To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal

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Keywords: extradition law; International Criminal Tribunal for the former Yugoslavia; International Criminal Tribunal for Rwanda; obligation to cooperate; United States.

Abstract: The relationship between national jurisdictions and the international criminal tribunals for the former Yugoslavia and Rwanda raises many problems. One of them concerns the surrender of indicted war criminals from national jurisdictions to the *Ad Hoc* Tribunals. Several obstacles stand in the way of effective surrender to the *Ad Hoc* Tribunals. This contribution focuses on the legal obstacles that may be encountered in this respect. By means of the case of the failed surrender of Ntakirutimana from the United States to the Rwanda Tribunal, it will be demonstrated that legal assistance to the *Ad Hoc* Tribunals is of a fundamental different nature than legal assistance offered to foreign tribunals.

1. INTRODUCTION

The international criminal tribunals for the former Yugoslavia and Rwanda cannot fulfill their mandate without obtaining custody over indicted war criminals. Since neither Tribunal has the power to hold trials *in absentia*,[1] they must rely on states for the arrest and transfer of accused persons. State cooperation in this area has been very poor. As of February 1998, the Yugoslavia Tribunal has publicly indicted 78 suspects for war crimes. Of the total, two have been convicted and 22 more are in custody. But 50 are still at large, as many as three may be released due to lack of evidence, and one suspect was killed in an arrest attempt last year. The figures for the Rwanda Tribunal are slightly better: 32 persons have been indicted and 23 are available for trial.

Looking at the situation in the former Yugoslavia, there is an overall lack of political will on the part of some states or entities. In its latest annual report, the Yugoslavia Tribunal has labeled the Federation of Bosnia Herze-

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1. *Cf.* Art. 20(4.d) 1994 Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Annex; and Art. 21(4.d) 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/25704 (1993), Annex.

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govina, the Federal Republic of Yugoslavia, and the Republika Srpska as states and entity which have not recognized their duty to cooperate with the Tribunal, which have not enacted implementing legislation to enable them to cooperate with the Tribunal, and which have neither arrested nor transferred any indictees.[2] Both the Federal Republic of Yugoslavia and the Republika Srpska have argued that their respective Constitutions forbid the extradition of nationals.[3] With this claim they are attempting to give a legal twist to what is essentially a matter of political will. The Croatian Constitution, for example, also excludes the extradition of Croatian nationals.[4] However, this state has urged some of the indicted Croatians to surrender themselves voluntarily to The Hague.[5] Consequently, the lack of cooperation demonstrated by some of the states and entities of the former Yugoslavia is not a purely legal problem.

On the other hand, effective state cooperation is not exclusively a matter of political will as well. Recently a state failed to cooperate with the Rwanda Tribunal, on legal grounds only. A Rwandese national, accused by the Rwanda Tribunal, was provisionally arrested in the United States with a view to his surrender to the Rwanda Tribunal. The surrender request, issued by the Rwanda Tribunal, was denied by a federal judge, because the manner in which the United States implemented its obligations under the Statute of the Rwanda Tribunal[6] was considered unconstitutional. Since the United States is a state that supports the Tribunal wholeheartedly,[7] the failed sur-

2. *See* Fourth Annual Report 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, UN Doc. A/52/375 (1997) and UN Doc. S/1997/729, para. 183.
3. As far as the Republika Srpska is concerned, it has to be mentioned that the new Prime Minister Dodik has promised to work intensively to facilitate voluntary surrenders, and thus seems to adopt a different attitude than his predecessors. Indeed, recently some indicted war criminals who resided on the territory of the Republika Srpska have surrendered voluntarily to The Hague. *Cf.* D. Scheffer, The Clear and Present Danger of War Crimes, Address at the University of Oklahoma College of Law, 24 February 1998, unpublished. However, at this point in time it is uncertain whether this more cooperative attitude will continue and whether Dodik has sufficient authority to "persuade" every single indicted war criminal on the entire territory of the Republika Srpska to hand himself over to the Tribunal.
4. *See* Art. 10 of the Croatian Constitution; this provision, however, refers to extradition to another state, which is clearly different from transfer of an accused to the Tribunal.
5. Blaškić was the first Croatian who surrendered himself voluntarily to The Hague; in October 1997 a group of 11 Croatians, including Kordić, surrendered themselves to the Yugoslavia Tribunal.
6. *See* 1994 Statute of the International Criminal Tribunal for Rwanda, *supra* note 1; except for the Tribunal's subject matter jurisdiction, the Statute of the Rwanda Tribunal is almost identical to the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, *supra* note 1.
7. Both the US Secretary of State, Madeline Albright, and US Ambassador at Large for War Crimes, David Scheffer, have on numerous occasions expressed in public the support of the United States for the *Ad Hoc* Tribunals and a permanent international criminal court; *see, e.g.*,

