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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, Presiding
Sergei Alekseevich Egorov
Inés M. Weinberg de Roca

Registrar: Adama Dieng

Date: 13 April 2007

THE PROSECUTOR

v.

Michel BAGARAGAZA

Case No. ICTR-2005-86-11bis

JUDICIAL
OFFICE
SECRETARY
GENERAL

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DECISION ON PROSECUTOR'S REQUEST FOR REFERRAL OF THE
INDICTMENT TO THE KINGDOM OF THE NETHERLANDS

Rule 11 bis of the Rules of Procedure and Evidence

Office of the Prosecutor:

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INTRODUCTION

1. The original Indictment against Michel Bagaragaza was confirmed by Judge Sergei Alekseevich Egorov on 28 July 2005 and charged Mr. Bagaragaza with conspiracy to commit genocide, genocide, and alternatively, complicity in genocide ("genocide counts").¹ Mr. Bagaragaza made an initial appearance before the Tribunal on 16 August 2005, where he pleaded not guilty to all counts.

2. On 15 February 2006, the Prosecution requested referral of the original Indictment against Mr. Bagaragaza to the Kingdom of Norway pursuant to Rule 11 bis of the Rules of Procedure and Evidence. Trial Chamber III, composed of Judges Dennis C. M. Byron, presiding, Jai Ram Reddy and Joseph Asoka Nihal de Silva, denied the request on the ground that Norway did not have jurisdiction over the crimes alleged in the original Indictment against the Accused.² The Appeals Chamber upheld this decision.³

3. On 1 November 2006, the Prosecution sought leave to amend the Indictment, principally by adding a fourth count against Mr. Bagaragaza pursuant to Article 4 of the Tribunal's Statute for killing and causing violence to health and physical or mental well-being as a serious violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977 ("war crimes"). The Defence did not object to the addition of the charge, as long as the war crimes count was charged only in the alternative to the genocide counts. The Prosecution amended its request accordingly. Trial Chamber III, composed of Judges Khalida Rachid Khan, presiding, Inés M. Weinberg de Roca and Dennis C. M. Byron, granted the Prosecution request on 30 November 2006.⁴ Mr. Bagaragaza made a further appearance on 1 December 2006, where he pleaded not guilty to the added war crimes count.

4. The Amended Indictment alleges, *inter alia*, that: Mr. Bagaragaza planned with others the extermination of all members of the Tutsi population because of their association with the RPF; 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 Rubaya for another attack; one of his subordinates recruited military reservists as employees, and provided military training, arms and ammunition to other employees of the Rubaya tea factory.

5. On 12 December 2006, the Prosecution submitted a Request for referral of the Amended Indictment to the Kingdom of the Netherlands.⁵ Pursuant to Rule 11 bis (A) of the Rules of Procedure and Evidence, the President of the Tribunal designated Trial Chamber III

¹ Indictment, filed 28 July 2005; "Decision on Confirmation of an Indictment against Michel Bagaragaza", 28 July 2005.

² Decision on the Prosecution Motion for Referral to the Kingdom of Norway (TC), 19 May 2006.

³ Decision on Rule 11 bis Appeal (AC), 30 August 2006.

⁴ Decision on the Prosecutor's Application for Leave to Amend the Indictment, 30 November 2006.

⁵ "Prosecutor's Request for Referral of the Indictment to Another Court", 12 December 2006 (the "Prosecution Request").

composed of Judges Khalida Rachid Khan, presiding, Sergei Alekseevich Egorov and Inés M. Weinberg de Roca, to decide the Prosecution Request.⁶ On 18 December 2006, the Defence responded to the Prosecution Request.⁷ The Prosecution replied on 21 December 2006.⁸

6. On 31 January 2007 the Chamber invited the parties and the Kingdom of the Netherlands to provide it with further submissions regarding certain specified issues.⁹ On 14 February 2007, the Prosecution filed a submission informing the Chamber that it was relying on the submissions contained in its original request for referral.¹⁰ On 15 February 2007, the Netherlands filed its submissions in response to the Chamber's request.¹¹ On 21 February 2007, the Prosecution¹² and the Defence¹³ filed submissions in response to the Netherlands. On 2 March 2007, the Netherlands filed an Application to provide additional information as *Amicus Curiae* pursuant to Rule 74.¹⁴

