

CASE NO. : ICR-96-11-T



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

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Before: Judge Navanethem Pillay, Presiding
Judge Laïty Kama
Judge Pavel Dolenc

Original: English

Registrar: Ms. Marianne Ben Salimo

Decision of: 30 August 1999

THE PROSECUTOR

versus

Ferdinand NAHIMANA

Case N°: ICTR-96-11-T

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ICTR
CRIMINAL REGISTRY
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**DECISION ON THE PRELIMINARY MOTION FILED BY THE DEFENCE
ON DEFECTS IN THE FORM OF THE INDICTMENT**

Counsel for the Defence:

Mr. Jean-Marie Biju-Duval

Office of the Prosecutor:

Mr. Nediumveetil S. Menon
Mr. William T. Egbe

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
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NAME / NOM:	AMINATTA K. R. N'GUM
SIGNATURE:	<i>A. N'GUM</i> DATE: 31/08/99

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 Pavel Dolenc;

CONSIDERING the preliminary motion filed by the Defence on 15 March 1999 as well as the Prosecutor’s response thereto, filed on 22 March 1999. The Defence, by way of this motion, raised preliminary objections to the amended indictment, dated 26 November 1998, pursuant to Rule 72 of the Rules of Procedure and Evidence (the “Rules”).

HAVING heard the Parties at a hearing held on 28 May 1999.

Background

The indictment against Ferdinand Nahimana (the “accused”) was confirmed on 12 July 1996. The accused made his initial appearance on 19 February 1997, pursuant to Rule 62 of the Rules and pleaded not guilty to all four counts in this indictment. The Defence subsequently filed a preliminary motion, raising defects in the form of this indictment and on 24 November 1997, Trial Chamber I ordered certain amendments to this indictment. The Prosecutor subsequently filed an amended indictment, dated 19 December 1997. The Defence filed a preliminary motion, raising objections to this amended indictment on the basis that it did not comply with the order of 24 November 1997, rendered by Trial Chamber I. On 17 November 1998 Trial Chamber I ordered further amendment to the indictment of 19 December 1997 and as a consequence thereof the Prosecutor filed another amended indictment, dated 26 November 1998 (the “indictment”). The Defence have now raised objections to this indictment.

The Prosecutor has filed a corrigendum to the French version of the indictment on 27 May 1999. The text in paragraph 3.20 of the French version of the indictment has been amended to reflect an accurate translation of the text in paragraph 3.20 of the English version of the indictment.

Submissions made by the Parties

1. The Defence in support its motion, submitted *inter alia*,:

1.1. that although the indictment charges the accused with the same five counts, these counts are now based on a new set of allegations which were neither mentioned in the previous indictments, nor in any of the affidavits or documents of evidence disclosed to the Defence to date. The accused may therefore raise objections based on the defects in the form of this “new indictment”;

1.2. with respect to count 1 of the indictment, the accused is unable to understand with sufficient certainty the allegations in support of this count. These new allegations do not

inform the accused of the identity of the person or persons with whom he is alleged to have conspired;

1.3. with respect to counts 2, 4 and 5 of the indictment, the accused is held individually criminally responsible for the conduct of his alleged subordinates. The accused however, is not informed of the identity of these alleged subordinates;

1.4. with respect to count 3, the indictment fails firstly, to specify the alleged acts that constitute complicity in genocide and secondly, to identify the other alleged accomplices or principal perpetrators.

2. The Defence further submitted that there are no serious or specific charge or charges that warrant the continued detention of the accused and the commencement of the trial against him. In the light of this submission, the Defence prayed for the withdrawal of all charges against the accused and his immediate release.

3. The Prosecutor, in response to the Defence motion submitted *inter alia* that:

3.1. the Defence is repetitive when raising objections to the form of the indictment which charges the accused. As an illustration of this repetitiveness the Prosecutor referred to two previous Defence preliminary motions dated 17 April 1997 and 22 April 1998 respectively, where the issue of the identification of the alleged co-conspirators had been raised. In its decision of 17 November 1998, the Trial Chamber found that the Prosecutor sufficiently identified the alleged co-conspirators. Despite this finding by the Trial Chamber, the Defence has once again raised this issue;

3.2. the Defence filed its motion outside the time limit as prescribed in Rule 72 of the Rules;

3.3. the subordinates have been specified in the current amended indictment and the Prosecutor has complied with the 17 November 1998 order of Trial Chamber I in this respect.

