The Surrender of Ntakirutimana Revisited

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Abstract: The surrender of Elizaphan Ntakirutimana, suspected of having committed genocide, to the Rwanda Tribunal has again been the object of litigation in the US. After his surrender had initially been denied, the Court of Appeals for the Fifth Circuit has certified his surrender. This decision raised certain questions. On the one hand, it is fortunate that Ntakirutimana will stand trial before the Rwanda Tribunal. However, the assistance of the US with respect to future surrender of war criminals indicted by the Tribunals for the former Yugoslavia and Rwanda is by no means certain yet. A concurring and dissenting opinion attached to the decision illustrate that US Judges are still not overly convinced of the constitutionality of the US method of implementing the obligations arising out of the creation of these *ad hoc* Tribunals.

1. INTRODUCTION

In a previous issue of this journal I wrote a short comment about the refusal of a United States federal judge[1] to comply with the order issued by the International Criminal Tribunal of Rwanda to transfer Elizaphan Ntakirutimana to its jurisdiction.[2] The decision of the US federal Judge was successfully challenged by the United States government in subsequent proceedings, which reached their climax in a decision of 5 August 1999 of the United States Court of Appeals for the Fifth Circuit.[3]

This latest decision in *re Ntakirutimana* calls for a short comment. In particular the question arises as to whether all legal problems pertaining to the cooperation of the United States to the *ad hoc* international criminal tribunals have now been resolved.

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1. In the matter of surrender of Elizaphan Ntakirutimana, Misc. No. L-96-5, United States District Court for the Southern District of Texas, Laredo Division, 1997 US Dist. LEXIS 20714, 17 December 1997, decided.
2. G. Sluiter, *To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal*, 11 LJIL 383-395 (1998).
3. Elizaphan Ntakirutimana, Petitioner-Appellant, v. Janet Reno, Attorney General of the United States; Madeleine Albright, Secretary of State of the United States; Juan Garza, Sheriff of Webb County, Texas, Respondents-Appellees, No. 98-41597, United States Court of Appeals for the Fifth Circuit, 1999 US App. LEXIS 18253, 5 August 1999, decided.

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In order to deal with this question adequately, a brief historical account of the previous decisions in *re* transfer Ntakirutimana will be provided (paragraph 2), before the merits and main elements of the decision of the Appeals Court can be addressed (paragraph 3). This decision, I will conclude, still offers some potential areas of conflict in the cooperation relationship between the United States and the *ad hoc* Tribunals.

2. PREVIOUS DECISIONS

Elizaphan Ntakirutimana has been charged, together with Gerard Ntakirutimana, Obed Ruzindana and Charles Sikubwabo, *inter alia* with genocide, by luring several ethnic Tutsis to his church on 6 April 1994 and then organising and leading an attack on this church to kill these Tutsis.[4] After these alleged events he was admitted in the United States, to live with his son in Laredo, Texas. He was provisionally arrested on 26 September 1996, at the request of the Rwanda Tribunal. The official request for surrender was submitted by the US government, together with accompanying documents, on 9 January 1997. On 17 December 1997, US District Court for the Southern district of Texas, Laredo Division, represented by magistrate M.C. Notzon, denied the request for surrender of the government and ordered the immediate release of Ntakirutimana.[5]

Notzon denied surrender on two grounds. First of all, he considered the legal basis for the surrender, the surrender agreement with the Rwanda Tribunal[6] and the domestic law implementing this agreement[7], to be unconstitutional.[8] The method of implementing the obligations arising out of the creation of the *ad hoc* Tribunals was considered unconstitutional in particular because, according to Notzon, it violated the separation of powers and allocation of competencies to the branches of Government as envisaged by the US Constitution.[9] In particular, Notzon deemed it essential that the surrender agreements would be ratified in accordance with the procedure set out in the Constitution, requiring a two-thirds majority approval of the Senate.[10] He also believed that surrender in the absence of a duly ratified treaty was prohibited.[11] The second ground of denial related to

