

Case No.: ICTR-96-7-T

ICTR  
CRIMINAL REGISTRY  
RECEIVED

1999 SEP 23 A 9:06

UNITED NATIONS      NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal penal international pour Rwanda

CHAMBER II – CHAMBRE II

Before:            Judge William H. Sekule, Presiding  
                      Judge Navanethem Pillay  
                      Judge Asoka de Zoysa Gunawardana

Registrar:        Mr. John Kiyeyeu

OR: ENG

Decision of:     12 August 1999

THE PROSECUTOR  
VERSUS  
THEONESTE BAGOSORA

Case No.: ICTR-96-7-T

DECISION ON THE PROSECUTOR'S REQUEST  
FOR LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor:  
Mohamed Chande Othman  
Charles Adeogun-Phillips  
Frederic Ossogo

Counsel for the Accused:  
Raphael Constant

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS	
NAME / NOM: <b>AMINATTA L. R. N'GUM</b>	
SIGNATURE: <i>[Handwritten Signature]</i>	DATE: <b>23/09/99</b>

*[Handwritten Signature]*

Bagosora - Leave to Amend the Indictment - 09/22/99

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("THE TRIBUNAL")**

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Navanethem Pillay, and Judge Asoka de Zoysa Gunawardana;

NOTING that on 10 August 1996 Judge Lennart Aspegren confirmed an Indictment against Theoneste Bagosora ("the accused"), pursuant to Rule 47 (D) of the Rules of Procedure and Evidence ("The Rules") on the basis that there was sufficient evidence to provide reasonable grounds for indicting the accused for Genocide, Crimes Against Humanity, Violations of Article 3 Common to the 1949 Geneva Conventions, and Violations of the 1977 Additional Protocol II thereto;

CONSIDERING that, pursuant to Rule 62 of the Rules, the accused pleaded not guilty to all counts of the Indictment at his initial appearance on 7 March 1997;

CONSIDERING that on 17 March 1998 this Trial Chamber decided on a postponement of the trial of the accused, which was scheduled to begin on 12 March 1998, until a joint Indictment, including Theoneste Bagosora, submitted by the Prosecutor on 6 March 1998, had been decided upon;

FURTHER CONSIDERING that, pursuant to Rule 50 of the Rules, on 11 August 1999 the Prosecutor brought a motion to amend the Indictment submitted on 5 August and confirmed on 10 August 1996, by adding new Charges;

HAVING HEARD the parties at the hearing on 11 August 1999;

CONSIDERING that following the hearing of 11 August 1999 this Trial Chamber rendered an oral decision on 12 August 1999 granting the motion for leave to file an amended Indictment, the substance of which is presented herein below.

**THE ARGUMENTS**

**The Prosecutor** argued inter alia, that:

- (i) the proposed amended Indictment is consistent with the Prosecutor's entitlement, subject to the discretion of the Trial Chamber, to request leave to amend, based on new evidence following ongoing investigations. The case against the accused formed part of an extremely complex investigation, which recently uncovered evidence of a conspiracy to commit genocide, involving the military, the government and political party officials. This evidence came to light after confirmation of the original Indictment against the accused;
- (ii) there is ample jurisprudence for allowing the amendment of Indictments, pursuant to Rule 50 of the Rules. Thus the proposed amended Indictment would reflect the

---

**Bagosora - Leave to Amend the Indictment - 09/22/99**



current jurisprudence and bring the Indictment in accordance with the existing jurisprudence of the Tribunal. To date various Trial Chambers have issued seven decisions regarding the amendment of Indictments. In two cases the Trial Chamber granted the amendment during the trial proceedings on the merits (See The Prosecutor v. Akayesu, Case ICTR-96-4-T and The Prosecutor v. Musema, Case ICTR-96-13-T. In each of the five other cases, the Trial Chamber granted the amendments before the trial proceedings on the merits. (See The Prosecutor v. Semanza, Case No. ICTR-97-20-I, The Prosecutor v. Ntakirutimana, Case No. ICTR-96-17-T, The Prosecutor v. Ntagerura, Case No. ICTR-96-10A-T, The Prosecutor v. Elie Ndayambaje, Case No. ICTR-96-8-T, and The Prosecutor v. Pauline Nyiramasuhuko and Shalom Ntahobali, Case No. ICTR-97-21);

- (iii) the new Charges in the proposed amended Indictment accurately reflect the totality of the accused's alleged criminal conduct and allow the Prosecutor to present the full scope of available, relevant evidence, which establishes a *prima facie* case against the accused for other violations of the Statute;
- (iv) the proposed amendment will not prejudice or infringe on the rights of the accused to a fair trial, as provided by Articles 19(1) and 20(4) of the Statute. Most of the new Charges stem from the same general facts and circumstances presented in the initial Indictment. The only additional Charge that alleges facts not mentioned in the initial Indictment is the count of Crimes Against Humanity (Rape), pursuant to Article 3(g);
- (v) regarding the *ex parte* nature of the hearing of a motion to amend an Indictment, the Tribunal, through its two Trial Chambers, has interpreted Rule 50 and has resolved the issue in its 30 September 1998 decision in The Prosecutor v. Pauline Nyiramasuhuko and Shalom Ntahobali, Case No. ICTR 97-21-1 ;
- (vi) if Annex B is disclosed before the granting of leave to amend the Indictment and before an order for witness protection, there will be a risk to witnesses' safety;.
- (vii) the Prosecutor has already disclosed ample evidence to the Defence by filing with the Registry about 20 volumes of documentation which is similar to the material in Annex B. Furthermore, by virtue of the new Rule 50, the Defence has an opportunity to file any preliminary motions it may wish within 60 days, as stipulated in Rule 50. Thus there is no prejudice caused.