7. The submissions of the Defence and of the Netherlands in response to the 31 January 2007 Order raised certain issues regarding the jurisdiction of the Netherlands to prosecute genocide allegedly committed by a non-national outside the territory of the Netherlands in 1994. The Chamber issued a Second Order for further submissions on 6 March 2007, in which it also granted the Netherlands' Application to provide additional information as *Amicus Curiae*.¹⁵ The Netherlands filed further submissions and documents in response to the Second Order on 21 March 2007.¹⁶ The Defence filed responsive submissions to the Netherlands on 26 March 2007.¹⁷

⁶ Designation of Trial Chamber under Rule 11 bis (President), 13 December 2006.

⁷ "Defence Response to 'Prosecutor's Request for Referral of the Indictment to Another Court'", 18 December 2006.

⁸ "Prosecutor's Reply to the Defence Response to the Prosecutor's Request for Referral of the Indictment to Another Court", 21 December 2006.

⁹ Order for Further Submissions Concerning the Request for Referral of the Indictment to the Kingdom of the Netherlands, 31 January 2007 (the "31 January 2007 Order").

¹⁰ "Prosecutor's Further Submissions in Response to Trial Chamber's Order for Further Submissions concerning the Request for Referral of the Indictment to the Kingdom of the Netherlands", 14 February 2007.

¹¹ "Submission by the Kingdom of the Netherlands pursuant to the Order of the Trial Chamber for Further Submissions Concerning the Request for Referral of the Indictment to the Kingdom of the Netherlands on 31 January 2007", 15 February 2007 (the "Submissions of the Kingdom of the Netherlands of 15 February 2007").

¹² "Prosecutor's Responsive Submissions Pursuant to Trial Chamber's Order for Further Submissions concerning the Request for Referral of the Indictment to the Kingdom of the Netherlands", 21 February 2007.

¹³ "Defence Response to Submission by the Kingdom of the Netherlands Pursuant to the Order of the Trial Chamber for Further Submissions Concerning the Request for Referral of the Indictment to the Kingdom of the Netherlands of 31 January 2007", 21 February 2007.

¹⁴ "Application to Pile an *Amicus Curiae* Brief According to Rule 74 of the Rules of Procedure and Evidence on behalf of the Kingdom of the Netherlands and proposed *Amicus Curiae* brief", 2 March 2007 (the "Netherlands' Application").

¹⁵ Second Order for Further Submissions Concerning the Request for Referral of the Indictment to the Kingdom of the Netherlands, 6 March 2007 (the "Second Order").

¹⁶ "Submission by the Kingdom of the Netherlands pursuant to the Second Order of the Trial Chamber for Further Submissions Concerning the Request for Referral of the Indictment to the Kingdom of the Netherlands of 6 March 2007", 21 March 2007 (the "Submissions of the Kingdom of the Netherlands Pursuant to the Second Order").

¹⁷ "Defence Response to Submission by the Kingdom of the Netherlands Pursuant to the Second Order of the Trial Chamber for Further Submissions Concerning the Request for Referral of the Indictment to the Kingdom of the Netherlands of 6 March 2007", 26 March 2007. In its Second Order for Further Submissions dated 6



DISCUSSION

8. Pursuant to Rule 11 bis, there are three requirements that must be met before a Chamber can order referral: (i) the referral State must have jurisdiction, and be willing and adequately prepared to accept the case; (ii) the Chamber must be satisfied that the Accused will receive a fair trial in the courts of the referral State; and (iii) the Chamber must be satisfied that the death penalty will not be imposed or carried out. The parties have raised other issues in their submissions.¹⁸

A. Jurisdiction, Willingness and Preparedness of the Netherlands

9. 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.¹⁹ Mr. Bagaragaza's alleged crimes were not committed in the Netherlands, and he was not arrested in the Netherlands, so Mr. Bagaragaza's case may only be referred if the Netherlands has jurisdiction and is willing and adequately prepared to accept the case.

