

COMMENTARY

The Failed Referral of Michel Bagaragaza from the ICTR to the Netherlands

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On 31 August 2009, the trial of Michel Bagaragaza before the International Criminal Tribunal for Rwanda (ICTR) finally began. That may come as a surprise, as the case of Bagaragaza, who is charged with (complicity in) committing genocide in his capacity as the head of the entity that controlled the Rwandan tea industry, was one of the ICTR cases slated for referral to States under Rule 11*bis* of the ICTR Rules of Procedure and Evidence. As is well-known, Rule 11*bis* was adopted by the ICTR Judges in the framework of the ICTR Completion Strategy. It is basically a ‘reverse complementarity’ rule that allows referrals to any State which has jurisdiction over a particular case (including universal jurisdiction – potentially *any* State therefore) which is able and willing to take up the case.¹ How the case of Bagaragaza eventually ended up with the ICTR again is the subject of this brief note.

After Bagaragaza had voluntarily surrendered to the ICTR in 2005, the ICTR Prosecutor sought to have his case transferred to Norway pursuant to Rule 11*bis*. Since Norway’s criminal code did not specifically prohibit genocide (with which the ICTR had charged Bagaragaza), and the accused would thus have to be tried under common law (for murder), the Tribunal refused to honor the Prosecutor’s request for deferral in a remarkable decision.² The Prosecutor did not relent in his efforts to have Bagaragaza’s case transferred, however. After he managed to win over the Dutch Government to accept a transfer, he again requested the Tribunal to have Bagaragaza’s case transferred. This time round the Prosecutor

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¹ The complementarity principle as enshrined in Article 17 of the Rome Statute of the ICC implies that the jurisdiction of the ICC is *complementary* to the jurisdiction of States, who are *primarily* responsible for the investigation and prosecution of crimes falling within the jurisdiction of the ICC. In contrast, the *régime* of the *ad hoc* tribunals, including the ICTR, is such that the tribunals’ jurisdiction is primary, with the jurisdiction of States, at least since the adoption of Rule 11*bis*, *complementing* the tribunals’ efforts to put perpetrators on trial in the framework of their Completion Strategy. See also M.M. El Zeidy, *From Primacy to Complementarity and Backwards: (Re-)Visiting Rule 11bis of the ad hoc Tribunals*, 57 *International and Comparative Quarterly* 403 (2008).

² 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*, 19 May 2006.

was successful: by decision of 13 April 2007 the Tribunal accepted to transfer the case to the Netherlands (where Bagaragaza had been held anyway since 2005, for security reasons, and where he had sought asylum as early as 1998).³

Nevertheless, after the referral, Dutch courts failed to find a jurisdictional ground in Dutch law in order to put Bagaragaza on trial in the Netherlands. After the District Court of The Hague held on 24 July 2007 that it did not have jurisdiction over the acts committed by Bagaragaza, the ICTR swiftly revoked its transfer order on 17 August 2007. The District Court's decision was upheld by the Court of Appeals, although on other grounds, on 17 December 2007. Bagaragaza himself was subsequently transferred, on 20 May 2008, to the ICTR, where, on 24 June 2008, he pleaded guilty with the Prosecutor (the guilty plea is confidential). After Bagaragaza's transfer to Arusha, the Dutch Supreme Court (*Hoge Raad*) eventually upheld the Court of Appeals's decision on 21 October 2008.⁴

The vicissitudes of Bagaragaza before Dutch courts closely resemble those of J.M., another ICTR indictee whose case was referred to the Netherlands. The present author has discussed the Hague District Court's decision in the J.M. case, rendered on 24 July 2007, *i.e.*, on the same day as its decision in Bagaragaza, at length in the pages of the *Hague Justice Journal*.⁵ The legal reasoning in *Bagaragaza* was the same as in *J.M.*, so that reference can be made to the previous comments as far as the analysis of the District Court is concerned. Neither the Appeals Court's decision nor the Supreme Court's decision have been discussed in these pages, however, so an analysis of those decisions is appropriate here. The emphasis will lie on the Appeals Court's decision, as this was upheld by the Supreme Court without much additional legal reasoning.⁶

