



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER II

Before: Judge Arlette Ramaroson, Presiding
Judge William H. Sekule
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 8 December 2006

The PROSECUTOR v. Joseph NZABIRINDA

Case No. ICTR – 2001 – 77 – PT

**DECISION ON THE PROSECUTION'S UNDER SEAL AND CONFIDENTIAL MOTION
FOR LEAVE TO AMEND THE INDICTMENT**

Office of the Prosecutor

Mr Hassan B. Jallow
Mr Stephen Rapp
Mr William Egbe

Defence Counsel

Mr Francois Roux
Mr Jean Haguma
Mr Celestin Buhuru
Ms Charlotte Moreau

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

SITTING as Trial Chamber II, composed of Judge Arlette Ramaroson, Presiding, Judge William H. Sekule, and Judge Solomy Balungi Bossa (the “Chamber”);

BEING SEIZED of the Confidential “Prosecutor’s Request for Leave to Amend an Indictment Pursuant to Rules 72 [sic], 73, 50 and 51 of the Rules of Procedure and Evidence,” filed on 20 November 2006 (the “Motion”);

CONSIDERING the Statute of the Tribunal (the “Statute”), specifically Articles 19 and 20, and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 47 (E), (F), (G), 50, and 73;

NOW DECIDES the matter pursuant to Rule 73 (A), on the basis of the Parties’ written submissions.

INTRODUCTION

1. Judge Navanethem Pillay confirmed the Indictment against the Accused Joseph Nzabirinda (the “Accused”) on 13 December 2001 (the “Current Indictment”). In its Motion, the Prosecution seeks leave to amend the Current Indictment by withdrawing all four counts and substituting one new count. On 21 November 2006, the Defence indicated that it did not intend to respond to this Motion.

2. On 27 November 2006, the Chamber ordered the Prosecution to provide material in support of the new count of murder as a crime against humanity and to clarify certain aspects of the proposed Amended Indictment of 20 November 2006, within three days.¹ On 29 November 2006, the Prosecution requested an extension of time² which was granted until 4 December 2006.³ On that date, the Prosecution filed supporting material and a new proposed Amended Indictment (the “proposed Amended Indictment”).

3. The Defence indicated on 6 December 2006 that the Accused accepted the facts as set out in the proposed Amended Indictment, but not all elements of the supporting material filed together with that proposed Amended Indictment.⁴ On 7 December 2006, the Prosecution stated that it would not reply.⁵

SUBMISSIONS OF THE PARTIES

The Prosecution

4. The Prosecution requests the Chamber to grant leave for it to amend the Current Indictment by withdrawing the following four charges:

- i) Count 1 : genocide – Art. 2 (3) (a) and 6 (1);
- ii) Count 2 : complicity in genocide – Art. 2 (3) (a) and 6 (1);

¹ Confidential Scheduling Order of 27 November 2006.

² “The Prosecutor’s Request to Extend the Time Period in which to File an Amended Indictment Pursuant to Confidential Scheduling Order of 27 November 2006”.

³ See correspondence between Registry and Prosecution dated 29 November 2006.

⁴ *Réponse de la Défense concernant l’acte d’accusation amendé conformément à la décision du 27 novembre 2006 et les preuves pour fonder le nouveau chef unique d’assassinat*, filed on 6 December 2006.

⁵ See correspondence of the Prosecution to the Chamber of 7 December 2006.

- iii) Count 3 : extermination as a crime against humanity – Art. 3 (b) and 6 (1);
- iv) Count 4 : rape as a crime against humanity – Art. 3 (b) and 6 (1).⁶

5. The Prosecution also seeks to delete the factual allegations supporting these four counts and intends to lead no evidence in relation to these charges. It requests the Chamber to adjudge that such withdrawal is in conformity with the principle of *non bis in idem*.⁷

6. The Prosecution further seeks to retain the charge of Art. 3 (a), 6 (1).⁸

7. The Prosecution submits that Rule 50 of the Rules and the jurisprudence of the Tribunal allow for the amendment of an indictment after the initial appearance of the Accused.⁹ The Prosecution adds that its request is justified in law and will not result in any delay in the commencement of trial, as no new Defence investigation is necessary to prepare for it.¹⁰ Additionally, the factual basis of the murder charge presents a lighter burden than was the case under the Current Indictment.¹¹

8. The Prosecution also submits that the proposed amendment will allow for a more expeditious trial within a relatively shorter period of judicial time, and adds that as no trial date has been set, an amendment at this stage will not prejudice the Accused.¹²

The Defence

9. The Defence indicates that the Accused accepts the facts as set out in paras. 15, 19, and 20 of the proposed Amended Indictment. The Accused does not oppose the explicit mention made of the count of murder as a crime against humanity in the proposed amended Indictment.¹³

DELIBERATIONS

The Applicable Standard Under Rule 50

10. In considering the Motion, the Chamber notes the relevant provisions of Rule 50 and Rule 47 of the Rules, which indicate that an indictment may be amended after the initial appearance of the Accused, if the Prosecution discharges its burden of setting out the factual and legal justifications for such amendments.¹⁴

⁶ The Motion, para. 2.

⁷ *Réponse de la Défense concernant l'acte d'accusation amendé conformément à la décision du 27 novembre 2006 et les preuves pour fonder le nouveau chef unique d'assassinat*, filed on 6 December 2006, paras. 12-13.