10. The Note Verbale of the Netherlands, dated 11 December 2006, which is annexed to the Prosecutor's original Request for referral, clearly expresses the willingness of the Netherlands to accept referral and prosecute Mr. Bagaragaza.²⁰

11. According to the Appeals Chamber, "[i]n 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".²¹ The Tribunal only has authority to refer cases where the State "will charge and convict [or acquit] only for those international crimes listed in its Statute" as opposed to "ordinary crimes" such as homicide.²²

12. The Netherlands submits that it has jurisdiction to try Mr. Bagaragaza on the charges in the Amended Indictment. The relevant Dutch legislation includes the War Crimes Act of 1952 and the Genocide Convention Implementation Act of 1964.²³

March 2007, the Trial Chamber did not invite the parties to respond to the Netherlands' submissions. Nonetheless, the Chamber will consider the Defence submissions in the interests of justice.

¹⁸ If referral is granted the Defence requests that the Chamber implement a condition that the Accused be safely and permanently relocated outside the African continent after the completion of his trial, and, if convicted, his sentence. As the Prosecution properly notes, this is not a matter which can be dealt with in the context of an order entered under Rule 11 bis. The Prosecution has also raised the issue of witness protection. This issues will be dealt with below.

¹⁹ Rule 11 bis (A) of the Rules of Procedure and Evidence.

²⁰ Letter from the Embassy of the Kingdom of the Netherlands, 11 December 2006 (attached as Exhibit 3 to the Prosecution Request).

²¹ Prosecutor v. Bagaragaza, Case No. ICTR-05-86-AR11bis, Decision on Rule 11 bis Appeal (AC), 30 August 2006, para. 9.

²² Id., para. 16.

²³ In 2003, the Netherlands adopted the International Crimes Act, which supersedes both the Genocide Convention Implementation Act of 1964 and the War Crimes Act of 1952. Nonetheless, the Netherlands submits

(i) *War Crimes*

13. The Dutch War Crimes Act of 1952 codifies into Dutch criminal law serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II of 1977. The Netherlands explains that it has "(secondary) universal jurisdiction" to try individuals for war crimes committed outside the Netherlands in 1994 when the accused is either (i) a Dutch national; or (ii) is present on Dutch territory. Mr. Bagaragaza is presently detained in the Netherlands as the result of an agreement between the ICTR and the government of the Netherlands. In this agreement, the Netherlands waives its right to exercise criminal jurisdiction over Mr. Bagaragaza. If Mr. Bagaragaza's case is referred to Dutch authorities then this waiver will be voided, and the Netherlands will have jurisdiction to prosecute Mr. Bagaragaza's alleged criminal conduct as a result of his presence in the Netherlands. According to their submissions, the Netherlands has previously prosecuted, convicted, and sentenced three non-nationals for war crimes and torture on the basis of their presence on Dutch territory.²⁴

14. Under Dutch criminal law, the penalties for conviction for war crimes range from a fine to life imprisonment depending on the severity of the crimes. Where the criminal act, *inter alia*, results in death or serious bodily harm, involves violence with "combined forces", or is "the expression of a policy of systematical (sic) terror or unlawful action against the entire population or against a specific group of that population", then a "term of life imprisonment or a term of twenty years or a fine of the fifth category shall be imposed".²⁵

15. On the basis of these submissions, the Chamber finds that the Netherlands has an adequate legal framework criminalizing the alleged war crimes of Mr. Bagaragaza and providing for an adequate penalty structure.

(ii) *Genocide*

16. The Dutch Genocide Convention Implementation Act of 1964 incorporates the 1948 Genocide Convention into Dutch criminal law. The Netherlands submits that under the *Genocide Implementation Act and the Dutch Criminal Code*, the Netherlands has jurisdiction to try individuals for violations committed outside the Netherlands in 1994 if (i) the accused is a Dutch national; or (ii) the case is transferred to the Netherlands from another jurisdiction in conformity with Article 4a of the Dutch Criminal Code.

17. Mr. Bagaragaza is not a national of the Netherlands, so jurisdiction over the genocide allegations will depend on the application of Article 4a of the Dutch Criminal Code to the referral. Article 4a states that "the Dutch criminal law is applicable to anyone against whom

that the International Crimes Act of 2003 cannot be applied retroactively to provide jurisdiction over the acts of the Accused.

²⁴ Submissions of the Kingdom of the Netherlands of 15 February 2007, para. 4.4 (citing Rechtbank Rotterdam (District Court Rotterdam), 7 April 1994 (number 10:000050-03); Gerechtshof's Gravenhage (Court of Appeal of The Hague), 29 January 2007 (Rolnummer: 22-006131-05); Gerechtshof's Gravenhage (Court of Appeals of The Hague), 29 January 2007 (Rolnummer 22-006132-05)).