It is recalled that, at first instance, the District Court found that Dutch courts could not entertain 'original' or 'derivative' jurisdiction over the case of Bagaragaza. In the Court's view, original jurisdiction did not lie since, at the time of the Rwandan genocide in 1994, Dutch law did not provide for universal jurisdiction over genocide. The Court observed that such universal jurisdiction may now apply pursuant to the Dutch International Crimes Act ("Wet Internationale Misdrijven") of 2003, but it added that such new legislation cannot apply retroactively, nor can customary international law (provided that it allowed the exercise of universal jurisdiction over genocide back in 1994) – custom being an unwritten source of law – expand the jurisdictional rules of the Dutch code. Derivative jurisdiction, in the sense of jurisdiction derived from the jurisdiction of the ICTR over the case, did not lie either, according to the Court. In order for Dutch law to be applicable to persons against whom the prosecution has been transferred from a foreign State to the Netherlands, a treaty is required pursuant to Article 4a of the Dutch Penal Code. Applying the criteria listed in the provision

³ Prosecutor v. Michel Bagaragaza, Case No. ICTR-2005-86-R11bis, Decision on the Prosecution Motion for Referral to the Kingdom of the Netherlands, *Rule 11 bis of the Rules of Procedure and Evidence*, 13 April 2007.

⁴ LJN: BD6568, Hoge Raad, 08/00142. *Ho*

⁵ C. Ryngaert, *Universal Jurisdiction over Genocide and Wartime Torture in Dutch Courts: an Appraisal of the Afghan and Rwandan cases*, 2 *Hague Justice Journal* 13-36 (2007).

⁶ Cf. Supreme Court Judgment, *supra* note 4, Sections 6.1-6.9.

to the case of Bagaragaza, the Court ruled that, while the ICTR could be equated with a foreign State (if a functional interpretation of the legal provision were espoused), no treaty that listed arrangements for the transfer of cases from the ICTR to the Netherlands could be identified. The criteria of the said Article 4a were therefore not met, and the Dutch Prosecutor's request regarding Bagaragaza was held to be inadmissible.⁷

On appeal, the Appeals Court upheld the inadmissibility of the case, yet it did so on other grounds. It concurred with the District Court's finding that there was no treaty between the ICTR and the Netherlands in the sense of Article 4a of the Penal Code. In this context, the Court interestingly held, relying on an expert advisory opinion, that the correspondence between the Prosecutor of the ICTR and the Dutch Minister of Justice relating to the transfer of Bagaragaza could be qualified as an informal treaty, but that such an informal treaty was not contemplated by the drafters of the Penal Code amendment resulting in Article 4a of the Penal Code.⁸ The Appeals Court's decision differed from the District Court's decision, however, in that it refused to equate the ICTR with a *State* for purposes of Article 4a, thereby rejecting the District Court's flexible, teleological statutory interpretation: the Court pointed out that equating an organ of the United Nations (the ICTR, established by the UN Security Council) did not satisfy the requirement of cognizability (*kenbaarheid*) of the law.⁹ On this point, the Supreme Court added that the terminological distinction between a 'State' and an 'international tribunal' was commonly accepted, and that accordingly there was no reason to construe 'State' as also implying 'international tribunal'.¹⁰

The Dutch courts' inflexible application of Dutch criminal procedure law on judicial cooperation may appear regrettable. This sort of legal nicety indeed seriously compromises the ICTR's Completion Strategy. Jurisdictional and substantive obstacles to a successful prosecution in the State to which cases are referred under Rule 11*bis* render referrals problematic, and oblige the ICTR, which struggles with a huge caseload anyway, to again take up cases which it could possibly have gotten rid of. The problem is compounded by the Tribunal's own inflexible stand on Rule 11*bis* case referrals to Rwanda: so far, the ICTR has refused to honor the Prosecutor's requests for referrals on the ground that Rwandan courts fail to live up to adequate due process standards.¹¹ As a result,

⁷ The reasoning of the District Court is reprinted in the Supreme Court Judgment, Section 5.1.

⁸ The reasoning of the Appeals Court is reprinted in the Supreme Court Judgment, Section 5.2, para. 29.