⁸ The Motion, para. 3. The Chamber notes, however, that there is no charge of murder as a crime against humanity in the Current Indictment. This will be discussed below.

⁹ The Motion, para. 23.

¹⁰ The Motion, paras. 22, 24.

¹¹ The Motion, para. 24.

¹² The Motion, paras. 25-26.

¹³ *Réponse de la Défense concernant l'acte d'accusation amendé conformément à la décision du 27 novembre 2006 et les preuves pour fonder le nouveau chef unique d'assassinat*, filed on 6 December 2006, para. 11.

¹⁴ *Prosecutor v. Mika Muhimana*, Decision on Motion to Amend Indictment, 21 January 2004, para. 4; *Prosecutor v. Casimir Bizimungu et al.*, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003, para. 27.

11. The Chamber recalls that as stated by this Chamber in the *Renzaho* case,¹⁵ the fundamental question in relation to granting leave to amend an indictment is whether it will unfairly prejudice the accused.¹⁶

On the Request to Withdraw Four Counts and Delete All Factual Allegations Alleged in Support of the Withdrawn Counts

12. The Chamber notes that the Prosecution seeks leave to withdraw four counts and delete all factual allegations alleged in support of the withdrawn counts. Considering that the Defence does not oppose the Motion and that the withdrawal of four counts and the removal of factual allegations supporting them may result in a more expeditious trial that promotes judicial economy and the rights of the Accused, the Chamber grants this Prosecution request.

13. With regard to the Prosecution prayer that the Chamber declare the withdrawal of counts to be in accordance with the *non bis in idem* principle, the Chamber notes that this prayer is premature at this stage of the proceedings. The Chamber therefore denies this prayer.

On the Request to Add one Count and the Potential Prejudice to the Accused

14. The Chamber notes that “[n]ew charges do not prohibit a Chamber from granting the Prosecution leave to amend an indictment.”¹⁷ Rather, the most important consideration for the Chamber is the potential prejudice to the Accused.¹⁸

15. As no material had been filed in support of the new count, the Chamber pointed out to the Prosecution in its Scheduling Order that while the Prosecution proposed to “retain” the charge of murder as a crime against humanity, there was no such count in the Current Indictment. Since the charge of murder was a new count, the Chamber ordered that the Prosecution file supporting material, pursuant to Rules 50 (A) (i), 47 (F) (i) of the Rules.

16. The Chamber has noted the supporting material the Prosecution filed with regard to the new charge of murder as a crime against humanity, and the clarifications that have been made in the proposed Amended Indictment in response to the Chamber’s Scheduling Order. After carefully reviewing the proposed Amended Indictment and the supporting material, the Chamber considers that there is a *prima facie* case against the Accused for the charge of murder within the meaning of Rules 50 (A) (i), 47 (E) of the Rules. The Chamber is also of the view that the proposed Amended Indictment is sufficiently clear to allow the Accused to adequately prepare his Defence.

17. The Chamber observes that the Accused accepts the facts as set out in the proposed Amended Indictment.¹⁹ Further, the Defence does not oppose the Motion.²⁰

¹⁵ *Prosecutor v. Tharcisse Renzaho, Décision sur la Requête du Procureur demandant l’autorisation de déposer un acte d’accusation modifié*, 18 March 2005, para. 47, quoting *Prosecutor v. Enver Hadzhihasanović and Amir Kubura, Décision relative à la forme de l’acte d’accusation*, 17 September 2003, para. 35.

¹⁶ *Prosecutor v. Paul Bisengimana, Decision on the Prosecutor’s Request for Leave to Amend an Indictment*, 27 October 2005, para. 18.

¹⁷ *Prosecutor v. Tharcisse Muvunyi, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision on 23 February 2005 (AC)*, 12 May 2005, para. 38.

¹⁸ *Prosecutor v. Paul Bisengimana, Decision on the Prosecutor’s Request for Leave to Amend an Indictment*, 27 October 2005, para. 22.

18. The Chamber notes that no trial date has been set and that there is thus no prejudice to the Accused caused by delay because of an amendment to the Current Indictment.²¹ The Chamber therefore grants the Prosecution's request to substitute a new count, namely, murder as a crime against humanity.

19. Finally, the Chamber considers that a further appearance of the Accused should be scheduled as soon as practicable to enable him to enter a plea on the murder count, in accordance with Rule 50 (B) of the Rules. It therefore directs the Registry to undertake the necessary steps.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS leave to amend the Indictment by withdrawing all four counts and substituting a new count of murder pursuant to Art. 3 (a), 6 (I) of the Statute;

DENIES the prayer for an order that the withdrawal of counts is an application of the principle of *non bis in idem*;

ORDERS the Prosecution to file an Amended Indictment in both English and French with the Registry and the Chamber by Monday, 11 December 2006;

ORDERS that a further appearance of the Accused shall be held as soon as practicable and that the Registry make all necessary arrangements to that effect.

Arusha, 8 December 2006

Arlette Ramaroson
Presiding Judge

William H. Sekule
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

¹⁹ *Réponse de la Défense concernant l'acte d'accusation amendé conformément à la décision du 27 novembre 2006 et les preuves pour fonder le nouveau chef unique d'assassinat*, filed on 6 December 2006, para. 13.

²⁰ See correspondence of the Defence to the Chamber of 5 December 2006.

²¹ *Prosecutor v. Augustin Ndingiyimana et al.*, Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment, 26 March 2004, para. 53.