelijeli.

16
17 They are saying they are under no duty to
18 provide that. Minimally, minimally, they
19 must provide some specificity with respect
20 to an allegation of rape, not just simply
21 that the man is charged with rape without
22 any facts. We are not talking about
23 evidence that is presented on a basis of
24 witness statements, but there has to be some
25 allegations with respect to what Mr.

1 Kajelijeli did. They are saying to you they
2 are under no duty to do that, and that is
3 clearly not within the Rules, not only
4 within this Tribunal, but international
5 jurisprudence.

6 JUDGE G NEY:

7 Is this your interpretation of the relevant
8 rule in this respect?

9 MR. HINDS:

10 Yes, Your Honour.

11 MR. FLEMING:

12 Your Honour, may I respond very briefly on
13 one point?

14 MR. PRESIDENT:

15 Will you be brief?

16 MR. FLEMING:

17 Yes, I will, I will. Rule 72; my learned
18 friend had a tactic that he wasn't going to
19 challenge the adequacy of the material
20 supporting the indictment or the fact that
21 it was confirmed until the actual hearing
22 and apparently at the close of the accused
23 -- the Prosecution case.

24

25 Now, the Prosecution intended to call the

1 evidence in the material which we have
2 provided to him that is, the witness
3 statements. The Rule actually says that if
4 you are going to challenge the indictment in
5 any particular way that constitutes a
6 preliminary motion, then you must do so
7 within a certain number of days.

8
9 Now, you see, he says that he was going to
10 leave this challenge until, apparently, the
11 end of our case. The Rules simply don't
12 allow it, that's our proposition, you simply
13 can't do that. He might be able to say
14 there is insufficient evidence in the case,
15 not to -- I'm sorry, there is insufficient
16 evidence to convict his client, but he can't
17 go back to the indictment. If there is a
18 problem with the indictment then that must
19 be sorted out within a certain number of
20 days of the indictment being confirmed.

21
22 So what our learned friend said is a total
23 misconception of the law in respect of this.
24 I'm sorry I took the time Your Honours, but
25 that's all we wish to say.

1 MR. PRESIDENT:

2 One minute.

3 MR. HINDS:

4 Yes, just -- I will take less than a minute.
5 I thought I made it clear that the Defence
6 had no intention to challenge the inadequacy
7 of the indictment, and what I said was after
8 the Prosecutor presented their case that the
9 Defence would move to dismiss the specific
10 counts for failure to provide sufficient
11 evidence to convict, not challenging the
12 indictment. Thank you.

13 MR. PRESIDENT:

14 Prosecutor's motion for leave to amend will
15 be deliberated upon and the Chamber will
16 rule on it. I'll give the floor again to
17 the Prosecutor to introduce the motion on
18 the request for further time for filing
19 briefs.

20 MR. FLEMING:

21 Your Honour, that's a simple proposition at
22 the end of the day. When we were confronted
23 with this difficulty as to whether or not we
24 ran under the old indictment or we should
25 amend, we were of the view that it might

1 change the contents of the pretrial brief.

2

3 Now, there will be many elements that are
4 common but there could be some things that
5 would change. We thought it wiser at the
6 end of the day to wait until we knew
7 whether or not we are entitled to now amend,
8 or whether or not we had to go back to the
9 order of the 12th and comply with what Your
10 Honours directed there. The only reason we
11 haven't complied with what Your Honours
12 directed there was in respect -- that was
13 because of this possible amendment. We can
14 tell Your Honours that we could, with some
15 haste, provide you with a pre-trial brief on
16 either matter by the end of this week.
17 However, to ensure that there is no
18 difficulty whatsoever, we could have a
19 pre-trial brief done either in this matter
20 as it presently stands, or on the amendment,
21 by the 5th of February, that's Monday the
22 5th of February, and we seek to extend the
23 time to there.

24

25 We are conscious, very conscious that we

1 haven't complied with what Your Honours said
2 on the 12th, but we were of the view that we
3 had to make a decision on whether to seek
4 amendment or whether to go with what we had
5 as a result of the 12th. We took the view
6 that we should seek amendment and we,
7 therefore, once we've done a lot of work in
8 respect of the pretrial brief and we could
9 give you something, we were of the view that
10 it would be better to wait and see precisely
11 what it was that we were dealing with in the
12 pretrial brief.

13
14 Your Honours, this might in some way be
15 affected by what our learned friend wants to
16 do in respect of seeking time to prepare the
17 case as well. Thank you, Your Honours.

