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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

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

Registrar: Agwu U. Okali

Date: 25 January 2001

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ICTR

**The Prosecutor**

v.

**Juvénal KAJELIJELI**

*Case No. ICTR-98-44A-T*

**DECISION ON PROSECUTOR'S MOTION TO CORRECT THE INDICTMENT  
DATED 22 DECEMBER 2000 AND MOTION FOR LEAVE TO FILE AN AMENDED  
INDICTMENT**

**WARNING TO THE PROSECUTOR'S COUNSELS PURSUANT TO RULE 46(A)**

The Office of the Prosecutor:

Ken Fleming  
Don Webster  
Ifeoma Ojemeni

Counsel for the Accused:

Lennox Hinds

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
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NAME / NOM:	John M. Kaye
SIGNATURE:	[Signature]
DATE:	25/01/2001

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II, composed of Judges Laïty Kama, Presiding, William H. Sekule, and Mehmet Güney;

BEING SEIZED of the Prosecutor's "Urgent Motion for Leave to File an Amended Indictment," and the "Brief in Support of Prosecutor's Motion for Leave to File an Amended Indictment," and the attached proposed amended Indictment, filed on 4 January 2001, (the "Motion to Amend the Indictment");

BEING SEIZED of the Prosecutor's "Motion to Correct an Indictment dated 22 December 2000, filed pursuant to the Trial Chamber II order of 12 December 2000," and the attached separate Indictment of 22 December 2000 as Annexure A, the Counts against the Accused as enumerated and framed in the Indictment of 29 August 1998 as Annexure B, and the corrections requested to be made in the Indictment of 22 December 2000 as Annexure C, filed on 10 January 2001, (the "Motion to Correct the Indictment");

CONSIDERING the Response of the Defense in "opposition to the Prosecutor's Request for Leave to File an Amended Indictment," filed on 17 January 2001, (the "Defense Response");

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 50;

NOTING that, Juvénal Kajelijeli (the "Accused") was arrested in Cotonou, Benin, on 5 June 1998 and that Judge Navanethem Pillay confirmed the Indictment against the Accused on 29 August 1998;

NOTING that on 22 December 2000 the Prosecutor filed a separate Indictment as ordered in the oral Decision of 12 December 2000 (the "Indictment of 22 December 2000");

HAVING HEARD the Parties on 22 January 2001, the Chamber now considers the Motions;

#### **AFTER HAVING DELIBERATED**

1. The Chamber will first layout the History and background of the Motions brought with respect to the Indictment to this date, then review the Motion to Correct the Indictment of 22 December 2000 and then decide upon the Motion to Amend the Indictment.

#### History and background of the Motions and Decisions pertaining to the Accused's Indictment

2. On 6 July 2000, the Chamber granted a separate trial to the Defence of the Accused Kajelijeli and consequently ordered that the Prosecutor prepare a separate indictment from the August 1998 joint Indictment.
3. The Prosecutor filed the separate Indictment pertaining to Kajelijeli entitled "Amended Indictment" on 15 August 2000.
4. The Prosecutor subsequently filed a Motion to Correct Amended Indictment accompanied with a Supporting Brief on 29 August 2000.

5. On 6 September 2000, the Defence Counsel requested clarifications on whether the Prosecutor should have filed an "Amended Indictment" or a new separate Indictment.
6. On 12 October 2000, Judge Sekule, designated by the Trial Chamber, delivered a Decision on the Prosecutor's Motion to correct the Indictment, granting the Prosecutor leave to correct the Indictment and ordering that the new Indictment, entitled "separate Indictment" or "Indictment" be filed within 15 days.
7. This Indictment was filed on 25 October 2000, but served on 30 October 2000 to the Accused.
8. At a Pre-Trial Conference held on 12 December 2000, the Defence challenged the Indictment of 30 October 2000 in that it was different from that of August 1998, in that the Accused was now facing new charges.
9. The Indictment of 25 October 2000 was indeed found to be in violation of the Chamber's 6 July 2000 Order in an Oral Decision rendered on 12 December 2000 by the Trial Chamber.
10. In this Decision, the Prosecutor was ordered, yet again, to: "... fully comply with the Decision of 6 July 2000 and ...to file a separate indictment pertaining only to the Accused... from the existing confirmed indictment...in the same order and in the same manner as the original indictment";
11. The Prosecutor filed again, on 22 December 2000, the latest version of the separate Indictment, followed by two Motions, one filed on 10 January 2001 seeking leave to correct this Indictment, the other, filed on 3 January 2000, seeking leave to amend the Indictment.

