

ICTR-05-86-11bis  
17-8-2007  
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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER DESIGNATED UNDER RULE 11 *BIS*

Before Judges: Dennis Byron, presiding  
Erik Mese  
Lee Gacuga Muthoga

Registrar: Adama Dieng

Date: 17 August 2007

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THE PROSECUTOR

v.

Michel BAGARAGAZA

Case No. ICTR-2005-86-11bis

DECISION ON PROSECUTOR'S EXTREMELY URGENT MOTION FOR  
REVOCATION OF THE REFERRAL TO THE KINGDOM OF THE  
NETHERLANDS PURSUANT TO RULE 11 *BIS* (F) & (G)

Office of the Prosecutor:

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Defence Counsel:

Geert-Jan Alexander Knoops

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
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NAME: CONSTANT HOMER JONGU  
SIGNATURE: [Signature] DATE: 17-08-2007

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## INTRODUCTION

1. On 13 April 2007, Trial Chamber III, composed of Judges Khalida Rachid Khan, presiding, Sergei Aleksceovich Egorov and Inés M. Weinberg de Roca granted the Prosecution's request to refer the Indictment of Michel Bagaragaza to the authorities of the Kingdom of the Netherlands pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence.<sup>1</sup> In connection with the referral, the Trial Chamber ordered the Prosecution to file an initial report to the Chamber on the progress made by the Dutch Prosecutor in the prosecution of Mr. Bagaragaza six weeks after transfer of the evidentiary material, and, thereafter, every three months. The Chamber specifically requested that the reports include information on the issue of jurisdiction over the genocide counts in Mr. Bagaragaza's Indictment.

2. On 7 May 2007, Mr. Bagaragaza was transferred from the custody of the United Nations Detention Unit ("UNDU") in The Hague to the custody of the Dutch authorities. The Prosecution completed the transfer of Mr. Bagaragaza's case file on 11 May 2007.

3. The Prosecution filed its initial report on the progress made by the Netherlands in prosecuting Mr. Bagaragaza on 22 June 2007,<sup>2</sup> and a confidential supplementary report on 2 August 2007.<sup>3</sup> In the Supplementary Report, the Prosecution informed the Chamber of a decision of the District Court of The Hague in the case of Joseph Mpambara, dated 24 July 2007 (the "Mpambara Decision"), in which the court found, *inter alia*, that it did not have jurisdiction to try Mr. Mpambara for genocide. The Dutch Prosecutor had intended to assert the same jurisdictional bases to try Mr. Bagaragaza for genocide as it had for Mr. Mpambara. As a result of this decision, the Dutch Prosecutor suspended proceedings against Mr. Bagaragaza.

4. After consultation with the Dutch authorities, the Prosecution filed an extremely urgent motion requesting that the Trial Chamber revoke the order of referral to the Netherlands pursuant to Rule 11 *bis*.<sup>4</sup> In separate letters annexed to the Motion, representatives of the Dutch Ministry of Justice and National Public Prosecutor's Office noted that Mr. Bagaragaza's period of provisional detention will end on 20 August 2007, after which the Dutch authorities would be forced to free him or attempt to prosecute him despite the lack of jurisdiction.<sup>5</sup> The Defence filed a Response on 13 August 2007,<sup>6</sup> and

<sup>1</sup> Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 April 2007 (the "Referral Decision"). The Chamber will hereinafter refer to the Kingdom of the Netherlands as the "Netherlands" and the authorities thereof as the "Dutch authorities".

<sup>2</sup> "The Prosecutor's Initial Report on the Progress Made by the Kingdom of the Netherlands in the Prosecution of Mr. Bagaragaza", filed 22 June 2007 (the "Initial Report").

<sup>3</sup> "Prosecutor's Supplementary Report on the Progress Made by the Kingdom of the Netherlands in the Prosecution of Mr. Bagaragaza", filed 2 August 2007 (the "Supplementary Report").

<sup>4</sup> "Prosecutor's Extremely Urgent Motion for Revocation of the Referral Order Pursuant to Rule 11 *Bis* (F) & (G)", filed 8 August 2007 (the "Motion").

<sup>5</sup> Motion, Annex 1: Letter of Dutch Minister of Justice, p. 2, dated 8 August 2007; Annex 2: Letter of Dutch Prosecutor, Gert Oldekamp, p. 4, dated 8 August 2007.

<sup>6</sup> "Public Defence Response to Prosecutor's Extremely Urgent Motion for Revocation of the Referral Order Pursuant to Rule 11 *bis* (F) & (G)", filed 13 August 2007 (the "Defence Response").