18
19 Yes, it might depend upon our learned
20 friend's withdrawal, although even without
21 that we can, depending on what Your Honours
22 conclude about our previous motion, have
23 something to you by, at the latest, the 5th
24 of December, fully and complete -- sorry,
25 5th of February, fully and completely.

1 MR. PRESIDENT:

2 Sorry, Mr. Hinds, any comments?

3 MR. HINDS:

4 No, Your Honours.

5 INTERPRETER:

6 Microphone of the President, microphone.

7 The microphone is off again, please.

8 MR. PRESIDENT:

9 There is a motion to correct an indictment
10 dated 22nd December. Do you want to
11 introduce the said amendment also -- the
12 said motion?

13 MR. FLEMING:

14 We will say simply Your Honour, again that
15 would depend upon what you do with this
16 present motion because if you allow the
17 amendment that would become irrelevant, if
18 you don't allow the amendment it would
19 become relevant and it's not of great
20 substance. My learned friend, Ms. Ojemeni,
21 can tell you the precise details if
22 necessary, but it will depend upon what Your
23 Honours determine in respect of the first
24 motion.

25 MR. PRESIDENT:

1 Mr. Hinds, any observations on this item?

2 MR. HINDS:

3 As Mr. Fleming pointed out, Your Honour, and
4 my reading of the motion to --

5 INTERPRETER:

6 Microphone.

7 MR. HINDS:

8 -- correct seems to be more -- dealing with
9 some typographical issues and nothing of
10 substance, I mean, if I'm correct, because I
11 read Exhibits B and C, and tried to make
12 heads and tails of it but I -- my sense of
13 it is that they wanted to insert one page
14 and they wanted to make some corrections
15 with some paragraphs, but I didn't see any
16 substance. If I'm misreading this I hope
17 the Prosecutor alerts me to this.

18 MR. FLEMING:

19 We can assure our learned friend that there
20 is nothing of substance. It is truly just
21 trying to sort out some typographical
22 issues. Thank you.

23 MR. PRESIDENT:

24 So this is duly noted that this will depend
25 on our ruling on your initial motion, but we

1 all agree that there are no matters of
2 substance being introduced in this latter
3 motion.

4 MR. FLEMING:

5 Exactly.

6 MR. PRESIDENT:

7 That's fine. Thank you. So we will
8 conclude with the motion by Mr. Hinds, which
9 makes mention of the difficulties he is
10 encountering in ensuring representation of
11 his client in connection with difficulties
12 he is also encountering within his own
13 chambers and his cooperation with Mr. Harvey
14 who is taken up with some other brief in
15 Northern Ireland. Can I give the floor to
16 Mr. Hinds?

17 MR. HINDS:

18 May it please the Court. I took an unusual
19 decision to file a motion to withdraw, not
20 because that was my intent, nor the intent
21 of my client. But I felt in fairness to
22 this Tribunal and in fairness to Mr.
23 Kajelijeli, given the chain circumstances
24 that I found myself in, I could not, in all
25 fairness to the Tribunal and to my client,

1 proceed under what I understood to be the
2 time schedule that this Tribunal was
3 prepared to adhere to. And I recognise my
4 duties to the Tribunal and my duties to my
5 client, and I wanted to make sure that
6 notwithstanding the decision taken by the
7 Tribunal, I would not jeopardise his
8 interest. And so therefore, I, while making
9 an application to withdraw, I continued to
10 do work on his case, including travelling to
11 Rwanda last week, taking 10 days being away
12 from my office, coming here, going back to
13 New York for four days, and then travelling
14 back here getting here on Saturday night.
15 This was done to make sure that Mr.
16 Kajelijeli's interest was not compromised in
17 any way and also to demonstrate to this
18 Tribunal that I took my responsibilities
19 very seriously.

20
21 While I was in Kigali, I received notices
22 and correspondence from this Tribunal
23 including some scheduling orders. In other
24 words, I was not in New York when the time
25 frames were set to respond to the

1 Prosecution's motion for leave to amend. I
2 was in Ruhengeri visiting various locations
3 there. And so therefore, I was faced with a
4 situation where there were time constraints
5 being given for me to respond to the brief
6 while I was in Rwanda with no support staff,
7 no co-counsel. I had to get back to New
8 York and within less than 24 hours, respond.
9 But I did so.

10

11 This Tribunal is aware that I have a law
12 firm headquartered in New York City, over
13 7600 miles from this place. I decided to
14 take this case at great personal sacrifice
15 because I wanted to do it.

