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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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OR: ENG

Before: Judge Navanethem Pillay, Presiding
Judge Laïty Kama,
Judge Tafazal H. Khan

Registry: Mr. Antoine Mindua

Decision of: 17 November 1998

**THE PROSECUTOR
VERSUS
FERDINAND NAHIMANA**

Case no. ICTR 96-11-T

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**DECISION ON THE DEFENCE MOTION ON DEFECTS IN THE FORM OF THE
AMENDED INDICTMENT**

Office of the Prosecutor : Mr. William T. Egbe

Counsel for Defence : Mr. Jean-Marie Biju-Duval
Ms. Diane Senechal

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “TRIBUNAL”),

SITTING AS Trial Chamber 1, composed of Judge Navanethem Pillay, as Presiding Judge, Judge Laïty Kama and Judge Tafazzal H.Khan;

HAVING NOTED that an indictment was confirmed against Ferdinand Nahimana on 12 July 1996 and subsequently amended following the decision of Trial Chamber I on 24 November 1997 (the “previous decision”);

HAVING BEEN SEIZED with a motion by Defence Counsel, dated 9 April 1998 and filed with the Registry on 22 April 1998, pursuant to Rules 72 and 73 of the Rules of Procedure and Evidence (“the Rules”), wherein Defence Counsel requested the suspension of all criminal proceedings against Ferdinand Nahimana (the “Accused”) and his immediate release;

HAVING CONSIDERED the indictment as amended by the Prosecutor, dated 19 December 1997 and filed with the Registry on 22 December 1997 (the “amended indictment”);

HAVING CONSIDERED the Prosecutor’s written response filed with the Registry on 22 June 1998;

HAVING NOTED the difficulties in obtaining from the Registry the translation of the Defence brief, which impediment has occasioned the substantial delay in the rendering of this decision;

HAVING HEARD the parties at a hearing on 26 June 1998;

AFTER HAVING DELIBERATED,

1. The Defence Counsel submitted that the Prosecutor had not amended the indictment against the accused, as ordered to do so by the Tribunal in its previous decision and as such the amended indictment is also defective since it fails to indicate with sufficient certainty and precision :

(1.1) the identity of the person or persons with whom the accused is alleged to have conspired;

(1.2) the period the crimes were allegedly committed;

(1.3) the alleged acts of the accused and the charges against him.

2. The Defence Counsel requested the immediate release of the accused, submitting that:

(2.1) fourteen months after the accused’s initial appearance, the Prosecutor is unable to provide an indictment complying with the minimum requirements as

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set out in the Rules and Statute of the Tribunal;

(2.2) no serious charges exist against the accused to permit the maintenance of the criminal proceedings against the accused, the commencement of the trial on its merits and the continued detention of the accused; and;

(2.3) in these circumstances the criminal proceedings against the accused should be suspended and the accused should be released.

3. The Prosecutor submitted that:

(3.1) she has complied with the Tribunal's previous decision and amended the indictment as ordered;

(3.2) the amended indictment provides with sufficient certainty and clarity the identity of some of the persons with whom the accused is alleged to have conspired, the time frames within which the crimes were allegedly committed and the charges against the accused;

(3.3) in the event of the Tribunal finding that the amended indictment is in fact defective the Tribunal should order further amendment of the said indictment, rather than suspending all criminal proceedings against the accused and releasing him.

On the identity of the alleged co-conspirators

4. The Tribunal refers to its previous decision, wherein it ordered that the Prosecutor "identify some or all of the persons ..." with whom the accused is alleged to have conspired. The Tribunal notes that the amended indictment identifies two persons the accused is alleged to have conspired with and accordingly finds that the Prosecutor has complied with its previous decision in this regard.

On the period the crimes were allegedly committed

5. The Tribunal refers to its previous decision and notes that it ordered the Prosecutor to specify the time frame in the allegations in paragraphs 3.2, 3.3, and 3.6 of the previous indictment. In this decision the Tribunal acknowledged that "...given the particular circumstances of the conflict in Rwanda and the alleged crimes, it could be difficult to determine the exact times and places of the acts with which the accused is charged."¹ Referring to the amended indictment, it is noted that the allegations in the aforementioned paragraphs have been amended to indicate when the alleged acts took place. Paragraph 3.2 alleges that acts described took place "During 1993..". Paragraphs 3.3 and 3.6 allege that the acts described therein were committed "From April 1993 until approximately 31 July 1994." In these circumstances, the Tribunal finds that the Prosecutor has in fact complied with its

¹.Decision on Preliminary motion ,dated 24 November 1997, ICTR 96-11-T, para. 30, page 8

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previous decision in this respect.