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the Prosecution replied to that Response on 14 August 2007.<sup>7</sup> Pursuant to Rule 33 (B), the Registrar filed two separate submissions on 16 August 2007.<sup>8</sup>

5. Given the extremely urgent nature of this Motion and noting that the Judges who issued the Referral Decision were away from the seat of the Tribunal in Arusha, Judge Dennis Byron, the President of the Tribunal, composed a bench to hear the Motion. This bench is comprised of Judges Dennis Byron, presiding, Erik Meso, and Lee Gacuiqa Muthoga.<sup>9</sup>

#### DISCUSSION

6. The Prosecution requests that the Chamber revoke the order referring the case of Mr. Bagaragaza to the Netherlands pursuant to Rule 11 *bis* (F), which reads:

At any time after an order has been issued pursuant to this Rule, and before the accused is found guilty or acquitted by a court in the State concerned, the Trial Chamber may, at the request of the Prosecutor and upon having given to the authorities of the State concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.<sup>10</sup>

7. Rule 11 *bis* (F) obliges the Chamber to give "the authorities of the State concerned the opportunity to be heard." In its Motion, the Prosecution notes that the Dutch Minister of Justice does not wish to be heard.<sup>11</sup> This follows from the letter from the Ministry annexed to the Motion.<sup>12</sup> Moreover, both the letter from the Dutch Ministry of Justice and from the National Public Prosecutor's Office explain that, as a result of the *Mpanbara* Decision, the Netherlands cannot prosecute Mr. Bagaragaza for genocide and that their jurisdiction to prosecute him for war crimes is also uncertain. As a result, the Dutch authorities support the Prosecution's request that the referral order be revoked. The Chamber is satisfied that the letters annexed to the Motion, are sufficient in relation to Rule 11 *bis* (F).

8. Rule 11 *bis* (F) does not provide the Accused with the right to be heard on the issue of revocation of a referral order. This is in contrast to Rule 11 *bis* (B), which requires that "where the accused is in the custody of the Tribunal", he must be given the

<sup>7</sup> "Prosecutor's Reply to 'Public Defence Response to Prosecutor's Extremely Urgent Motion for Revocation of the Referral Order Pursuant to Rule 11 bis (F) & (G)'", filed 14 August 2007 (the "Prosecution Reply").

<sup>8</sup> "Registrar's Submissions Under Rule 33 (B) of the Rules on Prosecutor's Extremely Urgent Motion and Public Defence Response for Revocation of the Referral Order Pursuant to Rule 11 bis (F) and (G)", filed 16 August 2007 (the "Registrar's First Submissions"); "Registrar's Further Submissions Under Rule 33 (B) of the Rules on Prosecutor's Extremely Urgent Motion and Public Defence Response for Revocation of the Referral Order Pursuant to Rule 11 bis (F) and (G) (Security Issues)", filed 16 August 2007 (the "Registrar's Security Submissions").

<sup>9</sup> Designation of Trial Chamber under Rule 11 *bis* (President), filed 14 August 2007.

<sup>10</sup> Rule 11 *bis* (F) of the Rules of Procedure and Evidence.

<sup>11</sup> Motion, para. 6.

<sup>12</sup> Motion, Annex E: Letter of Dutch Minister of Justice, p. 3, in which the Ministry official states, "Pursuant to Rule 11 bis (F) of the Rules of Procedure and Evidence, I hereby declare that the authorities of the Netherlands have no wish to make use of the opportunity to be heard in this matter."

*SBY*

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opportunity to be heard on the issue of referral to the authorities of a State. The Chamber nevertheless has considered the Defence submissions in the interests of justice.

9. The Defence argues that Mr. Bagaragaza cannot receive a fair trial if the referral order is revoked because the ICTR cannot possibly allocate time, space and resources for his trial in Arusha. Therefore, the Defence suggests that his case will likely be transferred to Rwanda. The Chamber considers this argument as premature and speculative. If the Prosecution ultimately seeks to refer Mr. Bagaragaza's case to the Rwandan authorities or to the authorities of any other State, he will have a full opportunity to be heard at that time.

10. The Defence submissions refer to an agreement between Mr. Bagaragaza and the Prosecution which provides, *inter alia*, that (i) he will not be prosecuted before the Tribunal; and (ii) a promise to renegotiate where no national court outside the African continent is prepared to prosecute him.<sup>13</sup> The Defence alleges that, in seeking revocation of the referral order and the transfer of Mr. Bagaragaza to Arusha, the Prosecution has violated these provisions of the Agreement. The Chamber finds that the Defence Submissions regarding the alleged violation of his agreement with the Prosecution are unavailing. As the Prosecution acknowledges, this agreement does not bind the Trial Chamber.<sup>14</sup>

11. The Referral Decision was predicated on that Trial Chamber's belief, based on the submissions of the Prosecutor and the Dutch authorities, that the Dutch courts were competent to prosecute Mr. Bagaragaza on the genocide and war crimes charges contained in the Indictment.<sup>15</sup> The *Mpambara* Decision and the submissions from the Dutch Ministry of Justice and the National Public Prosecutor's Office suggest that Dutch courts do not have jurisdiction to prosecute Mr. Bagaragaza for genocide and that jurisdiction over the war crimes counts in the Indictment is uncertain. Jurisdiction to prosecute the acts of an accused as international crimes is a minimum requirement for the referral of a case pursuant to Rule 11 bis.<sup>16</sup> The Netherlands no longer appears to have such jurisdiction.

