

UNITED NATIONS  NATIONS UNIES

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Case Number: ICTR-96-7-D

TRIAL CHAMBER I

**DECISION ON THE APPLICATION BY THE PROSECUTOR
FOR A FORMAL REQUEST FOR DEFERRAL**

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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

IN TRIAL CHAMBER I OF THE
INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

Case Number: ICTR-96-7-D

And

IN THE MATTER OF:
AN APPLICATION
BY THE PROSECUTOR
FOR A FORMAL REQUEST FOR
DEFERRAL BY THE KINGDOM
OF BELGIUM

AND

IN THE MATTER OF:
THÉONESTE BAGOSORA

DECISION OF THE TRIAL CHAMBER ON THE APPLICATION
BY THE PROSECUTOR FOR A FORMAL REQUEST FOR DEFERRAL
TO THE COMPETENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR
RWANDA IN THE MATTER OF THÉONESTE BAGOSORA
(PURSUANT TO RULES 9 AND 10 OF THE RULES OF PROCEDURE AND
EVIDENCE)

Considering the Request dated 15 May 1996 ("the Request"), filed by the Prosecutor of the International Criminal Tribunal for Rwanda ("the International Tribunal"),

Noting that Trial Chamber I has been designated by the President of the International Tribunal pursuant to Rule 9 of the Rules of Procedure and Evidence ("the Rules") of the International Tribunal to answer the Application,

Having heard the Prosecutor at a public sitting held in Arusha on 16 May 1996,

I- The Request

1. This is an application by the Prosecutor of the International Criminal Tribunal for Rwanda, made pursuant to article 8 (2) of the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for such acts or violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, and in accordance with Rule 9 (iii) of the Rules of Procedure and Evidence, seeking an order from the Trial Chamber in relation to investigations and criminal proceedings being conducted by the Kingdom of Belgium respecting serious violations of International Humanitarian Law committed in the Prefecture of Kibuye in the territory of Rwanda between April 1994 and July 1994 by Théoneste Bagosora, for a formal request to be made to the Kingdom of Belgium for its courts to defer to the competence of the Tribunal.
2. Pursuant to Rule 10 of the Rules, the Prosecutor has requested the Trial Chamber to issue a formal request to the Kingdom of Belgium in the following terms:
 - a) The courts of Belgium defer to the competence of the Tribunal in regard to all investigations and all criminal proceedings in respect of Théoneste Bagosora,
 - b) In regards to all such investigations and criminal proceedings of Théoneste Bagosora, the Tribunal requests that the Kingdom of Belgium forward to the Tribunal the results of said investigations, criminal proceedings, copies of the courts' records and judgements concerning Théoneste Bagosora, if any.
 - c) The reasons advanced by the Prosecutor in support of his proposal are:
 - 1) Investigations have been instituted against Théoneste Bagosora by the Kingdom of Belgium for murder and violations of the Geneva Conventions of 12 August 1949 and of Additional Protocols I and II of 8 June 1977, which were allegedly committed in the territory of Rwanda during 1994.
 - 2) The Prosecutor has been conducting investigations into crimes allegedly committed by Théoneste Bagosora which fall within the jurisdiction of the Tribunal.