4. *See* the indictment: International Criminal Tribunal For Rwanda, Case No. ICTR-96-10-1, The Prosecutor Of Tribunal Against Elizaphan Ntakirutimana, Gerard Ntakirutimana, Obed Ruzindana, Charles Sikubwabo.
5. *See supra* note 1.
6. 1995 United States- Rwanda Tribunal Agreement on Surrender of Persons, printed *in* Amnesty International, International Criminal Tribunals: Handbook for Government Cooperation, August 1996, AI Index: IOR 40/07/96.
7. National Defense Authorization Act, Pub. L. No. 104-106, 110 Stat. 486 (1996), para. 1342.
8. *See* Sluiter, *supra* note 2, at 389-391.
9. For a more detailed discussion *see id.*
10. *See* decision *supra* note 1, at 12-13.
11. *Id.*, at 13.

the evidence tendered by the US government supporting the surrender. Judge Notzon deemed that the accompanying documents did not rise to the level of probable cause, which is a constitutional requirement for the deprivation of liberty with a view to extradition or surrender.[12]

In my earlier comment I did not so much criticize the Notzon decision, but more the US government's method of implementation, which appears to treat the ad hoc Tribunals as any foreign court. I therefore favoured a cooperation regime with the *ad hoc* Tribunals, which would at crucial points deviate from inter-State legal assistance practice, in particular in the field of extradition. Such a regime would certainly suit the unique features of the *ad hoc* Tribunals better, in particular their vertical cooperation relationship with States.[13]

Understandably, the US government preferred to exhaust all remedies of obtaining surrender under the existing legal basis, before considering any adjustments. It therefore filed another request for surrender in the same court, adding two declarations to address the evidentiary issues raised by Notzon.[14] The district court certified the surrender, because it found the legal basis for Ntakirutimana's surrender constitutional, and found that the evidence submitted by the government sufficed to establish probable cause.[15] In particular, it held that the US Constitution sets forth no specific requirements for extradition, and that the US Supreme Court had given its approval of extraditions made in the absence of a treaty.[16] Following this decision, Ntakirutimana filed a petition for a writ of *habeas corpus*, which was denied. He appealed, timely, to the Court of Appeals for the fifth circuit.

3. DECISION OF COURT OF APPEALS TO EFFECTUATE SURRENDER

3.1. The majority opinion

The Court of Appeals denied Ntakirutimana's application for *habeas corpus* review and allowed his surrender, but it was by no means a unanimous decision.

12. *Id.*, at 20.
13. The general characteristics of cooperation between States and the ICTY have been clarified in the Blaskić subpoena decision. The findings in this case are equally relevant to cooperation with the ICTR. *See* Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Prosecutor v. Blaskić, Case No. IT-95-14-AR108bis, A. Ch., 29 October 1997. This decision is *printed in* A. Klip & G. Sluiter (Eds.), Annotated Leading Cases of International Criminal Tribunals 245-281 (1999). For a commentary, *see* R. Wedgwood, *International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaskić*, 11 LJIL 635-654 (1998).
14. *See* in *re* Surrender of Ntakirutimana, 1998 US Dist. LEXIS 22173, No. CIV. A. L-98-43, 1998 WL 655708 (S.D. Tex. 6 Aug. 1998).
15. *See id.*, at 9 and 30.
16. *See id.*, at 9.

Of the three judges, one issued a dissenting opinion, and one issued a concurring opinion, which comes in my view quite close to a dissenting opinion as well.

