

Can the US State Department Surrender Rwandan Fugitives to the UN Criminal Tribunal?

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INTRODUCTION

In an Order filed on 7 August 1998 in the US District Court for the Southern District of Texas, Laredo Division, Judge John D. Rainey ruled that Rwandan fugitive Elizaphan Ntakirutimana is properly extraditable to the UN International Tribunal for Rwanda (ICTR)¹. Judge Rainey's Order reversed a 17 December 1997 ruling by Magistrate Marcel Notzon, who had held that the executive agreement supported by congressional legislation "enabling" the US government to surrender or extradite indicted fugitives to the ICTR was unconstitutional and that the evidence in support of the charges against Ntakirutimana did meet the probable cause standard².

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 during the height of the genocidal rampage in Rwanda on April 16, 1994. Shortly thereafter, Ntakirutimana 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. He 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 indicted Ntakirutimana on 20 June 1996 and again on 7 September 1996 on charges of genocide, conspiracy to commit genocide, crimes against humanity, and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereof.

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 remained in jail from that date until his release on December 17, 1997. Former U.S. Attorney General Ramsey Clark, who serves as defense counsel for Ntakirutimana, claims the ICTR is illegal and that his client is falsely accused.

Ntakirutimana's release embarrassed the U.S. government. While the U.S. was encouraging, even pressuring, African countries to transfer Rwandan suspect over to the ICTR, one of its own courts had freed the only Rwandan indictee in US custody. Determined to correct this situation, the US government refiled its request for surrender on 29 January 1998, seeking

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<http://www.africa.ufl.edu/asq/v2/v2i3a6.pdf>

review by an Article Three judge in the Laredo division. The court granted the government's request for review and issued an arrest warrant for Ntakirutimana on 26 February 1998.

In his August 1998 Order, Judge Rainey concluded that the Government's second request for the surrender of Ntakirutimana was properly before the court. He concluded that, given the nature of extradition proceedings, *res judicata* would be inappropriate; the second request would be considered *de nova*; and the previous magistrate's opinion would not be dispositive³.

Contrary to Magistrate Notzon, who maintained that extradition could be executed only under the terms of a valid treaty, Judge Rainey held that the US Constitution does not require a treaty for extradition; the Supreme Court has repeatedly stated that extradition may be effected either by treaty or by statute; allowing surrender pursuant to either treaty or statute is consistent with the Constitution's provision that treaties and statutes are entitled to equal dignity as the supreme law of the land; and the Executive's power is at its highest when his actions are approved by Congress, as they were in this case⁴.

With respect to the issue of probable cause, the judge held that the Government's supplemental declaration offering more detailed and corroborating evidence of the alleged crimes, as well as an explicit explanation of the conditions under which the evidence was gathered was sufficient to establish probable cause to sustain the charges in the Tribunal's indictments⁵.

Consequently, the Court certified to the US Secretary of State that Ntakirutimana may properly be surrendered to the ICTR, and ordered that Ntakirutimana be arrested and detained. His transfer, however, was delayed for thirty days to provide his counsel an opportunity to file a habeas petition. In September, Ntakirutimana's counsel told this writer that he had filed such a petition. Hence, the final outcome of this case remains to be determined.

Nevertheless, ICTR Registrar Agwu Ukiwe Okali was buoyed by Judge Rainey's decision. He publicly thanked the US Government for its efforts to cooperate and render judicial assistance to the ICTR⁶.

Notes

1. In the Matter of Surrender of Elizaphan Ntakirutimana, U.S. Dist. Ct. Southern Dist. of TX, Laredo Div., Civil Act. No. L-98-43. (7 Aug. 1998).
2. In the Matter of Surrender of Elizaphan Ntakirutimana, U.S. Dist. Ct. Southern Dist. of TX, Laredo Div., Misc. No. L-96-5 (17 Dec. 1997). For a discussion of this ruling, see Paul J. Magnarella, "Is US Cooperation with the UN Criminal Tribunal for Rwanda Unconstitutional?" *African Studies Quarterly* Vol. 1, Issue 4 (1998). Online. Internet. Available <http://web.africa.ufl.edu/asq/v1/4/6.htm>. For background to the ICTR, see 79. "Judicial Responses to Genocide: The International Criminal Tribunal for Rwanda and the Rwandan Genocide Courts", *African Studies Quarterly* Vol. 1, Issue 1, (1997). Online. Internet. Available <http://web.africa.ufl.edu/asq/v1/1/2.htm>
3. In the Matter of Surrender of Elizaphan Ntakirutimana, p. 6.
4. *Ibid.*, p. 17. The Court relied on such cases as: *Grin v. Shine* 187 US 181 (1902); *Valentine v. United States* 299 US 5 (1936); *United States v. Rauscher* 290 US 276 (1933); *United*

States v. Walczak 783 F. 2D 852 (9th Cir. 1986); Dames & Moore v. Regan 453 US 654 (1981).

5. In the Matter of Surrender of Elizaphan Ntakirutimana, pp. 32-52.
6. "U.S. praised for Surrendering Rwandan Genocide Suspect," Xinhua News Agency (6 Aug. 1998), Lexis-Nexis News File.