- 3) The national investigations instituted by the Kingdom of Belgium closely relate to, or otherwise involve, significant factual and legal questions which have implications for investigations or prosecutions before the Tribunal.
3. In his request the Prosecutor has furnished facts which, in brief, are that as early as 8 April 1994, the Belgian military office opened an investigation against Colonel Théoneste Bagosora, Director of the Cabinet of the Ministry of Defense under the regime of former President Habyarimana. The Belgian civilian courts carried on the investigation, pursuant to an order from the Tribunal of First Instance in Brussels, dated 24 April 1995. The Examining Magistrate, Judge D. Vandermeersch, issued an international warrant of arrest for Colonel Théoneste Bagosora on 29 May 1995. On 9 March 1996, Colonel Théoneste Bagosora was apprehended by the Cameroonian authorities. To this day, he is still being held by the Cameroonian authorities, pending a decision on his extradition.
 4. The current investigations of the Kingdom of Belgium against Colonel Théoneste Bagosora involve allegations of murder and crimes of international law which constitute serious violations of the Geneva Conventions of 12 August 1949 and of additional Protocols I and II of 8 June 1977. Théoneste Bagosora is alleged, *inter alia*, to have been directly responsible for the massacres which followed the attack against President Habyarimana on 6 April 1994, and for the murder, on 7 April 1994, of 10 soldiers from the Belgian contingent of the United Nations Assistance Mission to Rwanda.
 5. The Prosecutor has submitted that in order to develop the ongoing investigations, he must collect further essential evidence and obtain full access to the statements, documents and other findings of the investigations conducted by the Kingdom of Belgium in relation to Théoneste Bagosora. In his investigations, the Prosecutor is collecting evidence in order to determine the merits of the allegations that the massacres were planned and led to the mass murder of a great many victims who were protected under international law. The investigations by the Prosecutor focus mainly on persons in position of authority, who were responsible for serious violations of international humanitarian law. To the extent that the investigations relate to persons in positions of authority, Colonel Théoneste Bagosora's alleged criminal responsibility seems most important. Indeed, Théoneste Bagosora, born in 1941 in Gicyie commune, was successively Second in Command of the *École Supérieure Militaire* in Kigali, Commander of the military camp in Kanombe and Director of the Cabinet of the Ministry of Defense, a position he continued to hold during the April 1994 events, though he had already retired in September 1993. A native of the same region as former President Habyarimana, he had become one of his close associates and participated in the Arusha accords as a military advisor. The aim of the Prosecutor's investigations is to assess Théoneste Bagosora's responsibility for the events and massacres which followed the attack on the presidential plane on 6 April. It is stated in the request that within six hours of the attack against the presidential plane on 6 April 1994, while the massacres were starting in Rwanda, Théoneste Bagosora allegedly assumed *de facto* control of the army and the country. The aim of the Prosecutor's investigations is therefore to assess Théoneste Bagosora's responsibility for said massacres.
 6. According to the Prosecutor, if the Kingdom of Belgium continues investigations which are similar to his investigations, a number of confusions and complications

might occur. It could turn out to be detrimental to investigations before the Tribunal, in particular in relation to testimonies. It is indeed to be feared that witnesses might become reluctant to appear before successive investigators and would no longer be willing to cooperate fully and effectively in the questioning. Testimonies might thus lose credibility as the number of questionings in different conditions increases, whereas some other witnesses might even be exposed to threats and see their lives put in danger.

II - Analysis of the merits of the request

7. Article 7 of the Statute of the International Tribunal extends its jurisdiction to the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

Article 8 of the Statute states that:

- "1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda."

Such primacy, however, can only be exercised if a formal request is addressed to the national court to defer to the competence of the International Tribunal. The Rules specify the modalities for exercising this right.

8. Rule 9 of the Rules states that:

"Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

(i) (...)

(ii) (...)

(iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,

(...).

9. In order to meet the conditions for a deferral, the Prosecutor therefore must demonstrate:

a) that national investigations or criminal proceedings have been instituted against said Théoneste Bagosora by the Kingdom of Belgium respecting crimes which come under the jurisdiction of the International Tribunal;

b) that investigations are being conducted by the Prosecutor on serious violations of international humanitarian law allegedly committed in the territory of Rwanda or in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in particular in respect of violations allegedly committed by Théoneste Bagosora;

c) that these investigations or criminal proceedings are closely related and otherwise involve significant factual or legal questions which may have implications for the Prosecutor's investigations or prosecutions.

10. The Prosecutor states that an investigation has been instituted by the Kingdom of Belgium in respect of acts allegedly committed by Théoneste Bagosora, which might also come within the jurisdiction of the Tribunal. This is supported by documents provided by the Prosecutor in support of his case, including: the order for an investigation against Théoneste Bagosora, under the charges of murder and serious violations of the Geneva Conventions of 12 August 1949 and of additional Protocols I and II of 8 June 1977, issued by the Prosecutor of the King of Belgium on 21 April 1995, the Order of 24 April 1995 issued by the President of the Tribunal of First Instance of Brussels nominating an Examining Magistrate to pursue the case, and the international warrant of arrest issued on 29 May 1995 by the belgian Examining Magistrate responsible for the case against Théoneste Bagosora.