We will start with the majority opinion, written by Judge Garza. Ntakirutimana raises in appeal the issue of constitutionality of the legal basis for his surrender. The unconstitutionality claim concerns in particular the violation of separation of powers-provisions in the implementation of the obligations arising out of the Statutes of the *ad hoc* Tribunals. Clearly, the majority opinion approaches the issue differently than Judge Notzon in his decision of 17 December 1997. The central issues are not the separation of powers and the respect for constitutional procedures concerning ratification of treaties, but rather the power to extradite somebody in the absence of a duly ratified treaty. From the perspective of protection of the rights of the accused, it is indeed important that the constitution "creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law".[17] The majority relied heavily on *Valentine* v. *United States*, to support the conclusion that deprivation of liberty and subsequent surrender must find a basis in the law, but a Senate approved extradition treaty is no requirement. Or as judge Garza put it, "[...] although some authorization by law is necessary for the Executive to extradite, neither the Constitution's text nor Valentine require that the authorisation come in the form of a treaty".[18] The majority opinion also discarded Ntakirutimana's argument, which was accepted by Judge Notzon, that a "historical practice" had developed that prohibits extradition in the absence of a treaty.[19] It found that although Congress has rarely exercised the power to extradite by statute, it nonetheless has the power to do so. It pointed at some instances in which fugitives had indeed been extradited in the absence of a treaty.[20]

The second ground of appeal of Ntakirutimana concerned the constitutional probable cause requirement. The evidence tendered to satisfy the probable cause requirements consisted initially of an affidavit of an ICTR investigator who had obtained about twelve incriminating witness testimonies. Judge Notzon found this insufficient. The government added a supplemental declaration of the ICTR investigator, elaborating on the formal aspects of the interviews, as well as a declaration of ICTR assistant prosecutor Prosper, further clarifying information in the investigator's initial declaration. The district court, in its decision of 6 August 1998, then found that probable cause was established. On appeal Ntakirutimana essentially raised credibility challenges to the evidence against him. The majority held that "[...] the issue of credibility "is a matter committed to the magistrate and is not reviewable on habeas corpus".[21] The district court ruled in

17. Valentine *v.* United States, 299 US 5, 57 S.Ct. 100, 81 L. Ed. 5 (1936).
18. Decision, *supra* note 3, at 14 and 15.
19. *Id.*, at 18.
20. *See* Hilario *v.* United States, 854 F. Supp. 165 (EDNY 1994), as cited at 18.
21. Decision, *supra* note 3, at 25. *See also* Escobedo, 623 F. 2d, 1102.

the government's favour as far as the credibility of witnesses was concerned and the Court of Appeals defers to this conclusion.[22]

In his last ground of appeal, Ntakirutimana advanced that the ICTR was unlawfully established and that his due process rights will be violated in Arusha. These issues are according to the majority opinion beyond the *habeas corpus* review. The analogy the opinion makes with inter-State extradition law is particularly interesting. For example, regarding Ntakirutimana's trial before the ICTR, the majority referred to the rule of non-inquiry, applicable in extradition cases.[23]

3.2. Concurring opinion and dissenting opinion

The authority of the majority opinion is significantly weakened by one concurring and one forcefully dissenting opinion.

In his concurring opinion, Judge Parker is very critical about the probable cause requirement. He believes that "[t]he evidence supporting the request is highly suspect", because it consists of affidavits of unnamed Tutsi witnesses acquired during interviews utilizing questionable interpreters.[24] He therefore invites the Secretary of State "[...] to closely scrutinize the underlying evidence as she makes her decision [...]" to surrender Ntakirutimana.[25] If this Judge is so critical regarding the evidence tendered to the Court, why did he choose to concur nevertheless and not to dissent? The reason is, quite ironically given the other ground of appeal, that this Judge respects the separation of powers. Or as Judge Parker put it: "I fully understand that the ultimate decision in this case may well be a political one that is driven by important considerations of State that transcend the question of guilt or innocence of any single individual. I respect the political process that necessarily is implicated in this case [...]."[26] One can conclude that such wording is in many respects unfortunate. It creates the image that an innocent man is being deprived of his liberty as well as the idea that cooperation with the ICTR is a 'political process'.