The Motion to Correct the Indictment

12. The Prosecutor seeks leave of the Chamber to correct errors made in the Indictment filed on 22 December 2000 pursuant to the Chamber's orders of 6 July, 12 October and 12 December 2000 in:
  - (a) adding page 12 of the Indictment, which was omitted,
  - (b) formulating Counts 4, 8, 10 and 11 in the same manner and the same order as in the August 1998 Indictment;
  - (c) correcting typographical errors in specific paragraphs referred to under Article 6(1) and 6(3) in all the counts of the Indictment as filed.

The Defence made no objection to this request.

13. The Chamber agrees that the corrections requested by the Prosecutor are necessary, provided that page 12 of the Indictment is not to be replaced with pars. 4.26 to 4.28 at page 24 of the Indictment of August 1998, as suggested by Annexure C to the Request of the Prosecutor, but by the actual page 12 entitled "2. Territorial, Temporal and Material Jurisdiction".



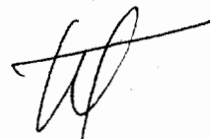
14. After a close scrutiny of the Indictment filed on 22 December 2000, the Chamber further notes that the wording as well as the substance of several paragraphs do not reproduce *verbatim* the paragraphs of the joint Indictment of August 1998 pertaining to the Accused Kajelijeli, as requested in the Chamber's previous three Orders of 6 July 2000, 12 October 2000 and 12 December 2000. *See and compare, inter alia:*

Indictment of 22 December 2000	Indictment of August 1998
par. 4.3	par. 4.28
par. 5.24 (French version only)	par. 5.26 (French version only)
par. 5.25	par. 5.27
par. 6.31	par. 6.38
par. 6.43	par. 6.54
par. 6.51	not found
par. 6.58	par. 6.75
Pars. 6.59 and 6.60	par. 6.77 and 6.78
par. 6.68	par. 6.86
par. 6.9	par. 6.87
par. 6.75	par. 6.96
6.76 and 6.77	Not found
par. 6.81	par. 6.101

15. The examples above are but a few of the discrepancies found between the Indictments of 22 December 2000 and August 1998. The Chamber considers that minor typographical errors are too widespread to be justified, especially considering the fact that, by an Order of 20 December 2000, the Chamber granted the Prosecutor an extension of the deadline for submission of the Indictment until the 22 December 2000. These errors therefore amount to gross negligence on the part of the Prosecutor.
16. Moreover, the Chamber finds that several of the discrepancies found are substantial in that they are in fact adding new charges to the ones Kajelijeli was formerly accused of under the Joint Indictment of August 1998. For instance, the Prosecutor added mention of Kajelijeli's authority over, not only "*the Interahamwe-MRND and the civilian population*" but also "*the members of the Police Communale and Gendarmerie Nationale*" at par. 4.3 of the Indictment of 22 December 2000. It is worth noting in this respect that she also added these allegations at par. 3.6 of the Indictment of 25 October 2000. In yet another instance, the Prosecutor added the name of the Accused to a list of persons accused of having "*participated in the distribution of weapons to the militiamen and certain carefully selected members of the civilian population with the intent to exterminate the Tutsi population and eliminate its accomplices*", at par 5.25 of the Indictment of 22 December 2000, whereas Kajelijeli's name does not figure at par. 5.27 of the Indictment of August 1998.
17. The Trial Chamber emphasizes that :
- (a) The Prosecutor did not comply with three Court Orders (those of 6 July 2000, 12 October 2000 and 12 December 2000) to file a separate Indictment pertaining

only to the Accused Kajelijeli without altering the formulation or substance of the relevant paragraphs of the Joint Indictment of August 1998;

