International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

**IN THE APPEALS CHAMBER**

**Before:**
Judge Fausto Pocar, Presiding
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

**Registrar: Mr. Adama Dieng**

**Decision of: 30 August 2006**

**THE PROSECUTOR**
**v.**
**Michel BAGARAGAZA**

***Case No. ICTR-05-86-AR11*bis**

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# DECISION ON RULE 11*bis* APPEAL

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**Office of the Prosecutor:**
Mr. Hassan Bubacar Jallow
Mr. Bongani Majola
Mr. James Stewart
Mr. Stephen Rapp
Mr. George Mugwanaya
Mr. Alex Obote-Odora
Ms. Inneke Onsea

**Counsel for the Defence:**
Mr. Geert Jan Alexander Knoops

1. The Appeals Chamber 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 Genocide and Other Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an interlocutory appeal filed by the Prosecution,[1] ("Appeal") pursuant to Rule 11*bis*(H) of the Tribunal's Rules of Procedure and Evidence ("Rules"), against a decision of Trial Chamber III,[2] denying its request to refer the case of Michel Bagaragaza to the Kingdom of Norway ("Norway").

**BACKGROUND**

2. The indictment against Mr. Bagaragaza was confirmed on 28 July 2005 and charges three counts of genocide, conspiracy to commit genocide, and, in the alternative, complicity in genocide.[3] In its Appeal, the Prosecution identifies the facts underlying the charges as alleging that Mr. Bagaragaza provided fuel, transport, and financial support for *Interahamwe*.[4] The Prosecution further explains that it is not alleged that Mr. Bagaragaza directly participated in, or was present, during the killings.[5]

3. Before his surrender, Mr. Bagaragaza had agreed to cooperate with the Prosecution and knowingly and voluntarily provided it with a lengthy statement incriminating himself and others.[6] The Prosecution explains that Mr. Bagaragaza has accepted responsibility for his actions and has agreed to assist in the process of justice.[7] As part of the agreement between the Prosecution and Mr. Bagaragaza, the Prosecution undertook not to prosecute Mr. Bagaragaza before the Tribunal and to request his transfer to a national jurisdiction outside the continent of Africa. [8]

4. Mr. Bagaragaza voluntarily surrendered to the Tribunal's authorities in Arusha, Tanzania, on 16 August 2005, and pleaded not guilty to all of the charges.[9] He was then transferred immediately and extraordinarily to the Detention Unit of the International Tribunal for the Former Yugoslavia ("UNDU" and "ICTY", respectively) in The Hague for a period of one year.[10] The Prosecution requested these special measures due to the security risks Mr. Bagaragaza faced at the United Nations Detention Facilities ("UNDF") in Arusha as a result of his agreement to testify as a Prosecution witness and to assist in the investigations of other accused.[11]

5. On 15 February 2006, the Prosecution requested the referral of Mr. Bagaragaza's case to Norway for trial with the full support of the Accused.[12] The Tribunal's President referred the matter to Trial Chamber III for consideration, which in turn invited Norway to make submissions on its jurisdiction over the crimes charged against Mr. Bagaragaza.[13] After considering the submissions of the parties and of Norway, the Trial Chamber denied the Prosecution's request to refer Mr. Bagaragaza's case to the Norwegian authorities.[14] On appeal, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's decision and to refer Mr. Bagaragaza's case directly to Norway.[15]

6. In his response to the Appeal,[16] Mr. Bagaragaza supports generally the Prosecution's position.[17] Mr. Bagaragaza also raises additional points, which the Appeals Chamber will not address given that he has not appealed the Trial Chamber's decision.

7. In addition, in relation to this Appeal, Norway requests leave pursuant to Rule 74 to file an *Amicus Curiae* brief related to its ability to exercise of jurisdiction over Mr. Bagaragaza's case.[18] The Appeals Chamber, therefore, finds it desirable for the proper determination of the appeal to grant leave to Norway to file its brief.[19]

**DISCUSSION**

8. Rule 11*bis* allows a designated Trial Chamber to refer a case to a competent national jurisdiction for trial if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.[20] Rule 11*bis*(A) contemplates possible referral to either the state where the crimes occurred, the state of the accused's arrest, or any other state having jurisdiction and being willing and adequately prepared to accept such a case.