²⁵ See *id.*, para. 4.1.

prosecution has been transferred from a foreign State to the Netherlands on the basis of a treaty from which the power of the Netherlands to prosecute follows".

(a) *Transfer from a Foreign State*

18. The Netherlands submits that a United Nations international criminal tribunal with primary jurisdiction such as this Tribunal qualifies as a "foreign state" for the purposes of Article 4a of the Dutch Criminal Code. The Defence questions whether the ICTR could be considered a "foreign state" for the purposes of Article 4a, submitting that the legislative history of Article 4a does not support such a view.

19. The Netherlands acknowledges that the issue of accepting transfer of criminal cases from international tribunals is a recent phenomenon and is therefore unsettled in its law. Nonetheless, it emphasizes the importance placed on cooperation with the ICTR and ICTY under Dutch law, and argues that "an interpretation which would exclude the ICTR from the definition of foreign state would run contrary to past and current views on the importance of cooperation with the ICTR".²⁶ As support for its position, it points to Article 2, paragraph 2 of the ICTR Implementation Law which incorporates by reference Articles 3 to 18 of the ICTY Implementation Law.²⁷ Article 9 of the ICTY Implementation Law states, "Requests by the Tribunal for any form whatsoever of legal assistance addressed to the police or any judicial body, named or otherwise, are to be complied with wherever possible".²⁸ The Netherlands submits that it "believes it important to help to extend international case law on grave breaches of the most fundamental norms of international humanitarian law, such as genocide, crimes against humanity and war crimes".²⁹

20. The Defence responds that under Dutch criminal law the Criminal Code is to be interpreted strictly, especially where a more expansive interpretation would be prejudicial to the accused. The Defence also argues that the European Court of Human Rights, interpreting Article 7 of the European Convention (which provides for the principle of legality) has ruled that "the criminal law must not be extensively construed to an accused's detriment, for instance by analogy".³⁰ The Defence acknowledges that "there will always be a need for adaptation to changing circumstances" and that "Article 7 cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence

²⁶ Submissions of the Kingdom of the Netherlands Pursuant to the Second Order, para. 15.

²⁷ Act of 18 December 1997 Containing Provisions Relating to the Establishment of the International 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 Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994.

²⁸ Act of 21 April 1994 Containing Provisions Relating to the Establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991.

²⁹ Memorandum from the Minister of Justice and the Minister of Foreign Affairs in response to the report of the house of Representatives' Permanent Committee on Justice concerning the Act of 18 December 1997 ("Nota naar aanleiding van het verslag").

³⁰ *C.R. v. United Kingdom*, ECHR, 22 November 1995, NJ 1997, 1.

and could reasonably be foreseen",³¹ but argues that interpreting Article 4a of the Dutch Criminal Code to include the ICTR as a "foreign state" could not reasonably be foreseen by the accused. Thus, the Defence suggests that the phrase "transferred from a foreign State" in Article 4a must be applied only to States, and not international tribunals.

21. Moreover, the Defence suggests that the ICTR and ICTY Implementation Laws relied upon by the Netherlands have to do with cooperation and the provision of legal assistance to the ICTR, and are not relevant to the issue of jurisdiction.

22. Although the issue remains unsettled in Dutch Law and is ultimately an issue for a competent court of the Netherlands, the Chamber is satisfied that the Tribunal will be considered a "foreign state" for the purposes of Article 4a of the Dutch Criminal Code. In addition to the reasons offered by the Netherlands, the Chamber notes that it is an established principle of international law that both the United Nations and States are "subjects of international law and capable of possessing international rights and duties".³²

(b) *Treaty from which the Power to Prosecute Follows*

23. The Netherlands submits that the 1948 Genocide Convention is a treaty from which the power of the Netherlands to prosecute follows for the purposes of Article 4a of the Dutch Criminal Code. Despite the plain language of Article VI of the Genocide Convention limiting trials to a "competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction", the Netherlands suggests that the 1948 Genocide Convention must be read as interpreted by the International Court of Justice ("ICJ") in 1996, in which it ruled that the "rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*" and "that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention".³³

24. Alternatively, the Netherlands notes (i) the ICTR was established by the Security Council acting pursuant to Chapter VII of the Charter of the United Nations, (ii) the Netherlands is a party to the United Nations Charter, and (iii) that other legal instruments, specifically Security Council Resolution 955 (1994) and Article 28 of the ICTR Statute oblige State parties to the United Nations Charter to cooperate with the Tribunal, and submits that this combination of factors renders the United Nations Charter a treaty from which the power to prosecute follows as required by Article 4a of the Dutch Criminal Code.