- (b) In doing so, the Prosecutor in fact tried in two occasions to amend on its own a confirmed Indictment, without requesting prior judicial leave pursuant to Rule 50 of the Rules.
18. With respect to the Prosecutor's attempts to amend the Indictment on her own, the Trial Chamber strongly reminds the Prosecutor that, under Rule 50(A):
- (a) Once an Indictment is confirmed, any alteration to its content is subject to a prior judicial leave; and
  - (b) The Prosecutor, when granted by a Trial Chamber leave to correct or otherwise amend an Indictment, may not "go beyond what was permitted or directed by the Trial Chamber" (International Criminal Tribunal for the Former Yugoslavia (ICTY) Krnojelac Decision on Prosecutor's Response to Decision of 24 February 1999, Decision of 20 May 1999, at par. 9).
19. Further, such a conduct, which is inadmissible as such, is aggravated by the following considerations :
- (a) The Prosecutor has on three occasions been in breach of a Trial Chamber Order (when filing three subsequent separate indictments either with delay and/or without fully complying with the Trial Chamber Orders). This conduct is offensive and could amount to an obstruction of justice;
  - (b) The proposed amended Indictment signed by the Prosecutor attached to the Motion of the Prosecutor for leave to file an amended Indictment (*See, below*) is dated 24 October 2000. This suggests that the Prosecutor could have filed a motion to amend the Indictment more than two months before the Motion was eventually filed on 3 January 2001, thereby avoiding adjournment of the trial scheduled to start on 22 January 2001, a date at which the Office of the Prosecutor had previously confirmed that they would be ready to proceed, thereby obstructing the proceedings (*See, Transcripts, Status Conference of 30 October 2000, Pre-Trial Conference of 12 December 2000*);
  - (c) At the hearing of 12 December 2000, the Prosecutor seemed to shift the burden of responsibility for its own grossly negligent conduct on the Trial Chamber, arguing that: "*We came before the Court today as a result of a decision [that of 6 July 2000 to sever the Accused from his co-Accused] that this Court made that we did not ask for*". This conduct of the Prosecutor is unacceptable. The Chamber reminds the Prosecutor that the Judges of the Tribunal are independent in carrying out their mission and sovereign in their deliberations and judgement;
  - (d) The Prosecutor expressly said at the hearing of 12 December 2000 that the Indictment filed on 22 October 2000 had been knowingly and deliberately amended without seeking any judicial leave, and that, moreover, the amendments were substantive (*See, Transcripts of 12 December 2000: "When we drafted, or submitted, a separate indictment (...) we could not simply go through the old indictment and strike out every paragraph that did not specifically mention the name Juvénal Kajelijeli, because the whole structure of thinking through the charges and pleading the facts was different"*). The



Prosecutor thus acted beyond his powers under the Statute and the Rules of the Tribunal.

20. The Chamber finds that the attitude of the Prosecutor's Counsels in the matter, as described above, certainly qualifies as a Misconduct of Counsel pursuant to Rule 46(A) of the Rules. Consequently, in accordance with the provisions of the said Rule, the Chamber hereby warns the Prosecution Counsels that, were their conduct to remain "offensive" or be otherwise considered "abusive", or were they to "obstruct the proceedings" or act "contrary to the interests of justice", the Chamber would impose sanctions pursuant to that Rule.

The Motion to Amend the Indictment

(i) *Preliminary matters*

21. The Chamber notes that the Prosecutor seeks leave to amend the August 1998 Indictment following the Chamber's Orders. The Chamber reminds the Prosecutor of its orders of 6 July, 12 October and 12 December 2000 to file a separate Indictment pertaining only to the Accused from the confirmed Indictment of 29 August 1998.
22. Following the said orders, the only valid Indictment against the Accused is the Indictment filed on 22 December 2000 and which will be considered by the Chamber in the Motion to amend, and taking into account the corrections as discussed above with respect to the Indictment of 22 December 2000.

(ii) *Legal basis*

23. The Prosecutor requests leave to amend the Indictment pursuant to Rule 50 of the Rules, which reads as follows:

**Rule 50: Amendment of Indictment**

- (A) The Prosecutor may amend an Indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an Indictment may only be made by leave granted by that Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 53 *bis* apply *mutatis mutandis* to the amended Indictment.
- (B) If the amended Indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.
- (C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges.
24. The Chamber recalls its Decision in *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-I, (21 June 2000) (Decision on Prosecutor's Request for Leave to file an Amended Indictment) which stated, at par. 33 that, "[...] in general, an amendment to a confirmed existing Indictment is sought for the following reasons: to add new charges to a



confirmed Indictment, to expand and elaborate upon the factual allegations adduced in support of existing confirmed counts, or to make minor changes to the Indictment.”