On the charges against the accused

6. The Tribunal, in its previous decision, requested the Prosecutor to “identify on the one hand the acts or sequence of acts for which the accused is held individually responsible for having committed direct and public incitement to genocide, and on the other hand, the acts or sequence of acts of his subordinates for which he is held responsible for as their superior.”² Count 2 of the original indictment alleged that the accused is individually criminally responsible for direct and public incitement to commit genocide, pursuant to Articles 6(1) and/or 6(3) of the Statute. The Prosecutor has specified, in count 2 of the amended indictment, that the accused is held individually criminally responsible, pursuant to Article 6(1) of the Statute, for direct and public incitement to commit genocide; and in count 5 of the amended indictment, that the accused is held individually criminally responsible pursuant to Article 6(3) of the Statute for the same crime. It is therefore apparent that count 5 of the amended indictment is not a new count, but rather an amplification of the charges in count 2. However, the Prosecutor has not specified the acts for which the accused is held individually criminally responsible, pursuant to Article 6(1) of the Statute and the acts allegedly committed by the accused’s subordinates for which he is held individually criminally responsible, pursuant to Article 6(3) of the Statute.

7. The Tribunal notes that count 4 of the amended indictment charges the accused with a crime against humanity pursuant to Articles 3(h) and Articles 6(1) and/or 6(3) of the Statute. This count, in its present text is vague and the Prosecutor is called upon to specify whether the alleged responsibility of the accused falls under Articles 6(1) or 6(3) or both. Where the Prosecutor is alleging individual criminal responsibility pursuant to Articles 6(1) and 6(3) of the Statute, She is called upon to specify the acts for which the accused is held individually criminally responsible, pursuant to Article 6(1) of the Statute and the acts allegedly committed by the accused’s subordinates for which he is held individually criminally responsible, pursuant to Article 6(3) of the Statute.

8. The Defence Counsel submitted that where the Prosecutor is alleging individual criminal responsibility, pursuant to Article 6(3) of the Statute, the Prosecutor must specify the identity of the subordinates. In response, the Prosecutor submitted that paragraphs 3.3 and 3.8 of the amended indictment provide sufficient preliminary information to enable the accused to identify the sources of his individual responsibility as a superior.

9. The Tribunal notes that paragraph 3.3 of the amended indictment alleges that the accused “..exercised control, or had the opportunity to exercise control, over the programming, operations and finances of RTLM SA and RTLM.” and paragraph 3.8 refers to subordinates, journalists and radio broadcasters, in RTLM. It is unclear whether the Prosecutor is alleging that the journalists and radio broadcasters are in fact subordinates or whether there is a separate category of persons who are alleged to be subordinates, in which

² *ibid* page 10

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case she is called upon to indicate who these subordinates are. The Prosecutor is requested to clarify this issue with respect to paragraph 3.8 of the amended indictment.



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FOR THESE REASONS,

THE TRIBUNAL,

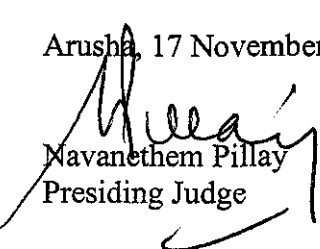
ORDERS the Prosecutor to further amend the amended indictment by:

- (a) specifying whether the accused is held individually criminally responsible pursuant to Articles 6(1) or 6(3) or both, in count 4;
- (b) indicating who the alleged subordinates of the accused are;
- (c) specifying the alleged acts for which the accused is held individually criminally responsible, pursuant to Article 6(1) of the Statute and the acts allegedly committed by the accused's subordinates for which he is held individually criminally responsible, pursuant to Article 6(3) of the Statute, in counts 2, 4, and 5.


INVITES the Prosecutor to make the aforementioned amendments within 30 days from the date of this decision;

DISMISSES the Defence motion in all other aspects.

Arusha, 17 November 1997/8


Navanethem Pillay
Presiding Judge


Laity Kama
Judge


Tafazzal H. Khan
Judge

(Seal of the Tribunal)