16

17 There are lawyers who have agreed to serve
18 here for various reasons. I did so with an
19 understanding that I could assemble a team
20 that would allow me the time to be away from
21 my office for a trial for three to four
22 months, and I operated up until December of
23 this year.

24

25 Every time this Tribunal scheduled a

1 proceeding I was here or I had co-counsel
2 here. There hadn't been a single proceeding
3 that went forward even when we -- there were
4 joint defendants, that went forward where I
5 was absent and unexcused.

6
7 And so, when I was here in December, even
8 though my co-counsel had decided to take
9 another assignment, I felt that I could
10 still make arrangements, and I made those
11 representations to the Court. But on going
12 back to New York, I was faced with two other
13 lawyers who are in my firm who have decided
14 to take employment elsewhere. One of those
15 lawyers left last week. Another lawyer will
16 be leaving in a couple of weeks.

17
18 My office represents the Government of South
19 Africa in the United States. We handle all
20 bilateral matters between the Government of
21 South Africa and the United States
22 Government; trade issues, and so on. In
23 addition to hundreds of other cases that we
24 deal with, I felt a duty to my client, and I
25 shared that with him, and a responsibility

1 to this Court. But I knew that with the
2 very structure of the Defence team
3 collapsing, I could not continue in this
4 representation unless I was given additional
5 time in order to organise myself and so,
6 therefore, I took the extraordinary step of
7 putting before this Court an application
8 setting forth the reasons. It was not an
9 easy decision for me to make.

10
11 My duty to this Tribunal and my client does
12 not include filing bankruptcy. Those -- all
13 of us who are at the bar have practised law
14 and we understand the problems that lawyers
15 face from time to time. This situation is
16 extraordinary. I have never had this
17 particular situation in the 27 years that I
18 have been practising, but I must confess I
19 have never tried a case requiring me to be
20 away from my office for months, seven
21 thousand miles away.

22
23 If this matter was within the United States
24 I would have no problem, I'd be able to
25 organise myself and most judges in the

1 United States would understand that. You
2 can make those arrangements. But being away
3 for this amount of time I just couldn't do
4 it. And so, therefore, the application that
5 I am making is an application to withdraw if
6 the Court intends to proceed with this trial
7 today. I just simply am not going to be in
8 a position to do so and to remain here for
9 three months. I would not be able to give
10 my client undivided attention for the very
11 reasons that I've set forth in the public
12 record, and I'm not going to belabour the
13 points which have been set forth in my
14 certification. I'm willing to entertain any
15 questions that the Tribunal may have.

16 MR. PRESIDENT:

17 Judge Sekule, you have the floor.

18 JUDGE SEKULE:

19 Thank you, Mr. President. Yes, Professor
20 Hinds, I followed your submissions and the
21 effort that you have recently made in
22 respect of the case of your client and your
23 own difficulties that you had been -- you
24 had pointed out -- just pointed out.

25

1 Do you have an idea, can you give us your
2 thoughts as to how you think you can get out
3 of this problem and be able to deal
4 adequately with the work of the Tribunal as
5 well as the -- take care of the interest of
6 your client effectively, of course, and
7 speedily? Do you have some idea? Because I
8 think this still remains to be open-ended.

9 MR. HINDS:

10 There is the issue of co-counsel --

11 INTERPRETER:

12 Microphone, please. Microphone, sir.

13 MR. HINDS:

14 There is the issue of co-counsel, Mr.
15 Harvey. A decision -- I will have to take a
16 decision within, I would think the next week
17 to 10 days with respect to what to do about
18 Mr. Harvey. I've not been able to
19 communicate with him. I know that this --
20 the Registrar's office have written to him
21 through New York. He has been e-mailed in
22 Northern Ireland. He has not responded, and
23 by the time I left New York I have not heard
24 from him in terms of what he intends to do.
25 So, a decision will have to be taken within

1 the next 10 days concerning co-counsel and
2 whether or not it would be Mr. Harvey and
3 whether or not he could meet the
4 requirements and the rigours that are
5 required with respect to moving this case
6 forward. That's one decision that has to be
7 taken.

8
9 The other decision that I have to take I
10 have to hire two new lawyers with respect to
11 handling the docket of cases that we have in
12 my office and reorganise along those lines
13 and then, of course, continuing to prepare
14 here.