**The Defence argued *inter alia* that:**

- (i) leave to amend the Indictment may result in further delay in the commencement of the trial proceedings against the accused. The Defence Counsel objected to the numerous postponements of the hearing, which he attributed to the Prosecutor;



- (ii) the Prosecutor has not disclosed Annex B. This material, which provides the basis of the Prosecutor's *prima facie* case in support of the proposed amendment, should be made available to the accused. The nondisclosure of Annex B is equivalent to holding *ex parte* proceedings or procedure *ex gratia* since the Defence, without access to such evidence, is unable to accurately evaluate the basis of the motion to amend. Moreover, the Prosecutor's argument that disclosure of Annex B could place the witnesses at risk is unacceptable since there are various other means to assure witness protection;
- (iii) The Trial Chamber is obligated, pursuant to Article 18 (1) of the Statute, to determine whether *prima facie* evidence exists;

**AFTER HAVING DELIBERATED, THE TRIBUNAL STATES THE FOLLOWING:**

**A. With regard to the Defence Counsel's request for disclosure of Annex B**

- (i) The Trial Chamber notes that the Prosecutor submitted Annex B, which includes materials in support of the proposed new Charges in the Indictment. Annex B was not disclosed to the Defence.
- (ii) In its deliberation, the Trial Chamber has not considered documents submitted by the Prosecutor under Annex B. Instead, the Chamber has relied upon both the oral and written arguments presented by the Prosecutor and the Defence Counsel in this matter. The Trial Chamber does not accept the Defence Counsel's argument that nondisclosure of Annex B amounts to *ex parte* proceedings or procedure *ex gratia*. The Prosecutor's motions to amend the Indictments must be dealt with at an *inter partes* hearing, thus implementing the right of the accused to participate in the hearing and affording the Defence an opportunity to present arguments in regard to such amendments.
- (iii) The Trial Chamber notes that the Defence is entitled to these documents at an appropriate stage of the proceedings. Rule 66, which covers the rules concerning the disclosure of materials by the Prosecutor, is subject to Rule 53 and 69. Rule 69 provides for the protection of victims and witnesses. Thus, for the proper administration of justice, it is necessary to balance the protection of the victims and witnesses against the right of the accused to disclosure. The Trial Chamber finds that the appropriate time to disclose the documents in Annex B is after the Prosecutor has obtained an order for the protection of the witnesses.
- (iv) The Trial Chamber acknowledges Rule 66(A)(I), which provides that supporting materials shall be disclosed to the Defence within 30 days of the initial appearance of the accused with respect to the new Charges enumerated in the amended Indictment. In addition, Rule 50 (B) provides that if the amended indictment includes new Charges and if 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. Thus, the Trial Chamber finds the disclosure of materials supporting the proposed new Counts at this stage of the proceedings to be premature.

**B. With regard to causing undue delay in the proceedings against the accused**

- (i) The Trial Chamber holds that the amendment of the Indictment at this stage will not contravene the provisions of Article 20(4)(c) of the Statute regarding undue delay. In determining whether a delay in the criminal proceedings against the accused is "undue," it is essential to consider the length of the delay, the gravity, nature and complexity of the case, as well as any prejudice that the accused may suffer.
- (ii) The fact that the accused to date has been in custody for three years and five months does not determine the possibility of future delays that may arise following an amendment to the Indictment. Moreover, this case against the accused involves serious Charges. The Chamber finds merit in the Prosecution's argument that the proposed amendment will represent the totality of the alleged conduct of the accused and will allow the Prosecutor to present the case to its full extent.
- (iii) The Trial Chamber is not satisfied that the proposed amendment to the Indictment, if granted, may cause substantial prejudice to the accused, which cannot be cured by the provisions in the Rules. The accused has a right to approach the Trial Chamber to seek remedy within 60 days in terms of Rule 50(c) of the Rules, which makes reference to Rule 72 of the Rules. Further the accused may file preliminary motions pertaining to the Indictment. Therefore, there is no prejudice caused.