The dissenting opinion is of considerably higher quality than the concurrent opinion. Judge DeMoss follows the strict separation of powers approach along the line of Judge Notzon in his decision of 17 December 1997, although his arguments are slightly different. The majority opinion assumed that extradition may also be permitted in the absence of a treaty if authorized by law. However,

22. Decision, *supra* note 3, at 27.
23. *See id.*, at 31, citing *In re* Extradition of Manzi, 888 F.2d 204, 206 (1st Cir. 1989), and Garcia-Guillern, 450 F.2d, 1192.
24. Decision, *supra* note 3, at 32.
25. As far as the outcome of such scrutiny is concerned, Judge Parker has the following to say: "To the extent that it may be relevant to the Secretary's decision, I merely add, based on all the information in this record, viewed from the perspective of a judge who has served fifteen years on the trial bench and five years on the court of appeals, that I am persuaded that it is more likely than not that Ntakirutimana is actually innocent." Decision, *supra* note 3, at 33.
26. *Id.*

Judge DeMoss points at the legislative history of the US domestic implementing legislation, which "came into being without hearings by any committee of the Congress, without a committee report from any committee of Congress, and without any debate on the floor of the Senate or the House of Representatives as to the substance of its provisions".[27] In other words, Congress is involved in name, but never really bothered with the substantive issues.[28] This may be considered to be to the detriment of the legal protection of the extraditee.

It is interesting that in a footnote, Judge DeMoss refutes the position that allowing Ntakirutimana's appeal would diminish the ability of the United States to cooperate with the ad hoc Tribunals. He, in my view, rightly underlines that all that is required for cooperation is an implementation mechanism which is in conformity with the US constitution.

4. A PYRRHIC VICTORY FOR EFFECTIVE ASSISTANCE

The decision definitely is only partly satisfactory. Undoubtedly, the United States government and the ICTR will be happy with the obtained result: the chances that Ntakirutimana will stand trial in Arusha have increased considerably.[29] This means that the legal basis for cooperation is still constitutional and the US government need not engage in enactment of new legislation or submit the executive cooperation agreements with the *ad hoc* Tribunals to the Senate. From a political point of view, the United States need no longer feel embarrassed for refusing to cooperate with the *ad hoc* Tribunals.[30] These are, however, the only positive aspects of this decision, which can be considered only a Pyrrhic victory for an effective legal assistance relationship between the *ad hoc* Tribunals and the United States.

First of all, the authority of Ntakirutimana's surrender is seriously affected by the concurring opinion and dissenting opinion in this case. In fact, it can even be contended that the Parker opinion is only concurring in name, but a dissenting one in substance. If he would have made it a dissent in name as well, Ntakirutimana's surrender could still not be effectuated. The dissenting opinion of DeMoss raises arguments of separation of powers, which traditionally play an important role within US legal doctrine. It can by no means be excluded that in future surrender cases Judges will be inclined to follow the Notzon and DeMoss line of reasoning. This uncertainty will subsist as long as the US Supreme Court

27. *Id.*, at 53.
28. It needs to be borne in mind that authorising extradition by law instead of treaty amounts already to a lower threshold, because the enactment of legislation requires a simple majority; the ratification of a treaty requires a 2/3 majority.
29. It is uncertain as to whether Ntakirutimana has sought to challenge the Court of Appeals decision before the US Supreme Court. He has not yet arrived in Arusha.
30. *See* my contribution, *supra* note 2, at 394.

has not ruled in favour of the constitutionality of the present cooperation scheme of the United States.