⁹ *Id.*, para. 16. The Appeals Court argument relating to the presence/absence of a treaty for purposes of Article 4a of the Penal Code appears superfluous, as the criteria of Article 4a are cumulative. If the transferring entity is not a State, Article 4a cannot come into play anymore, irrespective of the 'treaty' condition being fulfilled. Nevertheless, the argument was apparently made in the interest of the law.

¹⁰ Supreme Court Judgment, Section 6.5.1.

¹¹ See at length on these decisions: I. Onsea, *The Legacy of the ICTR in Rwanda in the Context of the Completion Strategy: The Impact of Rule 11bis*, in C. Ryngaert (ed.), *The Effectiveness of International Criminal Justice*, Antwerp, Intersentia, 173-194 (2009).

unlike at the ICTY,¹² the ICTR has not referred, or rather, been able to refer, cases for domestic trials.

Dutch courts should not come in for too much criticism, however. After all, they simply applied Dutch law, and as is common in criminal cases, rather strictly.¹³ Those who are really to blame for the failing Completion Strategy resulting from the aborted Rule 11*bis* referrals are those who devised and implemented the Completion Strategy in the first place: the United Nations and the ICTR. The Dutch Appeals Court in *Bagaragaza* observed incisively in this respect that it might have reached a different conclusion if the United Nations and the Netherlands had entered into a treaty which would have clarified the transfer of cases of ICTR indictees to the Netherlands in the framework of the Completion Strategy, even in situations where the Netherlands did not have original jurisdiction.¹⁴ Such a treaty would have satisfied the requirements of Article 4a of the Dutch Penal Code, and have allowed for a smooth transfer of ICTR cases to the Netherlands. The *Bagaragaza* saga shows that the architects of the ICTR Completion Strategy paid insufficient attention to the legal details of its implementation. This omission has now backfired. As a consequence, the ICTR eventually has to conduct its own trial of *Bagaragaza*. This whittles away at its scarce resources and its time-frame for closing shop, and may undermine the morale of its staff.¹⁵

It is worth noting that the Dutch Minister of Justice recently submitted a bill to parliament pursuant to which the Dutch International Crimes Act (“Wet Internationale Misdrijven”) of 2003 would retroactively apply to all international crimes occurred after 18 September 1966, *i.e.*, the date of entry into force of the Dutch Genocide Implementation Act (“Uitvoeringswet Genocide Verdrag”).¹⁶ This would enable Dutch courts to exercise *primary* jurisdiction over acts of

¹² Cf. J. Dieckmann and C. Kerll, *UN Ad Hoc Tribunals Under Time Pressure – Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence*, 8 *International Criminal Law Review* 87 (2008).

¹³ A cynic may contend that the Dutch courts’ rigid interpretation of the statute was informed by policy considerations rather than accepted techniques of statutory interpretation. The courts may have been concerned about Dutch judicial authorities being overburdened by cases which bear almost no relation with the Netherlands. The Dutch Government’s acceptance of the ICTR Prosecutor’s request to have *Bagaragaza*’s case transferred to the Netherlands, and its reasoning that the transfer *was* covered by Article 4a of the Penal Code, appears to belie this, however.

¹⁴ Appeals Court Judgment, reprinted in Supreme Court Judgment, Section 5.2, para. 29.

¹⁵ On 14 May 2009, the President of the ICTR reported to the UN Security Council on the progress of the Tribunal’s complementarity strategy. He observed that the Tribunal had to cope with an enormous workload, in particular because all requests for referrals of cases to domestic courts have so far been rejected. As a result, the tribunal would, in the President’s view, not be able to finalize all first instance trials before 2009. The President also implied that the staff’s morale is low and that the Tribunal faced difficulties in maintaining sufficient resources. Letter dated 14 May 2009 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, S/2009/247, para. 75 in particular.

¹⁶ See the press communique of the Dutch Minister of Justice, 6 October 2009, <<http://www.justitie.nl/actueel/persberichten/archief-2009/91006hirsch-ballin-zet-harder-in-op-vervolg-oorlogsmisdadigers.aspx>>. This page also allows the reader to access the text of the bill and the explanation to the bill.

genocide committed in 1994 in Rwanda, and thus allow the ICTR to refer cases to the Netherlands. It remains to be seen of course whether the bill is in keeping with the prohibition of retroactivity as it is understood by the Dutch judiciary.