

ICTR-05-86-R11bis  
29-8-2007  
(1072-1068)

1072  
Hm



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**OFFICE OF THE PRESIDENT**

**Before Judges:** Dennis Byron, President of the Tribunal  
**Registrar:** Adama Dieng  
**Date:** 29 August 2007

**THE PROSECUTOR**

v.

**Michel BAGARAGAZA**

*Case No. ICTR-2005-86-R11bis*

JUDICIAL  
2007 AUG 29 P 5:55  
[Signature]

**DECISION ON DEFENCE APPLICATION FOR MODIFICATION OF DETENTION  
CONDITIONS OF THE ACCUSED**

*Rules 19 and 64 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Hassan Bubacar Jallow  
Bongani Majola  
Silvania Arbia  
Richard Karegyesa  
Inneke Onsea

**Defence Counsel:**

Geert-Jan Alexander Knoops

[Signature]

## INTRODUCTION

1. On 13 April 2007, Trial Chamber III, composed of Judges Khalida Rachid Khan, presiding, Sergei Alekseevich 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 ("Rules").<sup>1</sup>
2. On 2 August 2007, 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.<sup>2</sup> 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.
3. 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>3</sup> In separate letters annexed to the Revocation 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>4</sup>
4. On 17 August 2007, a Trial Chamber composed of Judges Dennis Byron, presiding, Erik Møse, and Lee Gacuiga Muthoga, granted the Revocation Motion and requested that the Dutch authorities defer to the competence of the Tribunal.<sup>5</sup> It further issued a Warrant of Arrest and Order for Transfer and Detention at the seat of the Tribunal in Arusha.<sup>6</sup> In reaching its conclusions, the Chamber considered submissions from the Defence<sup>7</sup> and the Registrar<sup>8</sup> regarding the security issues Mr. Bagaragaza would face if transferred to the seat of the Tribunal in Arusha, Tanzania.<sup>9</sup>

<sup>1</sup> Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 April 2007 ("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> Prosecutor's Supplementary Report on the Progress Made by the Kingdom of the Netherlands in the Prosecution of Mr. Bagaragaza, filed 2 August 2007 ("Supplementary Report").

<sup>3</sup> Prosecutor's Extremely Urgent Motion for Revocation of the Referral Order Pursuant to Rule 11 *Bis* (F) & (G), filed 8 August 2007 ("Revocation Motion").

<sup>4</sup> Revocation 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>5</sup> 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), 17 August 2007 ("Revocation Decision").

<sup>6</sup> Warrant of Arrest and Order for Transfer and Detention, 17 August 2007 ("Warrant and Transfer Order").

<sup>7</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 to the Revocation Motion").



5. The Defence, pursuant to Rule 64 of the Rules, now moves the President to modify the conditions of Mr. Bagaragaza's detention such that he be allowed to remain in the Netherlands.<sup>10</sup> According to the Defence, such modification is necessary because Mr. Bagaragaza would face serious security issues if transferred to the seat of the Tribunal in Arusha, Tanzania. The Prosecution and Registrar oppose the Defence Application, and the Defence replied to the Prosecution.<sup>11</sup>

## DISCUSSION

6. Rule 64 of the Rules provides as follows:

Upon his transfer to the Tribunal, the accused shall be detained in facilities provided by the host country or by another country. The President may, on the application of a party, request modification of the conditions of detention of an accused.

7. As a preliminary matter, the Prosecution argues that, on the basis of the plain language of this provision, the Defence Application is premature because Mr. Bagaragaza has yet to be transferred to the Tribunal.<sup>12</sup> The Defence submits that applying Rule 64 only to persons physically at the Tribunal would be unreasonable under the present circumstances, where the Defence alleges Mr. Bagaragaza's life is at risk if he is transferred to the Tribunal.<sup>13</sup> Moreover, the Defence suggests that such an interpretation would be unduly burdensome for both Mr. Bagaragaza and the Tribunal, which would be forced to transfer Mr. Bagaragaza here and then return him to the Netherlands if the application was granted.<sup>14</sup>

8. The President disagrees with the strict interpretation of Rule 64 suggested by the Prosecution. As argued by the Defence, the potential threat to the safety of Mr. Bagaragaza favours a more flexible interpretation of the Rule under the present circumstances. Moreover, the President notes that, on 11 August 2005, the Prosecution made a similar application on Mr. Bagaragaza's behalf before his initial transfer to the Tribunal. This application was granted by Judge Arlette Ramaroson, then Acting President.<sup>15</sup> In that decision, the Acting President noted that the application was proper because the Prosecution had requested a modification of the terms of detention "which

<sup>8</sup> 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 Initial Security Submissions").

<sup>9</sup> Revocation Decision, paras. 14-16.