³¹ *Id.*

³² *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, (1949) ICJ Rep. 174 at 179; see also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, (1980) ICJ Rep. 73 at 89-90; *Cf. Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-1, Decision on Appropriate Remedy, 31 January 2007, para. 48 (finding the ICTR to be a special subsidiary organ of the United Nations Security Council possessing the international duty to respect generally accepted international human rights norms).

³³ *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgement, 11 July 1996, para. 31 ("11 July 1996 Judgement").

25. Annexed to the Netherlands' 21 March 2007 submissions is the decision of a Dutch investigative judge at the District Court of The Hague declining to institute a preliminary judicial investigation into genocide allegations against a Rwandan asylum-seeker because the investigative judge determined that the Netherlands did not have jurisdiction over genocide. In reaching this conclusion, the investigative judge, applying Article 4a of the Dutch Criminal Code, rejected the Public Prosecutor's assertion that the Genocide Convention of 1948 was a treaty from which the power of the Netherlands to prosecute follows because Article VI of the Genocide Convention limited prosecution to competent tribunals of the State in the territory in which the act was committed, or by an international tribunal.³⁴ The investigative judge did not refer to the 11 July 1996 ICJ Judgement rejecting any territorial limitation on every States' *erga omnes* obligation to prevent and punish genocide; it is not clear whether the Public Prosecutor raised this argument to the investigative judge.

26. The investigative judge did, however, accept the Public Prosecutor's argument that the United Nations Charter, when read in conjunction with the Statute of the ICTR, and Security Council Resolution 1503 (2003), was a treaty from which the power of the Netherlands to prosecute followed for the purposes of Article 4a of the Dutch Criminal Code. The Public Prosecutor reasoned that Resolution 1503 (2003) authorized transfers, and, read in conjunction with the legal cooperation provisions of the ICTR Statute as applicable to all State Parties to the United Nations Charter, provided the power to prosecute. Although the investigative judge accepted this reasoning, she declined to order a preliminary judicial investigation of genocide because the individual accused in question was not explicitly mentioned in the most recent Completion Strategy of the ICTR, and, as such, she concluded that the transfer of his case was not part of the Completion Strategy. The Prosecution Service has appealed the investigative judge's decision.

27. The Netherlands submits that because Mr. Bagaragaza's case was included in the most recent Completion Strategy, the reasoning of the Public Prosecutor's submissions and the investigative judge's decision described above provides another basis for considering the United Nations Charter, when read in conjunction with other legal instruments, specifically the ICTR Statute and Security Council Resolution 1503 (2003), a treaty from which the power of the Netherlands to prosecute genocide follows for the purposes of Article 4a of the Dutch Criminal Code.

28. The Chamber is not the competent authority to make a binding determination as to which treaty referred to above is a treaty from which the power to prosecute genocide follows for the purposes of Article 4a of the Dutch Criminal Code. That is a matter for a court of the Netherlands. The Chamber must, however, be satisfied that such a treaty exists. The Chamber is satisfied that the Genocide Convention of 1948, as interpreted by the ICJ in its 11 July 1996 Judgement referenced above, and the United Nations Charter read in conjunction with the ICTR Statute and relevant Security Council Resolutions are treaties from which the power to prosecute genocide follows for the purposes of Article 4a of the Dutch Criminal Code.

³⁴ Decision of the Investigative Judge in Criminal Matters of the District Court of The Hague on the Order of the Public Prosecutor of 5 January 2007 to Institute a Preliminary Judicial Investigation Against the Suspect. 11 January 2007.



29. Turning to punishment, Article 1 of the Genocide Convention Implementation Act states that "these crimes ... shall be punished with a term of life imprisonment or a term of twenty years or a fine of the fifth category".