12. For these reasons, the Chamber grants the Prosecution's request for revocation of the referral order of 13 April 2007, and makes a formal request for deferral pursuant to Rule 11 bis (F).

13. The Prosecution requests, pursuant to Rule 11 bis (G), that, if the Chamber grants its request to revoke the referral order of 13 April 2007, the Chamber (i) issue a warrant for the arrest of Mr. Bagaragaza to the Dutch authorities; and (ii) formally request that the Dutch authorities transfer him into Tribunal custody in Arusha, Tanzania.

<sup>13</sup> Defence Response, paras. 21-30.

<sup>14</sup> Prosecution Reply, para. 10. The Chamber notes that it appears premature to form a view on the alleged violations of the agreement.

<sup>15</sup> Referral Decision, paras. 15, 30.

<sup>16</sup> *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-AR11bis, Decision on Rule 11 bis Appeal (AC), 30 August 2006, paras. 9, 16-17.

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14. The Defence submits that, given the statements Mr. Bagaragaza has made to Prosecution investigators, the security situation in Africa is too dangerous for him to be prosecuted or even detained by the Tribunal. The Defence therefore argues that, if it revokes the referral order, the Chamber should make arrangements for Mr. Bagaragaza's detention and trial outside the African continent. The Defence suggests the possibility that the Trial Chamber order that arrangements be made with the Dutch authorities to detain him at the UNDF in The Hague and for the Tribunal to prosecute him there.<sup>17</sup>

15. The Registry submits that it is aware of the specific circumstances of Mr. Bagaragaza, and that it is prepared to address his security concerns if the Chamber revokes the referral order and orders that he be transferred to the seat of the Tribunal in Arusha. Specifically, the Registry submits (i) that the Commander of the United Nations Detention Facilities ("UNDF") will detain Mr. Bagaragaza without any contact with the other accused; (ii) that the Security and Safety Section of the Tribunal ("SSS"), in conjunction with the Tanzanian Authorities, the UNDF Commander, and the relevant departments of the Tribunal, is making arrangements to ensure his security; and (iii) that the Registrar has instructed the SSS to provide a comprehensive report detailing the security threats faced by Mr. Bagaragaza and the specific security measures that will be put in place to address them.<sup>18</sup>

16. Given the assurances provided by the Registry that the relevant bodies of the Tribunal and the UNDF will be able to adequately provide for the security of Mr. Bagaragaza, the Chamber grants the Prosecution request that it (i) issue a warrant for the arrest of the Accused, and (ii) formally request the transfer of Mr. Bagaragaza to the custody of the Tribunal.<sup>19</sup> Consequently, the Chamber need not consider the Defence suggestion that it order that the Accused be prosecuted by the Tribunal on Dutch soil.

#### **FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the Motion;

**REVOKES** the Order of 13 April 2007 referring the case of *Prosecutor v. Michel Bagaragaza* to the authorities of the Kingdom of the Netherlands;

**REQUESTS** that the authorities of the Kingdom of the Netherlands defer to the competence of the Tribunal regarding the case of *Prosecutor v. Michel Bagaragaza* in accordance with Article 28 of the Statute and Rule 10 of the Rules of Procedure and Evidence;

<sup>17</sup> Defence Response, paras. 33-35, 37. See also, Rule 4 of the Rules, which provides that "[a] Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice."


<sup>18</sup> Registrar's Security Submissions, paras. 3-4.

<sup>19</sup> Warrant of Arrest and Order for Transfer and Detention, filed 17 August 2007.

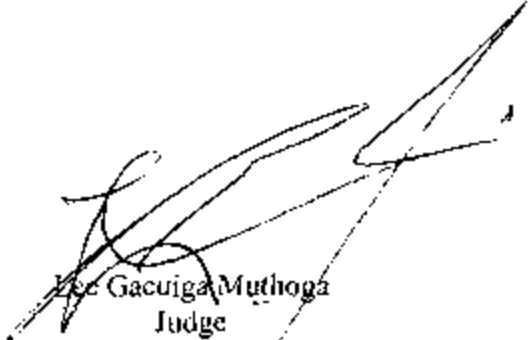
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**REQUESTS** that the authorities of the Kingdom of the Netherlands comply with the Warrant of Arrest and Order for Transfer and Detention issued by the Tribunal on 17 August 2007.

Arusha, 17 August 2007.

  
Dennis Byron  
Presiding Judge

  
Erik Mose  
Judge

  
Jee Gacuiga Muthoga  
Judge

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