<sup>10</sup> Public Defence Application to the President of the Tribunal for Modification of Detention Conditions Pursuant Rule 64, filed 17 August 2007 ("Defence Application", or "Application"); see also Defence Reply to Prosecution Response to Defence Application to the President of the Tribunal for Modification of Detention Conditions Pursuant Rule 64, filed 22 August 2007 ("Defence Reply").

<sup>11</sup> Prosecutor's Response to 'Urgent Public Defence Application to the President of the Tribunal for Modification of Detention Conditions Pursuant Rule 64, filed 21 August 2007 ("Prosecution Response"); Registrar's Submissions Under Rule 33 (B) of the Rules on 'Public Defence Application to the President of the Tribunal for Modification of Detention Conditions Pursuant Rule 64', filed 23 August 2007 ("Registrar's Updated Security Submissions").

<sup>12</sup> Prosecution Response, para. 6.

<sup>13</sup> Defence Reply, para. 4.

<sup>14</sup> Defence Reply, para. 6.

<sup>15</sup> Order for Special Detention Measures, 13 August 2005.

would otherwise apply to Mr. Bagaragaza upon his surrender to the Tribunal.”<sup>16</sup> The Acting President also noted that Rule 19 (A) gave the President the authority to “supervise the activities of the Registry”, which, pursuant to Article 8 (C) of the Directive for the Registry, includes the administration of the Tribunal’s detention unit.<sup>17</sup> The President will therefore consider the Defence Application.

9. The Defence submits that, by making statements to the Prosecution regarding other accused persons, testifying as a Prosecution Witness against other accused persons, and making statements implicating members of the current ruling party of Rwanda, the Rwandan Patriotic Front, of direct participation in crimes, Mr. Bagaragaza has put himself in a serious security situation.<sup>18</sup> In support of its Application, the Defence points to prior statements from the Registrar acknowledging security risks faced by Mr. Bagaragaza, as well as to Mr. Bagaragaza’s Agreement with the Prosecution, in which the Prosecution acknowledges that Mr. Bagaragaza faces security risks and agrees not to detain or prosecute him on African soil.<sup>19</sup> The Defence further submits that the only reason he agreed to alter the terms of the Agreement and physically testify in Arusha in the *Zigiranyirazo* matter was because of the personal guarantees and actions regarding his security undertaken by Mr. Stephen Rapp, formerly of the Office of the Prosecutor. The Defence suggests that Mr. Bagaragaza’s security situation has deteriorated since then as a result of subsequent statements.<sup>20</sup>

10. In his submissions, the Registrar indicates that according to an updated report from the chief of the Security and Safety Section of the Tribunal, it will be possible to provide for the security for the security of Mr. Bagaragaza in Arusha, and provides a brief outline of the security measures to be undertaken.<sup>21</sup>

11. The President notes that the Agreement between Mr. Bagaragaza and the Prosecution is not binding on the Judges of the Tribunal.<sup>22</sup> Statements contained therein regarding the security risks faced by Mr. Bagaragaza reflect the opinion of the Prosecution at the time the Agreement was entered into; they are not equivalent to the formal risk assessment of the Registry, the organ of the Tribunal tasked with addressing all matters of security.

12. The Defence submissions regarding his testimony in the *Zigiranyirazo* matter reflect a similar misunderstanding of the distinct roles of the Prosecution and the Registry. The Registry is tasked not only with assessing security risks, as mentioned above, but also with ensuring the security of witnesses and detainees. As such, it was the Registry, and not Mr. Rapp or any other representative of the Prosecution, that provided for Mr. Bagaragaza’s security when he testified in the *Zigiranyirazo* matter.<sup>23</sup> Moreover,

<sup>16</sup> *Id.*, para. 2.

<sup>17</sup> *Id.*

<sup>18</sup> Defence Application, paras. 5-7.

<sup>19</sup> Defence Application, paras. 8, 10.

<sup>20</sup> Defence Application, paras. 11-12.

<sup>21</sup> Registrar’s Updated Security Submissions, paras. 13-18.

<sup>22</sup> Revocation Decision, para. 10.

<sup>23</sup> *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness

the Registrar submits that the risk faced by Mr. Bagaragaza as a detainee at the UNDF is lower than it was when he testified as a witness in the *Zigiranyirazo* matter.<sup>24</sup>

13. On the basis of the updated assessment and guarantees of the Registry, the President is satisfied that adequate security can be provided for Mr. Bagaragaza in Arusha. There is, therefore, no need to modify the conditions of his detention.

**FOR THE ABOVE REASONS, THE PRESIDENT**

**DENIES** the Defence Application.

Arusha, 29 August 2007.



Dennis Byron  
President of the Tribunal

[Seal of the Tribunal]



Michel Bagaragaza via Video-link, 16 November 2006, para. 24 (ordering that Mr. Bagaragaza be transferred to Arusha to testify in reliance on the submissions of the Registry regarding its ability to provide for the security of Mr. Bagaragaza).

<sup>24</sup> Registrar's Updated Security Submissions, para. 9-10.