30. The Chamber is satisfied that an adequate legal framework criminalizing the alleged conduct of the Accused and providing for punishment exists. Moreover, the Chamber notes that Rules 11 *bis* (D)(iv) and 11 *bis* (F) serve as a potential remedy in the event that a competent court of the Netherlands determines that it does not have jurisdiction to prosecute Mr. Bagaragaza for genocide.³⁵ Rule 11 *bis* (D)(iv) provides for monitoring of referred proceedings, and Rule 11 *bis* (F) empowers the Chamber to revoke referral at the request of the Prosecutor.

B. Non-Imposition of the Death Penalty

31. According to Rule 11 *bis* (C), the Chamber must satisfy itself that "the death penalty will not be imposed or carried out". The Constitution of the Netherlands prohibits the death penalty. Moreover, the Netherlands has ratified the 13th Protocol to the European Convention on Human Rights on the abolishment of the death penalty in all circumstances. The Chamber is therefore satisfied that the death penalty will not be imposed or carried out if the case is referred to the Netherlands.

C. Fair Trial

32. Rule 11 *bis* (C) also obligates the Chamber to satisfy itself that "the accused will receive a fair trial in the courts of the State concerned". The Netherlands submits that international treaties are an important source of Dutch law on criminal procedures. Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR)³⁶ and

³⁵ *Cf.*, *Prosecutor v. Stankovic*, Case No. IT-96-23/2-PT, Decision on Referral of Case under Rule 11 *bis* (TC), 17 May 2005, para. 93.

³⁶ Article 6 of the ECHR, entitled Right to a Fair Trial, states:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defence;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

Article 14 of the International Covenant on Civil and Political Rights (ICCPR)³⁷ are the guiding principles for Dutch criminal procedure concerning the rights of the accused. The relevant provisions in the ECHR and the ICCPR are substantially similar to the rights enshrined in Article 20 of the ICTR Statute.³⁸

to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

³⁷ Article 14 of the ICCPR states:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

³⁸ Article 20 of the ICTR Statute, entitled Rights of the Accused, states:

1. All persons shall be equal before the International Tribunal for Rwanda.
2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

33. In its original submission, the Prosecution noted that "the taking of witness testimony in Dutch trials is done in a non-public hearing before an examining magistrate in the presence of counsel for both parties. The public trial, therefore, does not involve live witness testimony, but rather the presentation of the evidence taken by the examining magistrate and oral submissions on the facts and law by the parties".³⁹ The Defence expressed concern that witness statements might be admitted without the effective cross-examination of the witness by the Defence, and requested that the Chamber stipulate to the Netherlands that witness statements should not be admitted in evidence without the right to cross-examination.

34. The Netherlands submits that, under Dutch criminal law, the accused has the right to be present during the trial and the right to investigate the evidence put forward by the Public Prosecution Service and hand over evidence on his own behalf. The Netherlands also submits that, in line with Article 6 of the ECHR, the accused and the prosecution have the right to cross-examine witnesses.

35. The Chamber is satisfied that the Netherlands will honour Mr. Bagaragaza's right to cross-examine witnesses, and that he will receive a fair trial in a competent court of the Netherlands.

D. Witness Protection

36. Currently the only protective measures in place arise from the decision confirming the original indictment on 28 July 2005, which provided that the witness statements included in the supporting materials could be provided to the Defence in redacted form pending further orders from the Chamber. The Prosecution indicates that it does not foresee the need for further protective measures given its knowledge of the evidence in this case.

37. The Netherlands submits that, generally, witnesses' identities are disclosed in furtherance of the fair trial rights of the accused, but that there are provisions in Dutch law allowing for non-disclosure of the identity of a victim or witness, as well as other protections, in exceptional circumstances. When necessary, these protections may be ordered by the investigating judge.

- a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
- b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
- c. To be tried without undue delay;
- d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
- e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
- f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
- g. Not to be compelled to testify against himself or herself or to confess guilt.

³⁹ Prosecutor's Request, para. 26.

38. The Chamber is satisfied that, should they be deemed necessary, adequate witness protection measures can be provided by Dutch courts, and concludes that no matters of witness protection have been identified which preclude referral of this case.

