International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Jai Ram Reddy
Joseph Asoka Nihal de Silva

Registrar: Adama Dieng

Date: 19 May 2006

THE PROSECUTOR
v.
Michel BAGARAGAZA

***Case No. ICTR-2005-86-R11*bis**

DECISION ON THE PROSECUTION MOTION FOR REFERRAL TO THE KINGDOM OF NORWAY
Rule 11* bis *of the Rules of Procedure and Evidence

Office of the Prosecutor:
Hassan Bubacar Jallow
Stephen J. Rapp

Defence Counsel:
Geert-Jan Alexander Knoops

I. INTRODUCTION

1. On 28 July 2005, Judge Sergei Alekseevich Egorov confirmed the Indictment against Michel Bagaragaza. The Indictment contains three counts: conspiracy to commit genocide, genocide and complicity in genocide in the alternative. The Indictment alleges among other facts that: through numerous meetings, Michel Bagaragaza planned with others the extermination of all members of the Tutsi population because of their association with the *Inkotanyi*; he made hate speeches to incite others to participate in

such a plan; he provided financial assistance to the *Interahamwe*, agreed to raise funds for the *Interahamwe*, and supported the idea of them receiving paramilitary training; he ordered the employees of the Rubaya tea factory to provide fuel to the *Interahamwe* and the Presidential Guard as they were on their way to attack and kill hundreds of Tutsi at Kesho hill; he ordered one of his drivers from Nyabihu tea factory to transport the *Interahamwe* to the Nyundo Cathedral for an attack on some Tutsi; he ordered another driver to transport the *Interahamwe* to Rubaya for another attack; one of his subordinates recruited military reservists as employees, provided military training, arms and ammunition to other employees of Rubaya tea factory, and both groups of employees later took part in the killing of Tutsi.

2. Before his surrender on 16 August 2005, the Accused made an agreement to cooperate with the Prosecution and provided an extensive statement on the 1994 events in Rwanda which incriminated both himself and other Rwandans.[1] He agreed with the Prosecution to be tried before a national court, which would be determined at a later stage. On 15 February 2006, the Prosecution submitted a request for referral of the Indictment to the Kingdom of Norway pursuant to Rule 11*bis* of the Rules of Procedure and Evidence. The Defence responded to the request, supporting it in principle and making further requests to the Chamber.[2]

3. On 21 February 2006, pursuant to Rule 11*bis*(A), the President designated Trial Chamber III composed of Judges Dennis C. M. Byron (presiding), Jai Ram Reddy and Joseph Asoka Nihal de Silva to consider the Motion.[3] On 23 March 2006, the Chamber ordered the Parties and invited the Kingdom of Norway to make further submissions while recalling the provisions of Rule 74 on *Amicus curiae*.[4] The Defence, the Prosecution and the Ministry of Foreign Affairs of the Kingdom of Norway filed further submissions on 30 March, 6 April and 10 April 2006, respectively. The Prosecution filed a response on 12 April 2006, while the Registrar made submissions pursuant to Rule 33(B) on 20 April 2006. The Defence submitted a response to this later filing and a clarification of its own further submissions on 24 April 2006. No one else made submissions or sought leave to make the same. Considering all of the submissions, the Chamber will now decide the Motion.

II. DELIBERATIONS

4. On 19 May 2006, the President forwarded to the Chamber a Note Verbale that he received from the Rwandan Ministry of Foreign Affairs.[5] The Republic of Rwanda wishes to be heard before determination of the application if so invited pursuant to Rule 74. In its Order of 23 March 2006, the Chamber noted Rule 74 which provides that any interested party may be granted leave to appear or make submissions on any issue specified by the Chamber. It is the view of the Chamber that the Republic of Rwanda should have seized the Chamber to that effect following its Order. The Chamber declines the request for submissions by the Republic of Rwanda at this stage and notes that the right to be heard alleged in the Note Verbale will not be affected.

5. Pursuant to Rule 11*bis*, three requirements have to be considered in deciding a motion for referral: 1) the jurisdiction, willingness and preparedness of the Referral State; 2) the ability of the Referral State to conduct a fair trial and; 3) the non-imposition of the death penalty in the Referral State. In their submissions, the Parties raised other conditions for the referral.[6]

A. Jurisdiction, Willingness and Preparedness of the Referral State

6. Pursuant to Rule 11*bis*(A), a confirmed Indictment may be referred to a State (i) in whose territory the crime was committed, or (ii) in which the accused was arrested, or (iii) which has jurisdiction and is willing and adequately prepared to accept the referral. In the present case, the Prosecution requests that the Indictment be referred to the Kingdom of Norway under the third provision of Rule 11*bis*(A).

7. In its Motion, the Prosecution excludes both the Republic of Rwanda and the United-Republic of Tanzania as possible Referral States. While the Republic of Rwanda is the State where the crimes were committed (Rule 11*bis*(A)(i)), the Prosecution recalls the provisions of Rule 11*bis*(C) containing two other requirements – the absence of the death penalty and the guarantee of a fair trial – and declares that none of those requirements can be met at the present time. The Prosecution further states that, even if those requirements are met, strong public policy reasons favour the involvement of other countries in the prosecution of the Accused because it would be a manner of educating people in other countries on the lessons to be learned from the Rwandan genocide and would promote the development of ideas to prevent future similar tragedies. As for the United-Republic of Tanzania, where the Accused was arrested (Rule 11*bis*(A)(ii)) following his surrender on 16 August 2005, the Prosecution submits that a referral would be inconsistent with Article XX(1) of the Headquarters Agreement.[7]

8. The Prosecution, however, argues that the Kingdom of Norway meets the third criterion, being a State which has jurisdiction and is willing and adequately prepared to accept such a case (Rule 11*bis*(A)(iii)). The Prosecution attaches to its Motion correspondence exchanged with the Norwegian authorities supporting their willingness to take over this case for trial.

9. From that exchange of correspondence and from the further submissions made by the Norwegian Ministry of Foreign Affairs, the Chamber has concluded that the Kingdom of Norway does not have any provision against genocide in its domestic criminal law. The Norwegian authorities inform the Chamber that, on the basis of the facts alleged in the Indictment, the Accused may be prosecuted as an accessory to homicide or negligent homicide, for which the maximum sentence is 21 years imprisonment. The Norwegian authorities also submit that prosecution of the case may occur under the principle of universal jurisdiction, which implies that the Indictment will be approved by the King in Council. This means that, even though there is no direct basis for jurisdiction in the Norwegian courts on the facts as pleaded in the Indictment, prosecution can still take place under certain circumstances as explained in the Norwegian submissions of 10 April 2006. Finally, the Kingdom of Norway submits that, if the case is referred, it

will exercise its discretion to determine whether prosecution is warranted in view of the evidence.

10. Relying on the *Stankovic* Referral Decision, the Prosecution argues that the criterion of "having jurisdiction" does not imply that the Referral State must have the same provisions in its domestic criminal law as the Statute of the Tribunal. The Prosecution submits that the maximum penalty as included in the Norwegian General Civil Penal Code is adequate, considering the fact that the Accused is 60 years old, that he has accepted responsibility for his actions as detailed in his statement, and that he has agreed to collaborate with domestic and international criminal proceedings regarding the 1994 events in Rwanda.

11. The Defence argues that nothing prevents the Kingdom of Norway from exercising universal jurisdiction in this case. The Defence relies on the Norwegian law which provides for universal jurisdiction over ordinary crimes under national law. The Defence also relies on international jurisprudence, notably the *Warrant of Arrest* Judgment.[8] The Prosecution, however, disagrees with the reference to the *Warrant of Arrest* case and argues that the only relevant legal basis for jurisdiction to be exercised by the Kingdom of Norway is Rule 11*bis* and that there is no need to meet the requirements identified by the Defence in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Warrant of Arrest* Judgment of 14 February 2002.

12. The Appeals Chamber has affirmed that, although the Statute of the ICTY does not contain an explicit legal basis for Rule 11*bis*, it is clear that alternative national jurisdictions have consistently been contemplated for the "transfer" of accused persons.[9] In determining whether the Kingdom of Norway has jurisdiction under Rule 11*bis*(A)(iii), this Chamber must be satisfied that an adequate legal framework exists which could criminalize the alleged behaviour of the Accused, and that if found guilty, an appropriate punishment could be applied based on the offences currently charged before the Tribunal.[10] The Chamber is of the view that in making such a determination, the Statute is the main legal instrument to be considered.

13. The Statute provides for a definition of jurisdiction in its Articles 1, 2, 3, 4, 5, and 7. The interpretation of Rule 11*bis*(A)(iii) should rely on that definition which requires *ratione materiae*, *ratione personae*, *ratione loci*, *ratione temporis*. When confirming an indictment, the Confirming Judge must find that each of those requirements is satisfied in order for the Tribunal to have jurisdiction. In this case, the universal jurisdiction referred to in the submissions of the Kingdom of Norway will permit the prosecution of the Accused (*ratione personae*) for his acts allegedly committed in Rwanda (*ratione loci*) in 1994 (*ratione temporis*). The only aspect of jurisdiction which would not be covered by Norwegian law is the *ratione materiae*. The submission that Norwegian criminal law does not provide for the crime of genocide directly affects the finding of jurisdiction *ratione materiae*, where the legal qualification of the facts alleged in the confirmed Indictment is made.[11]

14. The Chamber looks to the *Stankovic* case, where the Referral Bench refused to determine, as between two laws applicable to the crimes alleged in the Indictment, which one the Referral State should apply but nonetheless gave a detailed analysis of the substantive law which could be applied if the case was referred to Bosnia and Herzegovina.[12] The Referral Bench concluded that since the Criminal Code of the Socialist Republic of Bosnia and Herzegovina ("SRBiH CC") did not contain any provisions criminalizing either violations of laws or customs of war or crimes against humanity, the crimes charged in the relevant Indictment, it should not even be considered.[13] The Bench, however, was satisfied that other criminal instruments available to the Referral State contained provisions which criminalize participation similar, if not equal, to those in the Statute and the Rules of Procedure and Evidence of the ICTY. Therefore the Bench concluded that the prosecution of some or all of the alleged criminal acts of the Accused could occur in the Referral State.[14]

15. The Chamber finds the Prosecution's argument that the Chamber does not have to determine the substantive applicable law before the domestic court misleading. The Chamber must determine whether the Referral State has jurisdiction within the definition provided by the Statute. Where several applicable laws exist within the domestic law of the Referral State, the Chamber does not have the power to determine which one should be applied, if each of the laws provides for appropriate legal qualification in accordance with the Statute.

16. In this case, it is apparent that the Kingdom of Norway does not have jurisdiction (*ratione materiae*) over the crimes as charged in the confirmed Indictment. In addition, the Chamber recalls that the crimes alleged – genocide, conspiracy to commit genocide and complicity in genocide – are significantly different in term of their elements and their gravity from the crime of homicide, the basis upon which the Kingdom of Norway states that charges may be laid against the Accused under its domestic law. The Chamber notes that the crime of genocide is distinct in that it requires the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". This specific intent is not required for the crime of homicide under Norwegian criminal law. Therefore, in the Chamber's view, the *ratione materiae* jurisdiction, or subject matter jurisdiction, for the acts alleged in the confirmed Indictment does not exist under Norwegian law. Consequently, Michel Bagaragaza's alleged criminal acts cannot be given their full legal qualification under Norwegian criminal law, and the request for the referral to the Kingdom of Norway falls to be dismissed.

B. Other Requirements

17. Having found that the Kingdom of Norway does not have jurisdiction over the alleged crimes in the Indictment against Michel Bagaragaza, there is no need for the Chamber to consider the other requirements for referral as provided in Rule 11*bis* or in the Parties' submissions.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 19 May 2006, done in English.

Dennis C. M. Byron Presiding Judge	Jai Ram Reddy Judge	Joseph Asoka Nihal de Silva Judge

[Seal of the Tribunal]

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[1] The Agreement and the Statement were attached to the Referral Motion as confidential materials because their disclosure would constitute a security risk to the Accused and his family.

[2] The Defence response was filed on 20 February 2006.

[3] Designation of Trial Chamber Under Rule 11*bis* (President), 21 February 2006.

[4] Rule 74 reads as follows: "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber."

[5] See the President's Memorandum with the reference [ICTR/PRES/026.06] and the Note Verbale with the reference [247/09.01/CAB/MIN/06].

[6] If referral is granted, the Prosecution requests an order relating to the detention and hand-over of the Accused no later than 18 August 2006, and that the protective measures of the witnesses in this case remain in force until a comparable order can be obtained from the Norwegian authorities. Also in the case of referral, the Defence requests that the Chamber order the safe and permanent location of the Accused outside of the African continent following the completion of his trial and potential sentence served in the Kingdom of Norway, and that the Tribunal make available the continued assistance of his ICTR designated international legal counsel.

[7] Article XX(1) of The Headquarters Agreement (31 August 1995) provides that: "The host country shall not exercise its criminal jurisdiction over any person present in its territory, who is to be or has been transferred as a suspect or an accused to the premises of the Tribunal pursuant to a request or an order of the Tribunal, in respect of acts, omissions or convictions prior to their entry into the territory of the host country."

[8] International Court of Justice, *Case Concerning The Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), 14 February 2002.

[9] *Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), 1 September 2005, para 14.

[10] *Prosecutor v. Radovan Stankovic*, Decision on Referral of Case Under Rule 11*bis* – Partly Confidential and *Ex Parte* (Referral Bench), 17 May 2005, para. 32.

[11] The reference by the Parties and the Kingdom of Norway to the principle of universal jurisdiction applies only to the jurisdiction *ratione loci* or geographic jurisdiction, and not the jurisdiction *ratione materiae*. The Kingdom of Norway ratified the 1948 Genocide Convention on 22 July 1994. The assertion that Norwegian criminal law does not incriminate the crime of genocide means that the Convention has not been incorporated in its domestic law, making it impossible to prosecute anyone for its perpetration.

[12] *Prosecutor v. Radovan Stankovic*, Decision on Referral of Case Under Rule 11*bis* – Partly Confidential and *Ex Parte* (Referral Bench), 17 May 2005, para. 32.

[13] *Prosecutor v. Radovan Stankovic*, Decision on Referral of Case Under Rule 11*bis* – Partly Confidential and *Ex Parte* (Referral Bench), 17 May 2005, para. 38.

[14] *Prosecutor v. Radovan Stankovic*, Decision on Referral of Case Under Rule 11*bis* – Partly Confidential and *Ex Parte* (Referral Bench), 17 May 2005, para. 46.