Another aspect of all the judgments in *re Ntakirutimana* which may give rise to criticism is the denial of the special character of the *ad hoc* Tribunals, which entail a unique legal assistance regime. Nowhere, in both the majority opinion and the dissent, reference is made to the mandatory powers of the ICTR and the almost absolute character of the obligations incumbent upon the US under Security Council Resolution 955 (1994) to comply with requests and orders from the ICTR. The Tribunal is treated as if it were a foreign court and constantly reference is made to 'extradition', whereas it has been generally recognised that the inter-State legal assistance concepts, such as extradition, do not apply with respect to international criminal tribunals.[31] DeMoss' dissent even appears to display certain hostility towards the ICTR, by stating that the ICTR is not a sovereign nation and he also appears not very pleased with the mandatory language in which the surrender order is couched.[32] When it comes to the argument as to whether the ICTR has been lawfully established, the majority and DeMoss wisely refrain from dealing with this issue.[33] However, DeMoss refers to the question as hotly debated in academia, whereas he could also have mentioned the confirmation of the lawfulness of both the ICTR and ICTY in their case law.[34]

It is generally known that international law does not occupy the same prominent place within the US legal order as in some other jurisdictions. I do not call for 'blind implementation' of Tribunal orders either, as appears to be the situation in some countries, such as the Netherlands.[35] However, such a situation calls for careful implementation of all the obligations under the Statutes, and this is

31. The latest example of this can be found in the ICC Statute, clearly distinguishing between surrender and extradition. *See* Art. 102 of the ICC Statute. As far as the ad hoc Tribunals are concerned, the United States government has recognised this difference, given the wording and character of the executive surrender agreements, but have failed to consistently maintain this terminology in its domestic legislation providing for surrender/extradition to the ad hoc Tribunals.
32. The surrender request actually 'orders' the US the hand over Ntakirutimana, using the word 'direct'.
33. DeMoss labels such a question as a political issue, explicitly referring to Baker *v.* Carr, 369 US 186, 210-11, 82 S.Ct. 691, 706, 7 L.Ed. 2d 663 (1962).
34. The lawfulness of the ICTY has been firmly established in Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor *v.* Tadić, Case No. IT-94-1-AR72, A. Ch., 2 October 1995 (Tadić (1995) I ICTY JR 353, and Klip & Sluiter, *supra* note 13, ALC-I-33 *et seq.*). The lawfulness of the creation of the ICTR was established, heavily relying on Tadić, in Decision on Jurisdiction, Prosecutor *v.* Kanyabashi, Case No. ICTR-96-15-T, Tr. Ch., 18 June 1997.
35. This considered an order of the ICTY for the return of a detained witness to Bosnia (Order for the Return of a Detained Witness, Prosecutor *v.* Tadić, Case No. IT-94-1-ST, IT-95-7-Misc.1, T.Ch.II, 27 May 1997; *printed in* Klip & Sluiter, *supra* note 13, ALC-I-211 *et seq.*). This witness, Opacić, challenged his return before a Dutch District Court alleging that he would face conditions of imprisonment in Bosnia violating the European Convention of Human Rights. The Dutch Judge found that the Netherlands is bound by the Tribunal order; furthermore, it found that decisions of the ICTY cannot be reviewed by the Dutch judicial authorities. *See* Dragan Opacić *v.* The Netherlands, KG 97/742, 30 May 1997.

where the US government failed. It has invited problems by not distinguishing cooperation with the *ad hoc* Tribunals from inter-State cooperation. Once it had opted for the 'inter-State approach' it has taken certain risks by deviating from that pattern as far as the implementation and conformity with constitutional division of powers is concerned. Therefore, in order to avoid probable future embarrassment and in order to live up to its obligations under international law, the United States should re-implement their cooperation obligations *vis-à-vis* the *ad hoc* Tribunals.

POSTSCRIPT

Ntakirutimana has indeed appealed the decision of the Circuit Court to the US Supreme Court. The US Supreme Court has denied the appeal in the sense that it has refused to hear the case.[36] Hereby the Supreme Court has cleared the way for the transfer of Ntakirutimana to Arusha. However, since it has not dealt with the merits of the case, the issue of constitutionality of the US implementation scheme is in my view still pending.

36. *See Way Clear for US to Deliver Rwanda War Crimes Suspect*, New York Times, 25 January 2000.