9. This case is the first involving a referral under Rule 11*bis* in this Tribunal. However, the ICTY Appeals Chamber has considered referrals to national jurisdictions in cases under a similar legal framework.[21] Such case law is largely applicable in the context of this Tribunal as well. In assessing whether a state is competent within the meaning of Rule 11*bis* to accept one of the Tribunal's cases, a designated Trial Chamber must consider whether it has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[22] The Trial Chamber's decision on whether to refer a case to a national jurisdiction is a discretionary one, and the Appeals Chamber will only intervene if the Trial Chamber's decision was based on a discernible error.[23] Accordingly, an appellant must show that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of its discretion, gave weight to irrelevant considerations, failed to give sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion; or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[24]

10. The Appeals Chamber notes that, pursuant to Rule 11*bis*(B), it is the designated Trial Chamber that decides, *proprio motu* or at the request of the Prosecutor, whether a referral of a case to national authorities is appropriate in the circumstances of each particular case. In these circumstances and without prejudice to the independence of the Prosecutor as a separate body of the Tribunal, the Appeals Chamber emphasizes that the Prosecution can hardly anticipate on the certainty of such transfer prior to applying for it.

11. In the concrete case before this Appeals Chamber, the Prosecution principally argues that the Trial Chamber erred in focusing on whether Norwegian criminal law had crimes with the same legal elements as defined in the Tribunal's Statute as opposed to

considering whether it adequately criminalized the underlying conduct.[25] In support of this position, the Prosecution argues that a plain meaning of Rule 11*bis* indicates that what is being transferred is a "case", not a crime.[26] The Prosecution notes that a "case" is a broad concept, referring to the criminal conduct or behavior of the accused, as opposed to legal qualification of the criminal conduct charged.[27] The Prosecution supports this reading by alluding to the plain language of the Rule, the need for flexibility, the limited number of States specifically criminalizing genocide and willing to exercise universal jurisdiction, as well as the principle of double criminality generally applicable in transnational criminal matters.[28] The Prosecution argues that Norway satisfies the conditions for transfer because it has jurisdiction over the criminal acts of the accused, provides for an adequate penalty structure in the context of this case, and is willing to cooperate.[29]

12. In its *Amicus Curiae* Brief, Norway submits that it has subject matter jurisdiction over Mr. Bagaragaza's alleged genocidal acts.[30] In this respect, it provides pertinent information on its legislative framework and the relationship between international law and Norwegian law.[31] Norway points to its consistent adherence to and support of international humanitarian law, in particular its early ratification of the 1948 Genocide Convention, its cooperation with the Tribunal and the ICTY, and its ratification of the Rome Statute on the International Criminal Court.[32]

13. Norway acknowledges that Norwegian criminal law does not explicitly contain the crime of genocide.[33] However, it submits that on ratifying the 1948 Genocide Convention, its Parliament considered it unnecessary to enact implementing legislation as all conduct prohibited under the convention was already criminal under existing provisions of its criminal law.[34] Norway explains that, according to its legal tradition, its laws are drafted in a general manner, but interpreted in light of both its international legal obligations as well as relevant legislative history.[35]

14. In this respect, Norwegian law has a general provision providing jurisdiction over certain crimes, including homicide and serious bodily injury, when committed abroad by a foreigner provided that the prosecution is authorized by the King.[36] Norway submits that its provisions against homicide and bodily harm would cover the underlying acts alleged in the Indictment against Mr. Bagaragaza.[37] In addition, Norway submits that Mr. Bagaragaza's alleged genocidal intent, as well as the number of its victims, could be taken into account under provisions allowing for the most severe penalties in aggravating circumstances, thus fully reflecting the gravity of the crimes charged.[38] Norway states that "if an indicted person accused of acts amounting to genocide is tried before Norwegian courts on the basis of an agreement between the requesting international court and the Norwegian government, the indictment in the case will fully reflect the aggravating circumstances under which the alleged offences have been carried out."[39] The Prosecution supports the position of Norway, and it further claims that the maximum possible penalty of 21 years' imprisonment under Norwegian law would provide adequate punishment in light of the specific charges against Mr. Bagaragaza and his willingness to cooperate.[40]

15. The Trial Chamber acknowledged that Norway could exercise jurisdiction over Mr. Bagaragaza's alleged criminal conduct committed in Rwanda in 1994.[41] However, the Trial Chamber reasoned that Norway lacked jurisdiction within the meaning of Rule 11*bis* because it could not charge the crime of genocide as defined in the Statute, noting that the crime of homicide did not require proof of genocidal intent, an essential element of the crime of genocide.[42]

16. Considering the submissions of the parties, the Appeals Chamber is not satisfied that the Prosecution has demonstrated that the Trial Chamber erred in denying its request to refer Mr. Bagaragaza's case to Norway for trial. As the *Amicus Curiae* Brief makes clear, Norway's jurisdiction over Mr. Bagaragaza's crimes would be exercised pursuant to legislative provisions dealing with the prosecution of ordinary crimes. The Appeals Chamber recalls that the basis of the Tribunal's authority to refer its cases to national jurisdictions flows from Article 8 of the Statute, as affirmed in Security Council resolutions.[43] Article 8 specifies that the Tribunal has concurrent jurisdiction with national authorities to prosecute "serious violations of international humanitarian law". In other words, this provision delimits the Tribunal's authority, allowing it only to refer cases where the state will charge and convict for those international crimes listed in its Statute.