AFTER HAVING DELIBERATED

On the Timeliness of the Filing of this Motion

4. This motion filed by the Defence falls within the category of a preliminary motion, pursuant to Rule 72(B)(ii) of the Rules. Rule 72(A) specifies that all preliminary motions must be filed within sixty days following disclosure by the Prosecutor to the Defence of all materials envisaged by Rule 66(A)(i). The materials that are subject to disclosure, as envisaged in Rule 66(A)(i) of the Rules are copies of the supporting material which accompanied the indictment at its confirmation as well as prior statements obtained by the Prosecutor from the accused. The



disclosure of these materials must be made within 30 days of the initial appearance of the accused. The Prosecutor submitted that all materials envisaged in Rule 66(A)(i) have been disclosed to the Defence on 24 April 1997.

5. Pursuant to Rule 72(F) of the Rules, where the accused has failed to comply with the time limits, as prescribed in Rule 72(A), such non-compliance shall constitute a waiver of the rights of the accused to file the respective preliminary motion, the Trial Chamber, however, may waive the prescribed time limits and condone the late filing of a preliminary motion if it is satisfied that good cause exists.

6. In this case the prescribed time limit for filing preliminary motions have expired and the Defence have not sought relief for the waiver of this time limit, as envisaged in Rule 72(F). However the Trial Chamber, after having examined the indictment against the accused, finds that it is in the interest of justice to consider the matter at hand and therefore *ex mero motu* waives the prescribed time limit as envisaged in Rule 72(A).

On the Indictment

7. The Trial Chamber finds that some of the objections raised in this motion have previously been raised by the Defence and ruled on and there is no need to once again rule on these issues. This finding is in accordance with the recognised principle of *Res Judicata*. The essence of this principle is that a matter adjudicated upon by a court of competent jurisdiction is conclusive and shall not be reopened or challenged by the parties or their representatives in law, except on appeal.

8. The Trial Chamber notes that the Defence has raised the issue of the identity of the accused's alleged subordinates. The Defence had previously raised this issue at a hearing on 26 June 1998. On that occasion the Trial Chamber found that it was "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 case she is called upon to indicate who these subordinates are."¹ In light of this ambiguity, Trial Chamber I ordered the Prosecutor to "indicate who the alleged subordinates of the accused are."² Following this order, the Prosecutor prepared and filed the present indictment against the accused.

9. The Trial Chamber finds that the allegation in Paragraph 3.20 of the present indictment enables the accused to understand the nature and cause of the charges against him. In any event the onus is on the Prosecutor to prove at the trial of the accused the alleged superior-subordinate relationship and the identities of the alleged subordinates.

¹ Decision on the Defence Motion on Defects in the Form of the Amended Indictment; 17 November 1998; para. 9; p 4.

² *Ibid* at 6



10. The Trial Chamber notes that the Prosecutor has introduced a new count 5 which charges the accused with crimes against humanity, as stipulated in Article 3(b) of the Statute. This count did not exist in the indictment at the stage of confirmation and it was therefore not confirmed pursuant to Rule 47 of the Rules. Further, the accused did not plead to this count at his initial appearance.

11. The Trial Chamber notes that Rule 50 of the Rules allows for the amendment of the indictment at the stage of, or after the initial appearance of the accused, but such amendment may only be made with leave of a Trial Chamber. The Prosecutor has not moved any motion, requesting such leave and therefore leave was not granted by the Trial Chamber, to add this new count 5 to the indictment. The Prosecutor therefore has not adhered to and satisfied the provisions of Rule 50. For these reasons, count 5 is invalid and must be deleted from the indictment.

12. The Trial Chamber observes that Paragraphs 3.9, 3.10 and 3.11 of the indictment are also allegations newly introduced against the accused, without leave of the Trial Chamber. For reasons similar to those advanced and in all fairness to the accused, these paragraphs must be deleted from the indictment.

FOR THE AFOREGOING REASONS,

THE TRIBUNAL,

ORDERS the Prosecutor to delete :

- (i) count 5 of the indictment;
- (ii) paragraphs 3.9, 3.10, and 3.11 of the indictment

FURTHER ORDERS that these amendments to the indictment shall be effected no later than 30 days from the date of this decision.

DISMISSES the Defence Motion in every other respect;

Arusha, 30 August 1999

Navanethem Pillay
Presiding Judge

Laity Kama
Judge



Pavel Dolenc
Judge