25. The Prosecutor contends that she seeks leave to amend the Indictment in order to expand and elaborate upon the factual allegations adduced in support of the existing counts in the said Indictment and to amend the accusatory instrument to make it consistent with the jurisprudence of the Tribunal by pleading Genocide as the lead count, complicity in Genocide as an alternative count to the lead count and impliedly pleading Conspiracy to Commit Genocide.
26. The Chamber, therefore, agrees with the Prosecutor that the amendment she seeks is properly brought pursuant to Rule 50. Furthermore, the Chamber, agrees with the jurisprudence of the Tribunal in *Prosecutor v. Musema*, at par. 2, Case No. ICTR-96-13-I, (18 November 1998) (Decision on the Prosecutor’s Request for Leave to Amend the Indictment) wherein it quoted a Decision of 30 September 1998 which held that, “[...] in considering the Prosecutor’s motions for leave to amend the Indictment under Rule 50, the onus is on the Prosecutor to set out the factual basis and legal motivation in support of these motions and it is for the Defense to respond to these argument.”

(iii) *The scope of the amendment sought by the Prosecutor*

27. The Prosecutor submits that the proposed amended Indictment does not include any new charges against the Accused as all the new expanded factual allegations are in support of the same counts of the Indictment. The major differences between the proposed amended Indictment and the Indictment are, according to her:
  - (a) The proposed amended Indictment individually charges the Accused with crimes against the Statute relying on direct evidence gathered from ongoing investigations obtained after the confirmation of the Indictment of 29 August 1998.
  - (b) The proposed amended Indictment provides specificity with regard to the Accused leadership role in events in Ruhengeri, in particular as investigations concerning sexual violence against Tutsi women have enabled the Prosecutor to amplify and further substantiate the allegations of rape and other crimes of sexual violence in the Indictment.
  - (c) The proposed amended Indictment provides further particulars and greater factual specificity to substantiate the eleven counts of the Indictment and the Accused’s direct participation in the crimes more sharply focusing on issues of fact for trial of a single defendant and relying less on allegations of vicarious liability of accused persons acting in concert.
28. The Defense argues on the contrary that the proposed amended Indictment contains new charges.
29. The Chamber notes that, contrary to the Prosecutor’s arguments, the ICTY’s above-mentioned *Krnjelac* Decision of 20 May 1999 she alludes to in her Motion clearly states at par. 20 that, when “entirely new factual situations in support of existing counts” are added, “even though the count remains pleaded in the same terms of the Statute, these substitutions may nevertheless amount effectively to new charges”.



30. The Chamber therefore carefully analyzed the content of the proposed amended Indictment with that of the Indictment, and notes that the so-called "expanded factual allegations" in the proposed amended Indictment do in fact amount to new charges with respect to:
- (a) Par. 4.16 of the proposed amended Indictment, wherein the Accused's name appears, with others, in a list of persons alleged to have distributed weapons to militiamen. His name did not appear in the same list in the Indictment;
  - (b) Par. 4.16 of the proposed amended Indictment, wherein the Accused is alleged to have distributed lists of Tutsi to be eliminated. These allegations do not figure in the Indictment, at pars. 5.34 to 5.38;
  - (c) Par. 4.18 of the proposed amended Indictment wherein the Accused is named, with others, as having publicly incited the people to exterminate the Tutsi population and its 'accomplices'. This allegation was not specifically laid out against the Accused in the Indictment (*See* par. 5.11);
  - (d) Par. 4.3 of the proposed amended Indictment, wherein the Accused is alleged to have had authority over the members of the Police Communale and the Gendarmerie Nationale. The Indictment simply alleged at par. 3.5 that the Accused, as a *Bourgmestre*, had authority over the civil servants posted in his *commune* and the civilian population;
  - (e) Par. 5.4 of the proposed amended Indictment, wherein the Accused is alleged to have witnessed the raping and other sexual assaults on Tutsi females. Such specific allegations are not to be found in the Indictment.
31. The Chamber is thus convinced that the factual allegations as set out above are not only "expansions" of former factual allegations but in fact amount to new charges. Some of the other modifications in the proposed amended Indictment however compare closely to the Indictment of 22 December 2000.
- (iv) *On whether the proposed amended Indictment will prejudice the Accused or infringe upon his right to a fair trial without undue delay*

32. The Chamber recalls the following provisions of Article 19(1) and 20(4)(C) of the Statute laid out below:

**Article 19: Commencement  
and conduct of trial proceedings**

- (1) The Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

**Article 20: Rights of the Accused**

[...]

- (4) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

[...]