**C. With respect to the role of the Trial Chamber regarding amendment of the Indictment After the initial appearance, pursuant to Rule 50**

- (i) The Trial Chamber does not accept the Defence Counsel's argument that the Chamber must determine whether prima facie evidence exists against the accused for the new Charges. The Tribunal distinguishes between the stage of confirmation of the Indictment and the stage of amendment of the Indictment. At the confirmation stage, the Trial Chamber is required to establish, based on the supporting materials, that a prima facie case exists against the accused.
- (ii) However, when asked to decide a motion requesting leave to amend an Indictment against an accused who has already been indicted, pursuant to Rule 50, a Trial Chamber has no cause to inquire into a prima facie basis for the proposed amendments to the Indictment. At this stage of amendment to the Indictment, the Trial Chamber must ascertain whether the Prosecutor has established sufficient



grounds, both in fact and in law, to justify the proposed amendment. In the instant case, the Chamber finds that sufficient grounds exist both in law and fact to justify the amendment sought by the Prosecutor.

**FOR ALL THE ABOVE REASONS, THE TRIBUNAL**

**GRANTS** leave to the Prosecutor to amend the indictment by adding

- (i) the Count of CONSPIRACY TO COMMIT GENOCIDE, pursuant to Article 2(3)(b) of the Statute, which should include the specification of the names of the alleged conspirators, namely, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva and others;
- (ii) the Count of COMPLICITY IN GENOCIDE, pursuant to Article 2(3)(e) of the Statute;
- (iii) the Count of CRIMES AGAINST HUMANITY (RAPE), pursuant to Article 3(g) of the Statute;
- (iv) the Count of CRIMES AGAINST HUMANITY (MURDER)(Belgian soldiers), pursuant to Article 3(a) of the Statute;
- (v) the Count of SERIOUS VIOLATION OF ARTICLE 3 COMMON to the GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL II (OUTRAGES AGAINST PERSONAL DIGNITY), pursuant to Article 4(e) of the Statute;
- (vi) To all the above-mentioned new Counts shall be added individual criminal responsibility, pursuant to Articles 6(1) and 6(3) of the Statute, except for Crimes Against Humanity (Rape), pursuant to Article 3(g), and Serious Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II, pursuant to Article 4(e) (outrages against personal dignity) which has individual criminal responsibility pursuant to Article 6(3) only;
- (vii) The Trial Chamber also GRANTS the Prosecutor's request to amend the Indictment and to separate Count 2 of the existing Indictment to create four Counts as follows:
  - the Count of CRIMES AGAINST HUMANITY (MURDER), pursuant to Articles 3(a), and 6(3) of the Statute;
  - the Count of CRIMES AGAINST HUMANITY (EXTERMINATION), pursuant to Articles 3(b), and 6(3) of the Statute;
  - the Count of CRIMES AGAINST HUMANITY (PERSECUTION), pursuant to Articles 3(h), and 6(3) of the Statute;

---

**Bagosora - Leave to Amend the Indictment - 09/22/99**

- the Count of Crimes Against Humanity (OTHER INHUMANE ACTS) pursuant to Article 3(i), and Article 6(3) of the Statute;
- (viii) Since all existing Counts have only individual criminal responsibility attached to them, pursuant to Article 6(3) of the Statute, in addition, individual criminal responsibility, pursuant to Article 6(1) of the Statute shall be added to the existing Counts as stipulated below: Counts on GENOCIDE, pursuant to Article 2(3)(a), and Article 6(1); CRIMES AGAINST HUMANITY (MURDER), pursuant to Article 3(a) and Article 6(1); CRIMES AGAINST HUMANITY (EXTERMINATION), pursuant to Article 3(b) and Article 6(1); CRIMES AGAINST HUMANITY (PERSECUTION), pursuant to Article 3(h) and Article 6(1); CRIMES AGAINST HUMANITY (OTHER INHUMANE ACTS), pursuant to Article 3(i) and Article 6(1); and SERIOUS VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II, pursuant to Article 4(a) (against civilians) and Article 6(1) of the Statute, and SERIOUS VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II, pursuant to Article 4(a) (against Belgian Soldiers) and Article 6(1) of the Statute.

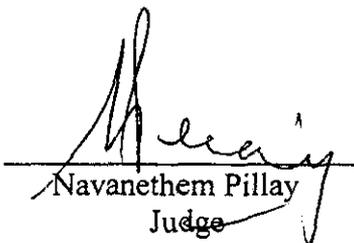
**DECIDES** that in regard to the new Charges, since the accused has already appeared before a Trial Chamber in accordance with Rule 62 of the Rules, a further appearance shall be held as soon as practicable to enable him to enter a plea on the new Charges, pursuant to Rule 50 (B) of the Rules;

**ORDERS** that the aforementioned Indictment, in French and in English, be filed with the Registry and served immediately on the Accused and his Counsel.

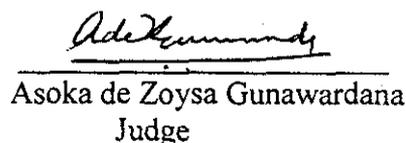
Signed on 22 September 1999



William H. Sekule  
Presiding Judge



Navanethem Pillay  
Judge



Asoka de Zoysa Gunawardana  
Judge



Bagosora - Leave to Amend the Indictment - 09/22/99