15
16 I do not believe that I could be ready to
17 proceed with this matter; that is, to start
18 a trial where I would be here for an
19 extended period of time earlier than June
20 30th. I could be here to deal with motions,
21 I could be here to deal with opening
22 statements, I could be here to deal with
23 cross-examining; for example, an expert
24 witness or something of that nature in two
25 months or something like that. But I could

1 not be a here to proceed with the trial
2 proper in terms of examining and
3 cross-examining substantive witnesses that
4 the Prosecutor would be presenting, before
5 the end of June.

6 MR. PRESIDENT:

7 Mr. Hinds, have I got you correctly? You
8 would be prepared to enter into a
9 compromise?

10 MR. HINDS:

11 Yes, the compromise is what I have just
12 proposed.

13 MR. PRESIDENT:

14 In other words, if I get you correctly, you
15 would be ready within the next month or two
16 to begin the trial; that is, to hear the
17 opening remarks of the Prosecutor and the
18 presentation of expert witnesses or others,
19 perhaps to counter -- cross-examine them.
20 But so far as factual witnesses are
21 concerned you would be ready to work on them
22 later on. This is what I got you to say.

23 MR. HINDS:

24 That's correct. With respect to expert
25 witnesses, if there is one expert witness to

1 be presented at that time, I would be in a
2 position to cross-examine an expert witness
3 if we are talking about some time in March.
4 That's what I'm saying, yes.

5 MR. PRESIDENT:

6 Prosecutor, what is your reaction?

7 MR. FLEMING:

8 If there was anything we say, we say in this
9 context: First, we acknowledge the right of
10 an accused to have an effective Defence.
11 Second, we would concede that to have
12 somebody new coming and start all over again
13 would probably be a lengthier process than
14 our learned friend remaining in the case.
15 So we would have to concede that it would be
16 better to have our learned friend to remain
17 in the case. And third, we also acknowledge
18 the fact that we've brought the motion that
19 we have first this morning. So anything we
20 say is within those context, and given the
21 circumstances it seems that we too would be
22 able to effect a compromise to get the trial
23 going.

24
25 Your Honours, there is one thing we should

1 say about experts: As the matter is pleaded
2 and as it is set up presently, there is a
3 6(3) allegation thereof; the effect command
4 responsibility. We are seriously
5 considering that because of the sufficiency
6 of the evidence of Mr. Kajelijeli's personal
7 involvement, that we won't proceed with
8 that, but rather we will proceed under 6(1).
9 If we make that decision, and we will do so
10 within the next couple of days, there
11 probably won't be a great need for an expert
12 that's why I went through that background,
13 because the expert would give principally
14 evidence in respect of the structures of
15 society and the structures of local
16 government, and so on.

17
18 The second thing we would say is this, that
19 if there is time, and my learned friend Ms.
20 Ojemeni foreshadowed this on the 12th of
21 December, we would consider it to be
22 appropriate to bring a motion for judicial
23 notice of certain things. Now, before we
24 did that, of course, we would communicate
25 further with our learned friend about

1 matters such as, for example, whether we had
2 to prove genocide; perhaps another reason
3 why we might call an expert. If our learned
4 friend was opposed to any admission of
5 genocide we would immediately bring a motion
6 for Your Honours to take judicial notice of
7 some of those matters. So we can usefully
8 use the time to save time at trial.

9
10 Now, having said all of that, and we are
11 prepared to obviously compromise in respect
12 of all of these things, there are some
13 matters which we must comment upon in our
14 learned friend's motion. I will not repeat
15 the matters that I have already commented
16 upon about Mr. Harvey taking another brief,
17 we have great concerns about that. We, of
18 course, have great sympathy for our learned
19 friend because we who practice law know the
20 difficulties that can arise without
21 involvement or complicity, and we
22 acknowledge our learned friend's position.

23
24 However, we must make some comments about
25 withdrawal of counsel and that is, and we

1 simply say the jurisprudence is that you can
2 only withdraw in exceptional circumstances.
3 It would be our argument that there are no
4 exceptional circumstances shown. Personal
5 comfort or personal pecuniary position
6 should not come before the obligation to the
7 client or to this Tribunal. We don't want
8 to belabour those propositions anymore.
9
10 There are propositions in respect of
11 language, that Mr. Harvey was a very fluent
12 French speaker and was obviously the person
13 who was translating and interpreting. We go
14 back to the beginning of this matter when
15 our learned friend Mr. Hinds was actually
16 appointed. Your Honours will recall that
17 this is being litigated but the simple
18 circumstances were these: Mr. Kajelijeli
19 insisted upon having Mr. Hinds. The
20 question of language was specifically raised
21 by the Registrar and this is well before Mr.
22 Harvey became involved as co-counsel, and
23 that issue was set to one side. Mr.
24 Kajelijeli himself said it wasn't an issue.
25 So we submit that it can't be made an issue

1 now in respect of the argument being run.