11. The Prosecutor indicates that his Office is investigating the crimes allegedly committed by Théoneste Bagosora.

12. The Prosecutor considers, not without reason, that the continuation of parallel investigations by the belgian courts and the International Tribunal might be detrimental to the investigations, including the testimonies. As they are repeated, testimonies can indeed lose their credibility, not to mention the risk of causing the witnesses to be distrustful; moreover the witnesses might be traumatised and even threatened of bodily harm.

13. Moreover, the Prosecutor rightly observes that Article 9.2 of the Tribunal's Statute, concerning the principle of *non bis in idem*, sets limits to the subsequent prosecution by the Tribunal of persons who have been tried by a national court for acts constituting serious violations of international humanitarian law. And, in the case of Théoneste Bagosora, as belgian law does not contain any provision concerning genocide or crimes against humanity, it was only for murder and serious violations of the Geneva Conventions of 12 August 1949 and Additional Protocols I and II of 8 June 1977 that the belgian authorities were able to prosecute him, given the facts that he is charged with. Therefore, should the Prosecutor subsequently wish to prosecute Théoneste Bagosora for the same facts, characterising them as genocide and crimes against humanity, he would not be able to do so, if Théoneste Bagosora had already been tried by belgian jurisdictions.
14. Finally and in addition, according to the Prosecutor's request, the Kingdom of Belgium has always been cooperative and it is expected that the latter would not be reluctant to accede to this request. Moreover, at the hearing on 16 May 1996, the representative of the Prosecutor stated that, in a telephone conversation with the authorities of the belgian Ministry of Justice, the Government of the Kingdom of Belgium indicated its goodwill and its willingness to comply fully with the decisions of the International Tribunal, including in the case concerning Théoneste Bagosora. The representative of the Prosecutor has confirmed that to that end, a law was enacted on 22 March 1996 by the Kingdom of Belgium.
15. In the light of the foregoing, the Judges of the Trial Chamber are of the opinion that the request for deferral by the belgian judicial authorities in the case of Théoneste Bagosora complies the provisions of Rule 9 of the Rules of Procedure and Evidence, and that such request should be favourably received.

III - The Decision

THE TRIAL CHAMBER
BASED ON THE FOREGOING DETERMINES AS FOLLOWS:

Considering all the matters before it and addressed in the public hearing,

Taking into account the provisions of Article 8 (2) of the Statute, and

Considering the requirements contained in Rule 9(iii) of the Rules,

the Trial Chamber consisting of Judge Laïty Kama, as Presiding Judge, Judge Lennart Aspegren and Judge Navanethem Pillay, being seized of the Request made by the Prosecutor,

HEREBY GRANTS the said Request,

FORMALLY REQUESTS the Government of the Kingdom of Belgium to defer to the International Tribunal all investigations and criminal proceedings currently being conducted against Théoneste Bagosora,

INVITES the Government of the Kingdom of Belgium to take all necessary steps, both legislative and administrative, to comply with this formal request and to notify the Registrar of the International Tribunal of the steps taken to comply with this formal request,

REQUESTS that the Government of the Kingdom of Belgium forward to the International Tribunal the results of its investigations and criminal proceedings and a copy of the court's records and the judgement, if already delivered,

The Trial Chamber requests the Registrar of the International Tribunal to notify the Government of the Kingdom of Belgium of this Decision.

Dated this 17th day of May 1996
Arusha

Laïty Kama
President

Lennart Aspegren
Judge

Navanethem Pillay
Judge

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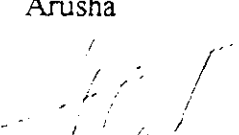
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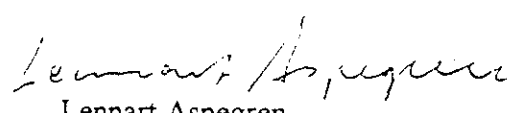
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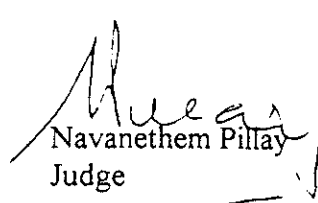
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Dated this 17th day of May 1996

Arusha


Laity Kama
President


Lennart Aspegren
Judge


Navanethem Pillay
Judge