E. Monitoring of the Proceedings

39. Pursuant to Rule 11 *bis* (D)(iv), "the Prosecutor may send observers to monitor the proceedings in the courts of the State concerned". The Appeals Chamber construed the identical ICTY provision as authorizing an ICTY Referral Bench to order the Prosecution to send observers if the Referral Bench finds that this is necessary to safeguard the fair trial rights of the accused.⁴⁰ In its submissions, the Prosecution has indicated that it is involved in negotiations with the International Commission of Jurists to provide an independent monitor. The Netherlands notes that its trials are generally public, but requests that if observers are sent, the Dutch authorities be informed in advance so that the president of the relevant court could be informed.

⁴⁰ *Stankovic*, Decision on Rule 11 *Bis* Referral (AC), paras. 50-55.



FOR THE ABOVE REASONS, THE CHAMBER

ORDERS the case of *Prosecutor v. Michel Bagaragaza* to be referred to the authorities of the Kingdom of the Netherlands, so that those authorities should forthwith refer the case to the appropriate court for trial within the Kingdom of the Netherlands;

ORDERS the Registrar to transfer custody of Mr. Bagaragaza, within 30 days of the date of this Decision, to the Kingdom of the Netherlands in accordance with the procedures applicable to transfer of convicted persons to States for service of sentence;

ORDERS the Prosecutor to hand over to the Prosecutor of the Kingdom of the Netherlands, as soon as possible and no later than 30 days from the date of this Decision, the material supporting the Indictment against Mr. Bagaragaza, and all other appropriate evidentiary material;

ORDERS the Prosecutor to inform the authorities of the Kingdom of the Netherlands in advance of sending a monitor from its own office or the International Commission of Jurists or any other organization for the purpose of monitoring and reporting on the proceedings of this case before a court of the Kingdom of the Netherlands;

ORDERS the Prosecutor to file an initial report to the Chamber on the progress made by the Prosecutor of the Kingdom of the Netherlands in the prosecution of Mr. Bagaragaza six weeks after transfer of the evidentiary material and, thereafter, every three months, including information on the issue of jurisdiction over the genocide counts and the course of the proceedings of a court of the Kingdom of the Netherlands after commencement of trial, such reports to comprise or include the reports of the International Commission of Jurists or any other organization monitoring or reporting on the proceedings.

Arusha, 13 April 2007, done in English.

Khalida Raehid Khan
Presiding Judge

Sergei Alekseevich Egorov
Judge

Inés M. Weinberg de Roca
Judge

[Seal of the Tribunal]





TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input checked="" type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon	
	<input type="checkbox"/> Chief, CMS J.-P. Fométe	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS K. K. A. Afande	<input type="checkbox"/> Appeals Chamber / The Hague R. Burriss	
From:	<input checked="" type="checkbox"/> Chamber III David Kinnecome (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other. (names)	
Case Name:	The Prosecutor vs. Michel Bagaragaza		Case Number: ICTR-2005-86-11bis		
Dates:	Transmitted: 13 April 2007		Document's date: 13 April 2007		
No. of Pages:	13	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Title of Document:	DECISION ON PROSECUTOR'S REQUEST FOR REFERRAL OF THE INDICTMENT TO THE KINGDOM OF THE NETHERLANDS				
Classification Level:	TRIM Document Type:				
<input type="checkbox"/> Strictly Confidential / Under Seal	<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence	<input type="checkbox"/> Submission from non-parties	
<input type="checkbox"/> Confidential	<input type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal	<input type="checkbox"/> Submission from parties	
<input checked="" type="checkbox"/> Public	<input type="checkbox"/> Disclosure	<input checked="" type="checkbox"/> Order	<input type="checkbox"/> Appeal Book	<input type="checkbox"/> Accused particulars	
	<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities		

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

Filing Party hereby submits only the original, and will **not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

English

French

Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version for filing, as follows:**

Original	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

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Filing Party will be submitting the translated version(s) in due course in the following language(s):

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<p><input type="checkbox"/> The OTP is over-seeing translation. The document is submitted for translation to:</p> <p><input type="checkbox"/> The Language Services Section of the ICTR / Arusha.</p> <p><input type="checkbox"/> The Language Services Section of the ICTR / The Hague.</p> <p><input type="checkbox"/> An accredited service for translation; see details below:</p> <p>Name of contact person: Name of service: Address: E-mail / Tel. / Fax:</p>	<p><input type="checkbox"/> DEFENCE is over-seeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS):</p> <p>Name of contact person: Name of service: Address: E-mail / Tel. / Fax:</p>
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III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	COMMENTS	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: