

Is US Cooperation with the UN Criminal Tribunal for Rwanda Unconstitutional?

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FACTUAL BACKGROUND

On December 17, 1997 US Magistrate Marcel Notzon in Laredo, Texas stunned the US State Department and human rights advocates around the world by ruling that the congressional legislation enabling the US government to surrender or extradite indicted fugitives to the UN Criminal Tribunal for Rwanda (ICTR) was unconstitutional ¹. The State Department had asked a Federal District Court in Texas to permit the surrender of Rwandan Elizaphan Ntakirutimana to the ICTR in Arusha, Tanzania where he had been indicted on several counts of genocide, conspiracy to commit genocide and crimes against humanity.

Allegedly, Ntakirutimana, the elderly, former pastor of a Seventh-Day Adventist Church in Rwanda's Kibuye Prefecture had conspired with and assisted Hutu militias in the murder of hundreds of his own Tutsi parishioners, who had sought refuge in his church back on April 16, 1994 during the height of the genocidal rampage in Rwanda. Shortly thereafter, he allegedly led bands of armed Hutu into the countryside of the Bisesero region to hunt down and kill those Tutsi who had survived the earlier attack. Ntakirutimana subsequently left Rwanda, eventually coming to the US in December 1994 where he joined one of his sons, an anesthesiologist living in Laredo, Texas.

As a result of its investigations, the ICTR included both Ntakirutimana and another of his sons, Gerard, among the twenty-one persons it has thus far indicted. Gerard was arrested and is among the thirteen indictees in custody in Arusha, awaiting trial before the ICTR.

After the ICTR's indictment of Ntakirutimana and its request for his surrender were properly certified by the US Ambassador in the Netherlands (the location of the ICTR's chief prosecutor) and transmitted to the US Secretary of State, FBI agents arrested the former pastor in Texas on September 26, 1996. He had remained in jail from that date until his release on December 17, 1997.

LEGAL BACKGROUND

The UN Security Council established both the ICTR and the UN Criminal Tribunal for the Former Yugoslavia (ICTY) under the authority of Chapter VII of the UN Charter, which provides that the Security Council shall "decide what measures shall be taken . . . to maintain or restore international peace and security." Under Article 48(1) of the Charter, "the action required

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to carry out decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations." Arguably, the US, as a UN member state, has a treaty obligation to honor the requirements imposed on it by Security Council resolutions governing the activities of the two Tribunals.

The general obligation of states to cooperate with the Tribunals is contained in paragraph 4 of Security Council Resolution 827, and paragraph 2 of Resolution 955, the resolutions establishing the ICTY and ICTR, respectively, and setting forth their structure, jurisdiction and procedures. These provisions both read as follows:

[The Security Council] decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a trial chamber . . .

The specific obligation to surrender fugitives is contained in Article 29 of the ICTY Statute and Article 28 of the ICTR Statute, which read, in part, as follows:

1. States shall cooperate with the International Tribunal [for Rwanda] in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal [for Rwanda].²

On February 10, 1996, the US Congress enacted legislation to implement two executive agreements with the ICTY and ICTR for the purpose of arresting and surrendering to these Tribunals indicted fugitives found in the US³.

Importantly, all previous extradition agreements had been in the form of treaties between the US and foreign states. According to the US Constitution, the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . ." ⁴. Over the decades, however, US presidents have entered into many more international executive agreements, which do not require the advice and consent of the Senate, than treaties. For example, during the 1980-1992 period US presidents entered into 4,510 executive agreements, but only 218 treaties⁵. The US constitution makes no reference to either international extradition or executive agreements, and legal scholars have hotly debated the propriety of the latter⁶.

Congress can express its support for, or opposition to, any particular executive agreement by enacting or withholding the necessary implementing legislation. A number of prominent legal scholars have concluded that executive agreements supported by implementing legislation (so-called "congressional-executive agreements") are the equivalent of treaties⁷. Vagts notes, however, that,

As a political matter, the executive and legislative branches have not considered treaties and executive agreements to be fully interchangeable. They have looked to tradition. Agreements relating to extradition, freedom of establishment, taxation and so forth have traditionally been passed through the Senate process; whereas trade agreements have been routed through the two-house channel ⁸.

The extradition legislation that the US magistrate in the Ntakirutimana case had declared to be unconstitutional had been the result of a congressional-executive agreement. The executive had entered into agreements with the two UN Tribunals and congress demonstrated its assent by promptly passing the necessary implementing legislation. Apparently, the US State and Justice Departments were confident that this arrangement was constitutionally sound ⁹.

THE ELIZAPHAN NTAKIRUTIMANA CASE

In the subject case Federal Magistrate Notzon had to determine (1) whether the Court had proper jurisdiction over fugitive Ntakirutimana for purposes of extradition, (2) whether the fugitive is being sought for offenses covered by the applicable agreement, and (3) whether there is sufficient evidence to establish that Ntakirutimana committed the crimes for which he is charged. The magistrate concluded that the "instant request fails on the first and third prongs of the above inquiry" ¹⁰.

With respect to prong 1, the magistrate reasoned as follows:

Throughout the history of this Republic, every extradition from the United States has been accomplished under the terms of a valid treaty of extradition. In the instant case, it is undisputed that no treaty exists between the United States and the Tribunal. . . . Without a treaty, this Court has no jurisdiction to act, and Congress' attempt to effectuate the Agreement in the absence of a treaty is an unconstitutional exercise of power. Accordingly, the Court FINDS that the provisions of Section 1342 of Public Law 104-106 are unconstitutional as they are applied to the Tribunal, . . . ¹

The magistrate appears to reason that what has not been done cannot be done. He cited no constitutional provision or case law that directly supports his conclusion.

The magistrate correctly stated that the third prong of the inquiry--sufficiency of evidence--must meet the probable cause standard. Citing *Parretti v US* ¹¹, the magistrate stated he was "free to exercise [his] discretion in judging the credibility of the evidence presented as in any other domestic case where the Court would be required to make a determination of probable cause." The fourth amendment to the U.S. Constitution requires, but does not define, "probable cause" for searches and seizures. Many judges have defined the concept rather vaguely as "reasonable grounds to believe." Consequently, judges exercise a good deal of discretion in determining whether probable cause exists in any particular case. Magistrate Notzon concluded that it did not exist in this case.

The magistrate was unconvinced by a number of factors. For one, the affidavit filed by a Belgian police officer assigned to the ICTR in support of the charges failed to list the names of its twelve witnesses and failed to note whether witness statements had been made under oath ¹². Although one of the witnesses claimed to have seen Ntakirutimana shooting at civilian Tutsi, he failed (according to the magistrate) to state whether anyone was killed. Four witnesses

identified Ntakirutimana from a photograph as a person who "participated in the attack," but Magistrate Notzon dismissed this evidence because "the affidavit fails to state when and under what conditions this photograph was shown to the witnesses, or whether the photograph was shown in conjunction with other photographs." For these and other reasons, the magistrate concluded that "the possibility for inaccuracy or incredibility in the witness' statements is high." Consequently, he concluded that the submitted evidence did not rise to the level of probable cause.

DISCUSSION AND CONCLUSION

The magistrate could have decided the constitutional issue of this case differently. In his Memorandum and Order, Magistrate Notzon reasoned that the US-UN Headquarters Agreement--an executive agreement locating the UN Headquarters in New York City--was constitutional because that "agreement was enacted pursuant to a treaty [the UN Charter] ratified with Senatorial advise and consent" ¹. Hence, the magistrate concluded, "this places it [the Headquarters Agreement] in marked contrast to the Agreement with the Tribunal in the instant case" ¹. Unfortunately, the magistrate did not explain how this placed it in marked contrast.

The US President entered into the Tribunal Agreements pursuant to the same UN Charter treaty, which requires member states to assist the Security Council in its implementation of measures designed to maintain or restore international peace ¹³. In order to restore peace in the former Yugoslavia and Rwanda the Security Council took judicial measures: it created the ICTY and the ICTR. Both of these Security Council creations need member states to assist them by, among other things, extraditing indicted fugitives. Hence, according to the magistrate's own reasoning, the US executive's Tribunal Agreements, having been made pursuant to a valid treaty, can be deemed to be constitutional. Moreover, an even stronger argument exists for asserting the constitutionality of the Tribunal Agreements than of the Headquarters Agreement: the US is obligated under the UN Charter to assist the Tribunals; it was not obligated under the UN Charter to agree to locate the UN Headquarters in New York City.