17. The Appeals Chamber agrees with the Prosecution that the concept of a "case" is broader than any given charge in an indictment and that the authorities in the referral State need not necessarily proceed under their laws against each act or crime mentioned in the Indictment in the same manner that the Prosecution would before this Tribunal.[44] In addition, the Appeals Chamber appreciates fully that Norway's proposed prosecution of Mr. Bagaragaza, even under the general provisions of its criminal code, intends to take due account of and treat with due gravity the alleged genocidal nature of the acts underlying his present indictment. However, in the end, any acquittal or conviction and sentence would still only reflect conduct legally characterized as the "ordinary crime" of homicide. That the legal qualification matters for referrals under the Tribunal's Statute and Rules is reflected *inter alia* in Article 9 reflecting the Tribunal's principle of *non bis in idem*.[45] According to this statutory provision, the Tribunal may still try a person who has been tried before a national court for "acts constituting serious violations of international humanitarian law" if the acts for which he or she was tried were "categorized as an ordinary crime". Furthermore, the protected legal values are different. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives.

18. The Appeals Chamber recognizes that this decision may have a practical impact on Mr. Bagaragaza's situation who, according to the Prosecution's submissions to the President of the Tribunal, faces security risks if detained in the UNDF in Arusha. It also notes that it may limit future referrals to similar jurisdictions which could assist the Tribunal in the completion of its mandate. However, the Appeals Chamber cannot sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law. This is particularly so

when the accused has been charged with genocide, an offense that -- unlike murder -- is designed to protect a "national, ethnical, racial or religious group, as such".

19. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Prosecution's Appeal.

Done in English and French, the English version being authoritative.

Done this 30th day of August 2006,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding

**[Seal of the Tribunal]**

[1] Prosecutor's Notice of Appeal (Rule 11*bis* (H)), 1 June 2006 ("Notice of Appeal"); Prosecutor's Appeal Brief (Rule 11 *bis* (H)), 23 June 2006 ("Prosecution Appeal Brief"). In addition, the Prosecution files a separate motion seeking clarification on the lengths of written briefs in appeals under Rule 11*bis*. *See* Prosecutor's Motion for Clarification on the Length of a Brief on Appeal Pursuant to Rule 11 bis OR Permission to File a Brief of a Certain Length, 26 June 2006. Mr. Bagaragaza responded in Defence Response to Prosecutor's Motion for Clarification on the Length of a Brief on Appeal Pursuant to Rule 11 bis OR Permission to File a Brief of a Certain Length, 27 June 2006. The Appeals Chamber notes that the proper length for briefs on Appeal under Rule 11*bis*(H) is governed by paragraph C(2)(a) of the Practice Direction on the Length of Briefs and Motions on Appeal. This provision relates to interlocutory appeals where appeals lie as of right, as stated in Rule 11*bis*(H). The Appeals Chamber, however, grants the Prosecution leave to file its brief in excess of this requirement, as this is the first appeal under Rule 11*bis* and its request is unopposed.

[2] *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-2005-86-R11*bis*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, 19 May 2006 ("Impugned Decision").

[3] Impugned Decision, para. 1.

[4] Prosecution Appeal Brief, para. 46; Impugned Decision, para. 1.

[5] Prosecution Appeal Brief, para. 46.

[6] Impugned Decision, para. 2; Prosecution Appeal Brief, para. 2.

[7] Prosecution Appeal Brief, para. 65.

[8] Impugned Decision, para. 2. *See The Prosecutor v. Michel Bagaragaza,* Case No. ICTR-05-86-R11*bis*, Prosecutor's Request for Referral of the Indictment to Another Court, 15 February 2006 (Annex II: Agreement between the Prosecutor and Michel Bagaragaza (confidential), p. 2). The Appeals Chamber also

notes that this agreement provides for a possibility of renegotiation, in contemplation of prosecution before the Tribunal, in the event that a transfer to a national jurisdiction outside Africa is not possible. *Id.*, p. 4.