2

3 The fact that it is a long way from home and
4 therefore stretches resources in
5 communications and everything else, we would
6 submit this is inadequate argument because
7 the brief is taken upon that basis. So we
8 would submit that there is no special
9 situation shown which would permit a
10 withdrawal.

11

12 Now having said all of that, we come back to
13 the point where we would agree that the best
14 way forward is for our learned friend, Mr.
15 Hinds, to stay in the case and try to find
16 ways that we can expedite the matter from
17 there. And we have at least one or two, one
18 being that we will review the indictment and
19 finally make a decision on 6(3), and second,
20 negotiating with our learned friend in
21 respect of matters that we might not have to
22 prove; if not, then we will bring a motion
23 for judicial notice within a very short
24 period of time. And Your Honours, we are
25 prepared to meet any reasonable timetable in

1 respect of the matter. Thank you.

2 MR. PRESIDENT:

3 Mr. Prosecutor, the Chamber was thinking
4 that in spite of his motion, Professor Hinds
5 has described practical problems that he has
6 and that we've understood that he was
7 prepared to come back to revise his motion
8 rather, if we could together, come up with a
9 compromise solution that would enable us to
10 start a trial, cross-examining witnesses, et
11 cetera, even if it means that later on he is
12 able to cross-examine the factual witnesses
13 of the Prosecution.

14
15 We were thinking about those compromise
16 which appears to us to be constructive. I
17 believe that if we leave it at that, we can
18 find a solution so that -- this is the
19 reason why I should like to propose that we
20 deliberate. It is not impossible, with the
21 agreement of my colleagues, that if we see a
22 possible date in March that we call the
23 Judges, the Prosecutor and the Defence in a
24 public hearing in my office so that we find
25 a constructive compromise.

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MR. FLEMING:

18

Yes, Your Honour.

19

MR. PRESIDENT:

20

Thank you very much. You have a lawyer, Mr.

21

Kajelijeli. If you want to make a comment

22

use your lawyer, please.

23

INTERPRETER:

24

Microphone, please.

25

MR. PRESIDENT:

1 Mr. Hinds?

2 MR. HINDS:

3 Your Honour, may I have an opportunity to
4 consult with my client, find out what he
5 wants.

6 MR. PRESIDENT:

7 Okay.

8 MR. HINDS:

9 May I, Your Honour? Mr. Kajelijeli
10 communicated with the Court and he is -- he
11 was somewhat concerned that the Prosecutor
12 might have been misquoting the intent of his
13 communication to the Court in terms of his
14 letter. I have informed him that the Court
15 received the communications and that the
16 letter speaks for itself, notwithstanding
17 whatever the Prosecutor said about it, that
18 the Court understood his intent and there
19 was no need for him to clarify that point.

20 MR. PRESIDENT:

21 Professor Hinds, this is the reason why I
22 listened with a great deal of interest to
23 what Mr. Fleming was saying to see whether
24 it was in our interest to change lawyers at
25 this time or not. And we understood in

1 Kajelijeli's communication that he truly
2 wanted you as counsel. This is reason why
3 we propose a dynamic compromise, as we say
4 in French, to conciliate the two interests.

5

6 Very well, if I'm not mistaken there are no
7 more motions.

8 REGISTRY:

9 No more, Your Honours, we are through.

10 MR. PRESIDENT:

11 We shall now rise.

12

13 (Court adjourned at 1150)

14

15 (Pages 66 - 100 by G. Harding)

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1 C E R T I F I C A T E

2 We, Shannon Flemming and Gifty Harding,
3 Official Court Reporters for the
4 International Criminal Tribunal for
5 Rwanda, do hereby certify that the
6 foregoing proceedings in the
7 above-entitled cause was taken at the
8 time and place as stated; that it was
9 taken in shorthand (Stenotype) and
10 thereafter transcribed by computer and
11 revised under our supervision and
12 control; that the foregoing pages contain
13 a true and correct transcription of the
14 said proceedings to the best of our
15 ability and understanding.

16 We further certify that we are not of
17 counsel nor related to any of the parties
18 to this cause and that we are in no wise
19 interested in the result of said cause.

20
21 Shannon Fleming Pages 1 to 65

22
23 Gifty C. Harding Pages 66 to 100

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