Part of the reason for the magistrate's ruling may result from the anti-UN bias harbored by some Americans. At an October 1996 hearing of the Ntakirutimana case, Magistrate Notzon reportedly said the following: "I question whether we are acting to subordinate U.S. sovereignty to the United Nations. I am particularly bothered by the potential harm of depriving this man of his freedom. . . . Little by little, we are losing the guarantees of those individual freedoms each time we give up a bit of our freedoms. It makes me, the grandfather of five little girls, worry about the future" ¹⁴. Apparently, Magistrate Notzon fears that America's involvement with the UN is a dangerous slippery slope leading to the lost of sovereignty.

The magistrate's decision is a serious, but temporary, setback for US efforts to support the two UN Tribunals. In recent years the US has been pressuring countries, such as Kenya, Croatia and Serbia, to extradite indictees to the ICTR or the ICTY. Kenya has been critical of the ICTR, and has extradited some of the fugitives on its soil only grudgingly. Both Croatia and Serbia argue that their constitutions prevent them from ordering such extraditions. The US has rejected

this argument, but now Washington finds itself caught in a major contradiction--one that recalcitrant capitals will point to with glee.

On January 30, 1998, a spokesman for the US State Department read to this writer a statement expressing the Department's disappointment with the Ntakirutimana decision. He said the State Department is considering [unspecified] options to fulfill US obligations to the UN Tribunals.

The US executive can remedy the situation by submitting the Tribunal executive agreements to the Senate for its advice and consent. Since both houses of Congress have already signaled their approval of the agreements by enacting implementing legislation, it is highly probable that the Senate will give its consent.

With respect to the probable cause evidentiary requirement of extradition hearings, State Department lawyers must work more closely with Tribunal prosecutors to help them better prepare their affidavits so as to satisfy US magistrates who are unfamiliar with the history, the widespread violence, and the sad circumstances of Bosnia and Rwanda.

Notes

1. In the Matter of Surrender of Elizaphan Ntakirutimana, U.S. Dist. Ct. Southern Dist. of TX, Laredo Div., Misc. No. L-96-5 (Dec. 17, 1997).
2. Statute 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. S/25704, annex (1993); Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, SC Res. 955 (Nov. 8, 1994), reprinted in 33 ILM 1602 (1994).
3. National Defense Authorization Act, Pub. L. No. 104-106, 1342, 110 Stat. 486 (1996); for a discussion of the executive agreements, see Robert Kushen and Kenneth J. Harris, "Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda," *American Journal of International Law*, v. 90, pp. 510-518 (1996).
4. Article II, Section 2.
5. Henry J. Steiner, et al., *Transnational Legal Problems*. Westbury, NY: Foundation Press, 1994, p. 561.
6. See, for example, Myres McDougal & Asher Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy" (pts. 1 & 2), *Yale Law Journal* v. 54, pp. 181-351, 534-615 (1945), and Edwin Borchard, "Shall the Executive Agreement Replace the Treaty?" *Yale Law Journal* v. 53, pp. 664-683 (1944); "Treaties and Executive Agreements --A Reply," *Yale Law Journal* v. 54, pp. 616-664 (1945).
7. For a series of quotes to this effect, see Detlev F. Vagts, "International Agreements, the Senate and the Constitution," *Columbia Journal of Transnational Law* v. 36, pp. 143-155 (1997).

8. Ibid., p. 153.
9. Robert Kushen and Kenneth J. Harris, "Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda," *American Journal of International Law* v. 90, pp. 510-518 (1996).
10. For this and subsequent case quotes, see Note 1.
11. *Parretti v. United States*, 112 F. 3d 1363 (9th Cir., 1997).
12. The practice of listing witnesses by letters (e.g., A, B, C, etc.) rather than by name may be to protect them from assassination. Over 200 witnesses were murdered in 1996 alone. See, Zarembo, Taba. "Rwanda's Genocide Witnesses Are Killed As Wheels of Justice Slowly Begin to Turn," *Christian Science Monitor*, p. 7, Jan. 23, 1997; Buckley, Stephen. "Witnesses of Genocide Targeted; Protection Efforts Fail Rwandans Waiting to Testify in Tribunals," *Washington Post*, p. A24, Jan. 20, 1997.
13. UN Charter, Articles 39, 41 & 42.
14. McLemore, David. "Rwandan war crimes suspect to remain jailed in Laredo," *Dallas Morning News*, p. 25A, Oct. 12, 1996.