- (c) To be tried without undue delay





33. The Chamber notes the Prosecutor's argument that although the August 1998 Indictment was drafted and confirmed almost two and a half years ago, trial has not commenced. The Prosecutor also contends that the proposed amended Indictment contains the same counts found in the August 1998 Indictment with further particulars concerning allegations in support of those counts as a result of fresh evidence obtained through ongoing investigations particularly in Ruhengeri. The Prosecutor, therefore, argues that the Defense will now be afforded a clearer forecast of the evidence that will be adduced at trial. In fact, the Prosecutor argues that the only legal challenge to the propriety of the timing of the amendment to an Indictment is the prospect of unreasonable or undue delay.
34. It is likewise noted that the Defense responds by stating that it is unjust and unfair that the Prosecutor be granted leave to file an amended Indictment containing new charges, two and a half years after the Accused was originally indicted and on the eve of trial. The Defense argues that the Prosecutor should not have waited all these years to charge the Accused afresh and expect him to defend himself against those new charges, find witnesses and exculpatory evidence to use in his defense, days before the commencement of trial.
35. As to the propriety of the timing of the Prosecutor's Motion, the Chamber concurs with the jurisprudence of the Tribunal in *Prosecutor v. Musema*, ICTR-96-13-T (6 May 1999) (Decision on the Prosecutor's Request for Leave to Amend the Indictment), which held, at par. 17 that, "[...] Rule 50 of the Rules does not explicitly prescribe a time limit within which the Prosecutor may file to amend the Indictment, leaving it open to the Trial Chamber to consider the motion in light of the circumstances of each individual case. A key consideration would be whether or not, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial. In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber."
36. The Chamber will consider the issue whether the proposed amendments, if granted, will cause an "undue" delay in the commencement of the trial of the Accused, to his prejudice. The Chamber recalls that the trial date in the instant case has been set for the 22 January 2001, which was also the date of the hearing of the Prosecutor's Motions.
37. Furthermore, the Chamber is mindful that, in considering whether a delay in the criminal proceedings against an Accused is "undue," it is essential to take into consideration the length of the delay, the gravity, nature and complexity of the case against the Accused and the prejudice that may be suffered by the latter. The Defense argues that the Prosecutor's Motion for leave to amend, which was filed two and a half years after the Accused was originally indicted and arrested and days before trial is to commence, is unfair and unjust on the Accused. The Chamber, taking into account the circumstances of the case, and the fact that the trial was adjourned at the hearing of this motion, is not convinced by this contention. The Chamber finds merit in the Prosecutor's argument that, in setting out the Accused individual criminal responsibility to the 11 counts, the Defense is afforded a clearer forecast of the case against him, on the basis of which he can effectively prepare his defense. This will be in the interest of justice.




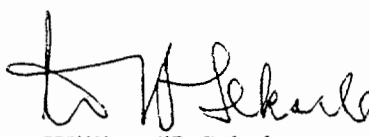
38. Moreover, whatever prejudice might occur for the Defense can be cured by relief provided by the Rules, particularly Rule 50(C), which affords the Defense thirty days within which to file preliminary motions pursuant to Rule 72 in respect of the new charges.
  39. The Chamber, therefore, finds that the Accused will not suffer undue delay and it is in the interest of justice to grant the proposed amendment.
- (v) *On whether to allow the amendment to the Indictment*
40. In light of the Chamber's finding that the proposed amended indictment does indeed contain new charges, and that this Motion is properly brought pursuant to Rule 50, the Chamber finds sufficient factual and legal basis in the Prosecutor's oral and written arguments to support the present motion to amend, and therefore grants leave to the Prosecutor to file the amended Indictment.
  41. As a result of these amendments, the Accused will have a further appearance to plead on the new charges, pursuant to Rule 50(B) of the Rules and his Defense has thirty days within which to file any preliminary motions under Rule 72, if they so wish, pursuant to Rule 50(C) of the Rules.

**FOR THESE REASONS, THE TRIBUNAL,**

- I. **WARNS** the Prosecutor's Counsels in the matter that, were their conduct to remain "offensive", or otherwise "abusive", or were they to "obstruct the proceedings", or otherwise act "contrary to the interests of justice", the Chamber would impose sanctions pursuant to Rule 46 of the Rules;
- II. **GRANTS** the Prosecutor's Motion to amend the 22 December 2000 Indictment and to file the proposed amended Indictment;
- III. **ORDERS** the Prosecutor to file the Amended Indictment in both French and English by Thursday 25 January 2001 before close of business;
- IV. **INSTRUCTS** the Registry to organize as soon as practicable the further appearance of the Accused on the new charges, possibly on Friday 26 January 2001.

Arusha, 25 January 2001,

  
Laity Kama  
Presiding Judge

  
William H. Sekule  
Judge

  
Mehmet Güney  
Judge