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render of Ntakirutimana demonstrates that cooperation with the *Ad Hoc* Tribunals is not only a question of political will, but involves important legal aspects as well. This article will examine why Ntakirutimana could not be transferred to the Rwanda Tribunal and how such a situation can be avoided in the future. Before getting into the *Ntakirutimana* case itself, however, a brief overview will be given of a UN member state's obligation to arrest and transfer an indicted person at the request of the *Ad Hoc* Tribunals.

2. THE OBLIGATION TO TRANSFER

Both the Yugoslavia Tribunal and Rwanda Tribunal have been established by the Security Council acting under Chapter VII. They have both been endowed with mandatory jurisdiction and have primacy over national jurisdictions.

The obligation for states to cooperate can first be found in the relevant UN Security Council resolutions. Thus, operative paragraph 4 of Resolution 827[8] and operative paragraph 2 of Resolution 955[9] oblige states to cooperate fully with the Yugoslavia Tribunal and the Rwanda Tribunal respectively, in accordance with their respective Statutes. Article 29 of the Statute of the Yugoslavia Tribunal and Article 28 of the Statute of the Rwanda Tribunal reiterate these obligations.[10] Both Articles contain in their first paragraph a general duty for states to cooperate and in the second paragraph an obligation for states with regard to specific forms of assistance, including the arrest and transfer of the accused to the Tribunals. The Rules of Procedure and Evidence of the Tribunals[11] reiterate the duty for states, laid down in the Statutes, to act promptly in executing a warrant of arrest, or any other order

Address by David Scheffer at the University of Oklahoma College of Law, "The Clear and Present Danger of War Crimes", 24 February 1998, unpublished.

8. *See* UN Doc. S/RES/827 (1993).
9. *See* UN Doc. S/RES/955 (1994).
10. According to the Secretary-General's comment to Art. 29 of the Statute of the Yugoslavia Tribunal, "an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations", Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), para. 126.
11. The Rules of Procedure and Evidence, adopted on 11 February 1994 and latest revised on 20 October and 12 November 1997, UN Doc. IT/32/Rev.12, have been adopted by the Rwanda Tribunal, as is envisaged by Art. 14 of the 1994 Statute of the Rwanda Tribunal, *supra* note 1. Therefore, when reference is made to "the Rules" this concerns the Rules of Procedure and Evidence of both Tribunals.

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of the Tribunals.[12] The case law of the Yugoslavia Tribunal, finally, has confirmed the duty imposed on states to comply fully and without delay with requests for assistance.[13]

Considering the duty to cooperate in general and the obligation to transfer indicted persons in particular, the legal framework of the *Ad Hoc* Tribunals bears some striking features. First of all, the duty to cooperate is absolute and unconditional. This becomes apparent on the basis of Section 2 of the Rules of Procedure and Evidence, dealing with orders and warrants. According to Rules 56 and 58 the obligation of a state to surrender the accused prevails over any legal impediment in its national legislation. The absolute character of the duty to cooperate has been confirmed in the *Blaškić* decision, where it was held that "there are no specified grounds on which a state may refuse to comply with an order or request from the International Tribunal, as there are in treaties or bi- or multilateral agreements"; as a result, "any stated refusal must be evaluated by the International Tribunal for merit".[14] Another striking feature of the Tribunals' law regarding the transfer of the accused is the change from extradition law. The Tribunals' legal framework avoids the term extradition deliberately. Traditional extradition law has been rejected for good reasons. The model of sovereign equality and reciprocity, characteristic for extradition law, is not applicable to the relationship between states and international criminal tribunals set up by the international community. Furthermore, using traditional extradition law opens the door for many exceptions that are part of traditional bilateral extradition law and practice, but which would certainly be inappropriate in the framework of an international prosecution for crimes of an international character.[15] The Yugoslavia Tribunal has stressed on numerous occasions the inapplicability of extradition law with respect to transfer of the accused to the Tribunal.[16] Nevertheless, the majority of states still cling to familiar extradi-

12. *See* First Annual Report 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, UN Doc. A/49/342 (1994) and UN Doc. S/1994/1007, para. 86.
13. *See* Prosecutor *v.* Tihomir Blaškić, Decision of Trial Chamber II of 18 July 1997 on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, Case No. IT-95-14-PT, and Prosecutor *v.* Tihomir Blaškić, Judgment of 29 October 1997 of the Appeals Chamber on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108*bis*.
14. Blaškić Decision of Trial Chamber II, *supra* note 13, para. 77; views confirmed by the Blaškić Decision of the Appeals Chamber, *supra* note 13, which stated, *inter alia*, that Art. 29 does not envisage any exception to the obligations of states to comply with requests and orders of a Trial Chamber; *see* para. 63.
15. Examples of inappropriate grounds of refusal are the non-extradition of nationals, the political offence exception, and the double criminality requirement. *See* K.J. Harris & R. Kushen, *Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations With the U.S. Constitution*, 7 Criminal Law Forum 570-574 (1996).
16. *See, e.g.*, the Fourth Annual Report, *supra* note 2, para. 186.

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tion procedures. Some even use the term "extradition" explicitly in their legislation implementing the obligations arising out of the creation of the *Ad Hoc* Tribunals.[17]

3. THE UNITED STATES IMPLEMENTATION SCHEME

The United States has adopted the same approach as several other states by declaring (large portions of) their domestic law on inter-state legal assistance applicable to assistance to the *Ad Hoc* Tribunals.[18] This approach offers, from the perspective of the state, two advantages. First, it will not be necessary to enter into an elaborate and time-consuming drafting process. Second, the use of existing extradition procedures offers the best guarantee of compliance with important requirements imposed by domestic law.

In implementing its obligations to transfer indicted war criminals to the *Ad Hoc* Tribunals, the United States relied on its extradition law as a starting point. Section 3181 of Title 18 of the United States Code (USC) provides that Chapter 209 (procedures relating to international extradition) applies only "during the existence of any treaty of extradition with [a] foreign government". Section 3184, applicable in this case, requires the existence of an extradition treaty for the surrender of fugitives from a foreign country. The United States tried to give effect to this requirement by concluding surrender agreements with both Tribunals, before it enacted implementing legislation.[19] Moreover, these Surrender Agreements intend to harmonize the obligations under the Statutes with domestic constitutional requirements. Article 2 of the Surrender Agreements obliges the Tribunals to support a request for surrender

17. *Cf.* Art. 2(1) of the Danish implementing legislation (Act on Criminal Proceedings Before the International Tribunal for the Prosecution of Persons Responsible for War Crimes Committed in the Territory of the Former Yugoslavia, Act No. 1099 of 21 December 1994); Section 2 of the Norwegian implementing legislation (Bill Relating to the Incorporation Into Norwegian Law of the UN Security Council Resolution on the Establishment of an International Criminal Tribunal for the Former Yugoslavia, Law 1994-06.24 38 JD/31-1-1995); Section 3 of the Swedish implementing legislation (Act Relating to the Establishment of an International Tribunal for Trial of Crimes Committed in Former Yugoslavia which entered into force on 1 July 1994); and Art. 7 of the Bosnian implementing legislation (Decree with force of law on extradition at the request of the International Tribunal, PR number 1786/95, 6 April 1995, Sarajevo).

18. *See, e.g.*, the Hungarian implementing legislation (Act XXXIX of 1996 on the fulfillment of obligations deriving from the statute of the International Tribunal established for punishing the serious violations of international humanitarian law committed in the territory of the former Yugoslavia, May 1996).

19. *See* 1994 United States – Yugoslavia Tribunal Agreement on Surrender of Persons; and 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.

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> "by copies of the warrant of arrest and of the indictment and by information sufficient to establish there is a reasonable basis to believe that the person sought has committed the violation or violations for which surrender is requested".

It is clear that the information concerned here is meant to satisfy the constitutional "probable cause" standard applied by US courts in analyzing the sufficiency of evidence presented in extradition proceedings.[20] However, the Surrender Agreements constitute a significant departure from traditional extradition treaties, because the Agreements do not contain the traditional grounds of refusal. By excluding grounds of refusal based on the accused's nationality, political or military offences, specialty, time bar, *non bis in idem*, and dual criminality from the Surrender Agreements, the United States has tried to give effect to the absolute obligation under the Statute to surrender indicted war criminals. Another important change from extradition law concerns the lack of reciprocity: surrender is only possible in one direction, from the United States to the Tribunals.

On 10 February 1996, the United States enacted legislation to implement the Surrender Agreements and to provide for other forms of assistance.[21] Concerning the surrender of accused persons, the US National Defense Authorization Act provides that "the provisions of chapter 209 of title 18 USC relating to the extradition of persons to a foreign country pursuant to a treaty or convention for extradition between the United States and a foreign government, shall apply in the same manner and extent to the surrender of persons, including United States citizens, to the *Ad Hoc* Tribunals".[22] Consequently, the extradition procedures, as enshrined in Sections 3184 to 3196 of USC Title 18 apply to the surrender of persons to the *Ad Hoc* Tribunals. By adopting these procedures and the interpretative case law pertaining to international extraditions, the implementing legislation provides for a judicial hearing and the opportunity for review by a higher court, as is required under the US Constitution.[23]

The question arises whether the implementation scheme adopted by the United States enables it to provide the *Ad Hoc* Tribunals with the required assistance. The request for the surrender of Ntakirutimana is the first test of the manner in which the United States has given effect to its obligations under the Statutes. As will be described in the next paragraph, the result is clearly unsatisfactory.

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20. *See* R. Kushen & K.J. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AJIL 513 (1996); the Fourth Amendment to the US Constitution requires, *inter alia*, that "no warrants shall issue, but upon probable cause".
21. *See* National Defense Authorization Act, Pub. L. No. 104-106, 110 Stat. 486 (1996), para. 1342.
22. *Id.*, Section (a).
23. Extradition, and now also surrender of persons to the Tribunals, involves a deprivation of liberty that implicates rights under the Fourth, Fifth, and Fourteenth Amendments; *see* Kushen & Harris, *supra* note 20, at 516 and 517.

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4. THE *NTAKIRUTIMANA* CASE

4.1. Factual background

Elizaphan Ntakirutimana, President of the Seventh Day Adventist Church, has been charged by the Rwanda Tribunal, *inter alia*, with luring several ethnic Tutsis to his church complex in the days immediately following the death of Rwandan President Habyarimana on 6 April 1994 and then organizing and leading an attack on his church complex on 16 April 1994 to kill all of these Tutsis. At some point after this attack he was admitted to the United States, and he is now legally residing with his son in Laredo, Texas. On 26 September 1996, Ntakirutimana was provisionally arrested on the above charges, at the request of the Rwanda Tribunal. The US government submitted the official request for surrender from the Rwanda Tribunal and the documents supporting that request on 18 October 1996. The request for surrender was then made in the government's "Motion for Hearing on Request for the Surrender of Elizaphan Ntakirutimana", filed on 9 January 1997. On 17 December 1997, US magistrate M.C. Notzon denied the request for surrender of the government and ordered the immediate release of Ntakirutimana, on grounds that will be discussed below.[24]

4.2. Legal issues

Judge Notzon denied the request for surrender on two grounds. First of all, he decided that the manner in which the United States has implemented its obligations under the Statute is unconstitutional. Secondly, the information supporting the request does not rise to the level of probable cause.

The implementing legislation is declared unconstitutional, because there is no Senate approved treaty between the Tribunal and the United States, as the basis for the surrender. The executive agreements with the Tribunals were effectuated by Congress through enacting enabling legislation rather than through a traditional ratification process by the Senate, as provided for in Article II, Section 2, of the US Constitution. Two questions arose in this case. First of all, was there a treaty in the sense of 18 USC Section 3184 concluded between the United States and the Tribunals? Second, is the absence of a treaty a fatal defect in the government's surrender request?

An extradition treaty in the sense of 18 USC Section 3184 requires the advice and consent of the Senate, as referred to in Article II, Section 2, of the US Constitution. It can be argued that by enacting the implementing

24. In the matter of surrender of Elizaphan Ntakirutimana, Misc. No. L-96-5, US District Court for the Southern District of Texas, Laredo division, 1997 US Dist. LEXIS 20714, 17 December 1997, Decided. Citations in Section 4 are all to this decision.

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legislation, Congress has approved of the Surrender Agreements. However, by expressing its consent through the implementing legislation instead of adhering to a traditional ratification process, "Congress has instructed the Court to treat the Agreement as if it were a treaty of extradition negotiated between the United States and some other sovereign country". The Court continues that "Congress cannot so instruct the Court and that Public Law 104-106 is unconstitutional". Thus, no Senate approved treaty in the sense of Article II, Section 2, of the US Constitution exists, and the "instruction", by means of the implementing law, given by Congress to treat the Surrender Agreements as treaties in the sense of Article II, Section 2, of the US Constitution is unconstitutional.

The question arises whether persons can be surrendered in the absence of a treaty. The government argued that Congress might provide for the extradition of fugitives without a treaty and without action of the Executive. It also referred to the provisions of 18 USC Section 3181(b) for the proposition that fugitives may be extradited without a treaty. It cited case law in support of these arguments. Judge Notzon rejected both arguments. He found that "Congress has no independent authority to regulate extradition and that a treaty of extradition is required before extradition can occur". As far as the case law cited is concerned, he held that there has never been "an occasion where a fugitive was extradited absent a valid treaty". Consequently, the absence of a Senate approved treaty is a "fatal defect in the government's request that the extraditee be surrendered".

With respect to the treaty requirement, the question arises why the government did not suggest the UN Charter, in which the surrender request ultimately finds its basis, as an alternative treaty basis. This is a Senate approved treaty and although the Senate at the time of ratification certainly did not envisage surrender on the basis of the Charter, there appears to be no clear constitutional bar to using a multilateral instrument as the legal basis for granting an extradition request.[25] It is interesting that in the present case the government referred to the experience with the United States-United Nations Headquarters Agreement[26] as a precedent in which the United States courts have given effect to executive agreements. The Court's reaction to this argument was that the constitutionality of this Agreement has never been addressed in any case. What is more important, Judge Notzon stressed that "the Headquarters Agreement was enacted pursuant to a treaty ratified with Senatorial advice and consent", namely the UN Charter, and intended "to effectuate a validly negotiated, signed and ratified treaty entered into by the United States". Can it not be argued that the Surrender Agreements serve

25. *See* Harris & Kushen, *supra* note 15, at 578.
26. *See* Interim Headquarters Agreement Between United Nations and United States of America, 11 UNTS 347 (1947).

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a more or less similar purpose? Ultimately, they intend to give effect to the obligations of the United States under the UN Charter. The Court, however, is of the opinion that a "marked contrast" exists between the Headquarters Agreement and the Surrender Agreements. This assertion may be called in question, because there definitely is a relationship between the Surrender Agreements and the UN Charter.

Although the absence of a valid Senate approved extradition treaty was in itself sufficient to deny surrender, the Court nevertheless proceeded to an examination of whether there existed probable cause to support the extradition. The required level of probable cause has been established in numerous judicial decisions in the United States. After an examination of the evidence against Ntakirutimana, which essentially consists of an affidavit filed by a Belgian police officer assigned to the Tribunal, the Court found that the information does not rise to the level of probable cause. For an outsider to the United States criminal justice system it is impossible to challenge this finding. However, the question arises whether the government should be offered the possibility to remedy the lack of information supporting the surrender request. In this respect regard should be had to Article 2(5) of the Surrender Agreement. According to this provision, the United States shall request supplemental information from the Tribunal, if this is required to establish probable cause. Such a provision remains to a large extent without effect if in national proceedings the United States government is not allowed to supplement the information supporting the surrender request. Of course, the answer to this question is no longer relevant for the outcome of this case, since the Court already denied the request on other grounds.

5. POSSIBLE REMEDIES

5.1. The Rwanda Tribunal

By denying the surrender of Ntakirutimana, however embarrassing this may be for the US government, the United States has violated its obligation under international law to comply with requests for the surrender of an accused. In case of a refusal to cooperate, the Rwanda Tribunal, just as the Yugoslavia Tribunal, has some, modest, means at its disposal to enforce compliance. Rule 7bis of the Rules of Procedure and Evidence deals with non-compliance with obligations under the Statute in general.[27] On the basis of this Rule, non-compliance of a state may be reported to the Security Council. In addition to Rule 7bis, Rule 61 provides for a specific procedure

27. *See* note 11, *supra.*

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in case of a failure to execute an arrest warrant.[28] This procedure includes submitting the indictment and evidence to the Trial Chamber and permits the Trial Chamber to determine whether or not there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment.[29] The Rule also provides for the possibility of issuing an international arrest warrant and reporting an instance of failure to cooperate to the Security Council.[30] The question arises whether this procedure is applicable to this case, since Rule 61 seems to deal exclusively with the failure to execute an arrest warrant. The United States has executed the arrest warrant but has not given effect to the surrender request. However, the immediate release of Ntakirutimana following the Court's decision can be considered a failure to comply with the initial arrest warrant.

The effectiveness of the remedies available to the Rwanda Tribunal, Rule 7bis and Rule 61, may be called in question. First of all, the United States is a permanent member of the Security Council. Reporting its failure to cooperate to this Council might therefore not be very useful. Second, the United States cannot be equated with states and entities of the former Yugoslavia which continuously refuse to cooperate with the Yugoslavia Tribunal. The United States has recognized the Tribunals and is prepared to cooperate with the *Ad Hoc* Tribunals.[31] The mechanisms of Rule 7bis and Rule 61 seem more appropriate for instances of failure to cooperate resulting from a lack of political will than for this particular instance of non-compliance. However, even if the effectiveness of Rule 7bis and Rule 61 in this case may be called in question, other relevant considerations, like the desire to make the evidence against Ntakirutimana public, may nevertheless result in their application.

In this case, the Rwanda Tribunal has given the United States the opportunity to remedy its failure to comply with the obligations under the Statute, by re-filing the surrender request for Ntakirutimana, before considering to resort to the procedures of Rule 7bis or Rule 61.[32]

28. This procedure has been applied in, *inter alia*, the cases of Karadžić and Mladić (Decision of Trial Chamber I of 11 July 1996, Review of Indictment Pursuant to Rule 61, Cases No. IT-95-5 and IT-95-18), and the case of Nikolić (Decision of Trial Chamber I of 9 October 1995, Review of Indictment Pursuant to Rule 61, Case No. IT-94-2).
29. *Cf.* Rule 61(C) of the Rules of Procedure and Evidence, *supra* note 11.
30. *Cf.* Rule 61(D) and Rule 61(E) of the Rules of Procedure and Evidence, *supra* note 11.
31. It is in this respect noteworthy that US Ambassador at Large for War Crimes, David Scheffer, has in one of his presentations referred to the United States as a country that "has led the effort to bring indictees to The Hague, and will continue to do so". *See* note 7, *supra*.
32. *Cf.* Rwandan Arrested in War Crimes, the Associated Press, 27 February 1998.

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5.2. The United States

What can the United States do to ensure the surrender of Ntakirutimana and to avoid a similar situation in the future? At the time of writing, the United States has re-arrested Ntakirutimana after it has received a new surrender request from the Rwanda Tribunal.[33] The State Department will re-file the extradition request with another federal judge in Laredo, believing "that the law and the facts support surrender for trial, and that the statute passed by congress authorizing surrender is constitutional".[34] Assuming that the federal Judge rejects the new extradition request on similar grounds as Judge Notzon, the question arises as to how the United States intends to give effect to its surrender obligations under the Statutes in the future. Several options exist. A first option is that no legislative action is taken, but that in future surrender cases, the US government puts forward the UN Charter as a treaty basis for the fugitive's surrender. This is a risky approach, however, because courts might be of the opinion that the US Senate has not approved this treaty with a view to the surrender of fugitives.[35] Moreover, the Court has declared the implementing legislation itself unconstitutional. This will not be remedied by using the UN Charter as a treaty basis. A better alternative would be to re-implement the obligations under the Statute in almost the same manner. Instead of concluding executive agreements, the United States will then need to conclude Senate approved treaties with the Tribunals. The question arises, however, whether the Tribunals have the power to conclude such treaties. In the decision concerning Dokmanović's arrest, the Trial Chamber expressed the view that the Yugoslavia Tribunal is not a state and "thus [does] not have the power to conclude extradition treaties with other States".[36] With a view to effective state cooperation, the best option would be to create a *sui generis* legal assistance regime, taking into account the unique character of the *Ad Hoc* Tribunals, in which there is no place for existing extradition law and related grounds of refusal. But even a *sui generis* legal assistance regime, breaking with the extradition concept, needs to satisfy constitutional requirements, like the probable cause standard. However, in a *sui generis* regime there appears to be no need to require a treaty basis for the surrender of a person indicted by the Rwanda Tribunal or the Yugoslavia Tribunal. This is clearly an advantage to the approach of applying extradition law to the surrender of persons to the *Ad Hoc* Tribunals.

33. *See Rwandan Arrested in War Crimes*, The Associated Press, 27 February 1998.
34. *Id.*
35. *See* Kushen & Harris, *supra* note 20, at 579.
36. Decision of Trial Chamber II of 22 October 1997 on the Motion for Release by the Accused Slavko Dokmanović, Case No. IT-95-13a-PT, para. 67.

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Whatever its reaction may be, the United States government has to act swiftly. By declaring the entire implementing law unconstitutional, the United States is in a difficult position. The question arises to what extent the United States is at present able to give effect to requests for whatever form of assistance addressed to it. The most embarrassing aspect of the present situation is that the United States finds itself in a similar position as the states and entities of the former Yugoslavia which it has always criticized for their obstruction of the Yugoslavia Tribunal's work.

6. CONCLUDING REMARKS

The case of Ntakirutimana demonstrates that there are inherent dangers to using the inter-state legal assistance model to the relationship between states and the *Ad Hoc* Tribunals. The Appeals Chamber in the *Blaškić subpoena* case refers to the relationship between states and the Yugoslavia Tribunal as a "vertical relationship", which differs from the "horizontal relationship" in inter-state legal assistance.[37] When it comes to assistance to the Tribunals in general and the apprehension of indicted war criminals in particular, a prerequisite is that the requested state recognizes the Tribunal and is willing to cooperate. The Federal Republic of Yugoslavia and the Republika Srpska still obstruct the Yugoslavia Tribunal in fulfilling its mandate; they have neither enacted legislation nor have they arrested any indictees.[38] This lack of political will remains a crucial problem in the apprehension of indicted persons, since most of them reside in the territories under the control of this state and entity and are, as a result, shielded from international prosecution. However, the case of Ntakirutimana demonstrates that even if a state is prepared to cooperate with the *Ad Hoc* Tribunals this may not be enough to ensure the assistance in practice. The problem is not only one of political will, but also one of a legal nature. The United States has insufficiently taken into account the special character of the *Ad Hoc* Tribunals and has insufficiently differentiated the assistance to the *Ad Hoc* Tribunals from inter-state legal assistance. The United States is not unique in this respect. Other states as well do not sufficiently recognize that the relationship with the *Ad Hoc* Tribunals is of a fundamentally different nature than the relationship with other sovereign states. In order to provide the *Ad Hoc* Tribunals with the assistance required to fulfill their mandate, states should be urged to break with inter-state legal assistance in general, and traditional extradition practice in particular.

37. Blaškić Decision of Appeals Chamber, *supra* note 13, para. 47.

38. Recent developments point out that the Republika Srpska tends to adopt a more cooperative attitude *vis-à-vis* the Tribunal; *see* note 3, *supra*.

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The issuance of the decision to deny the surrender of Ntakirutimana has provoked several negative reactions. However, the first impression is that it is not the federal Judge who is at fault, but rather the United States executive and legislative branches which have apparently implemented the obligations under the Statutes in an incorrect manner. It is to be hoped that the United States can remedy the defects in its implementation scheme as soon as possible.

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