[9] Impugned Decision, para. 2.

[10] *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-I, Order for Special Detention Measures, 13 August 2005 (ICTR President); *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-I, Order for the Continued Detention of Michel Bagaragaza at the ICTY Detention Unit In The Hague, The Netherlands, 17 February 2006 ("Order for Continued Detention")(ICTR President).

[11] *See* Order for Continued Detention, pp. 1-2. The Appeals Chamber notes that Mr. Bagaragaza chose to testify openly for the Prosecution on 13 June 2006 in *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T.

[12] Impugned Decision, para. 2.

[13] *Id.* at para. 3.

[14] *Id.* at paras 3, 16.

[15] Prosecution Appeal Brief, paras 6, 67.

[16] Defence Response to Prosecutor's Appeal (Rule 11*bis* (H)), 28 June 2006 ("Bagaragaza Response").

[17] Bagaragaza Response, paras 11, 14.

[18] *See* Submission for Leave to File *Amicus Curiae* Brief of the Kingdom of Norway, 26 June 2006.

[19] *See Amicus Curiae* Brief Filed by the Kingdom of Norway, 26 June 2006 ("*Amicus Curiae* Brief").

[20] Rule 11*bis* provides in pertinent part:

(A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(…)

(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.

[21] *The Prosecutor v. Radovan Stankovi}*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11*bis* Referral, 1 September 2005 ("Stankovi} Appeal Decision"); *The Prosecutor v. Gojko Jankovi}*, Case No.

IT-96-23/2-AR11*bis*.2, Decision on Rule 11*bis* Referral, 15 November 2005 ("Jankovi} Appeal Decision"); *Prosecutor v. Mejakić et al.,* Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Appeal Against Decision on Referral under Rule 11*bis*, 7 April 2006, ("*Mejakić et al.* Appeal Decision"); *The Prosecutor v. Paško Ljubiči}*, Case No. IT-00-41-AR11*bis*.1, Decision on Appeal Against Decision on Referral Under Rule 11bis, 4 July 2006 ("*Ljubiči}* Appeal Decision").

[22] *See Mejakić et al.* Appeal Decision, para. 60.

[23] *Ljubiči}* Appeal Decision, para. 6.

[24] *Id.*

[25] Prosecution Appeal Brief, paras 3-4, 9.

[26] *Id.* at para. 12.

[27] *Id.*

[28] *Id.* at paras 11-36, 50-62.

[29] *Id.* at paras 41-49, 63-65.

[30] *Amicus Curiae* Brief, paras 4, 11, 45.

[31] *Id.* at para. 11.

[32] *Id.* at paras 14-26. In addition, Norway refers to several domestic prosecutions of war criminals for international crimes after World War II which were based primarily on its existing criminal code with full reflection of the international gravity of the crimes.

[33] *Id.* at para. 12.

[34] *Id.* at paras 18, 20. Norway notes that it is presently considering whether to revise its criminal code to codify a more specific catalogue of international crimes. *Id.* at para. 24.

[35] *Id.* at paras 12, 34-37.

[36] *Id.* at para. 45.

[37] *Id.* at paras 27-32, 39-41.

[38] *Id.* at paras 28-32, 40-44.

[39] *Id.* at paras 29, 45.

[40] Prosecution Appeal Brief, paras 63-65; *Amicus Curiae* Brief, para. 28 (referring to maximum penalty).

[41] Impugned Decision, para. 13.

[42] *Id.* at paras 13, 15, 16 ("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 (…) The Chamber must determine whether the Referral State has jurisdiction within the definition provided by the Statute (…) In this case, it is apparent that the Kingdom of Norway does not have jurisdiction (*ratione materiae*) over the crimes charged in the confirmed Indictment (…) Therefore, in the Chamber's view, the *ratione materiae* jurisdiction, or subject matter jurisdiction, for the acts alleged in the confirmed Indictment dos not exist under Norwegian law.")

[43] The ICTY Appeals Chamber made this observation on the basis of the equivalent Article of the ICTY Statute (Article 9) in *Stankovi}* Appeal Decision, paras 14-17. *See also Mejakić et al.* Appeal Decision, para. 16. The Security Council has endorsed the referral of cases by this Tribunal in S/Res/1503 (2003) and S/Res/1534 (2004).

[44] *See Mejakić et al.* Appeal Decision, para. 60.

[45] Article 9(2) states in pertinent part: "A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if: (a) The act for which he or she was tried was characterized as an ordinary crime; or (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted."