**THE PROSECUTOR**

**v.**

**Michel BAGARAGAZA**

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

***AMICUS CURIAE* BRIEF FILED BY THE KINGDOM OF NORWAY**

**23 June 2006**

---

1. In conformity with Rule 74 of the Rules of Procedure and Evidence ("the Rules") of the International Criminal Tribunal for Rwanda (ICTR), the Government of the Kingdom of Norway submits an *amicus curiae* brief on the question of jurisdiction *ratione materiae* in the case of The Prosecutor v. Michel Bagaragaza (Case No. ICTR-2005-86-PT). Basing itself on the guidelines issued in the document IT/122 dated 27 March 1997 regarding information concerning the submission of *amicus curiae* briefs, Norway also requests to be invited to participate should any oral argument be deemed necessary.

2. The Prosecutor of the International Criminal Tribunal for Rwanda filed on 15 February 2006 a motion under Rule 11 *bis* of the Rules requesting the Trial Chamber III ("the Chamber") to transfer the case of Michel Bagaragaza ("the Accused") to the Kingdom of Norway for trial.

3. Rule 11 *bis* of the Rules states that:

> *If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:*
> *… (iii) having jurisdiction and being willing and adequately prepared to accept such a case*

4. Responding to a Note Verbale from the ICTR dated 23 March 2006 (ICTR/IOR/ERSPS/03/06/45-RD) the Norwegian Ministry of Foreign Affairs confirmed on 11 April 2006 that Norwegian Courts have subject-

matter jurisdiction over certain acts committed by foreigners abroad, and that in the opinion of the Norwegian Director General of Public Prosecution it will be possible to prosecute persons indicted by the ICTR in Norway.

5. As a customary reflection of the paramount principle of independence of the judiciary, it was recalled that Norwegian Courts will interpret the provisions of the General Civil Penal Code 22 May 1902 No. 10 with subsequent amendments ("the Penal code") in an independent manner, and that certainty about the court's findings, including about jurisdiction, is therefore not possible to provide.

6. Based on communications with the Office of the Prosecutor it is nevertheless the clear understanding of the Kingdom of Norway that the case will be returned to the ICTR, should Norwegian courts reach any conclusion that they do not have jurisdiction.

7. In its decision of 19 May 2006 the Chamber has, however, denied the Prosecutor's motion for referral to the Kingdom of Norway of the case of the Accused. In its ruling the Chamber found that the Kingdom of Norway does not have jurisdiction over the alleged crimes in the indictment against the Accused. Thus there was no need for the Chamber to consider the other requirements for referral as provided in Rule 11 *bis* or in the Parties' submissions.

8. For the sake of good order, it is noted that the Chamber in its consideration of the issue of jurisdiction *ratione materiae* seems to have based itself on the assumption that the Kingdom of Norway ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide only on 22 July 1994, cf. paragraph 13 of the Decision and footnote 11. It should therefore be pointed out that the correct date of ratification is 22 July 1949 and that the Convention entered into force for Norway in 1951.

9. As reference has been made in the Decision paragraph 10 to the so-called *Stankovic* Referral Decision (ICTY case number IT-98-23/2) it is moreover noted that:

> "*The bench must be satisfied there would exist an adequate legal framework which criminalises the alleged behaviour of the Accused so that the allegations can be duly tried and determined and which provides for punishment*".
>
> The ICTR must accordingly, quoting from the said decision, decide*:* "*Whether there is any significant deficiency which may impede or prevent the prosecution, trial, and if appropriate, the punishment of the*

*Accused for the alleged criminal conduct which is charged in the present Indictment*".

10. The question here is whether Norway has jurisdiction in accordance with Rule 11 *bis* (A) (iii), based on the situation in 1994, so that the conditions stated in Rule 11 *bis* would be satisfied as regards a sufficient ("*adequate*") legal framework for the purposes specified in the Rules and the Statute.

11. The Government of Norway submits that, as of 1994, when the alleged criminal conduct of the Accused took place, Norway had criminal jurisdiction *ratione materiae* notably with regard to genocide in accordance with its international legal obligations.

12. While it is undisputed that Norway had no explicit reference to genocide in its Penal code, Norwegian authorities find it necessary to provide information which may be pertinent for the interpretation and application of Rule 11 *bis*. This concerns Norwegian legislative traditions and the particular relationship between international law and Norwegian law in this field. Two main features will be highlighted. These are the relevance of international legal norms to the application of the relevant criminal provisions, and at the same time, the tradition generally followed in the Penal code to draft criminal provisions in a general and so-called synthetic way, rather than in a specific, detailed manner. This latter approach has hitherto been followed, including with regard to international crimes. These are subsumed under general criminal provisions, but trigger other provisions of especially aggravating circumstances.

13. Against this background, the Norwegian authorities respectfully submit that, even though this general legislative tradition is currently undergoing a comprehensive review and that changes are envisaged in this field, this should have no bearing on the question as to whether Norway had criminal jurisdiction over the conduct concerned in 1994.

**The Norwegian Penal code of 1902 and international crimes**

14. Since the prosecution of war criminals in the aftermath of the Second World War it has been a consistent premise in Norwegian law that the perpetrators of war crimes and other grave international crimes be brought to justice.

15. Based on a Royal Decree of 12 October 1945, Norway adhered to the London Agreement of 8 August 1945 for the prosecution and punishment of the major War Criminals of the European Axis. Norway thus supported and signalled willingness to assist the Nuremberg tribunal. This was done on the basis that there was effective national jurisdiction in Norwegian law over

the offences set out in the Charter annexed to the Agreement, among these crimes against humanity.

16. The Norwegian Supreme Court subsequently confirmed that international criminal norms are indeed applicable in the interpretation of the national Penal code, given the international nature of the prosecution of Axis war criminals. This was the reasoning in the "Klinge-case", cf. Rt. (Supreme Court Report) 1946 p.198 and *Annual Digest and Reports of Public International Law Cases*, Year 1946, at 263, where a person was sentenced for aggravated cases of torture based on the relevant sections of the Penal code (section 228 - violence against person, and section 229 - injury against person in body or health).

17. In another Supreme Court case, reported in Rt. 1947 p. 248, a person was sentenced for war crime, in having directed the deportation to German concentration camps of 503 members of the Norwegian Jewish community during the war, in the knowledge that the group of people, among them women and children, would likely perish from starvation, forced labour or mistreatment. Only ten members of the group ever returned to Norway. The court sentence in this case was based on section 233 (homicide) and section 225 (transport of people to slavery) of the Penal code in concurrence. The Supreme Court explicitly stated, in rebutting the arguments for appeal, that the conduct of the convicted in this case constituted a war crime.

18. On 22 July 1949 Norway ratified the 1948 Convention on the prevention and punishment of the crime of genocide, which entered into force for Norway in 1951. The convention requires that Norway criminalise and provide effective penalties for all persons guilty of genocide. The government's proposal to parliament to give its assent to ratify the convention, cf. St.prp. nr. 56 (1949) p.6, stated that existing national legislation provided sufficient legal basis for establishing criminal jurisdiction over the offences described in the convention. The Norwegian parliament (Storting) concurred with this view, cf. Innst. S. nr. 138 – 1949, St.tid. p.234.

19. With crimes against humanity already established as crimes under customary international law, the Norwegian authorities' assessment ("*opinio juris*") by that time also relied on the opinion expressed in UN General Assembly resolution of 11 December 1946 to this effect. Moreover, in its Advisory Opinion of 28 May 1951 the International Court of Justice reiterated that "*The principles underlying the Convention* [on the prevention and punishment of the crime of Genocide] *are recognised by civilised nations as binding on States even without any conventional obligation*", cf. ICJ Reports 1951 p.15.

20. The assessment that, already by 1994, Norway had criminal jurisdiction with regard to crimes under the Statute of the ICTR is presumed also in the Parliament's adoption of the Act of 24 June 1994 No. 38 relating to the incorporation into Norwegian law of the United Nations Security Council Resolution on the establishment of the international tribunals for crimes committed in the former Yugoslavia, cf. Ot.prp. nr. 54 (1993-94), and Rwanda, cf. Ot.prp. nr. 37 (1994-95). It was concluded that the punishable crimes included in the Statute of the Tribunal were recognized as international crimes under customary international law and that both Norwegian courts and the Tribunal had jurisdiction over those crimes, cf. Ot.prp. nr.54 (1993-94) pp. 5 and 13.

21. As a consequence of this *opinio juris*, it was understood that Norwegian authorities, in applying the Act of 24 June 1994, would be able to surrender an indicted person to the ICTR using existing extradition provisions with minor adjustments. This inherently confirms that the crime committed is also punishable under Norwegian law, cf. section 3 (1) of Act relating to extradition of offenders etc. 13 June 1975 No. 39.

22. The completion of the negotiations on the International Criminal Court and the adoption in 1998 of the Rome Statute led to significant and renewed focus on domestic internalization of international penal norms. The Norwegian government's White Paper on the implementation of the Rome Statute, cf. Ot.prp. nr. 95 (2000-2001) p. 13, acknowledged that the Penal code did not itself define genocide and crimes against humanity, and that it may therefore be desirable to reform the legislation.

23. It was deemed, however, that most if not all categories of crimes defined in the Statute, would fall under Norwegian criminal jurisdiction, and that Norwegian courts would reflect the interests protected by the international prohibition of these offences by applying provisions of especially aggravating circumstances to the crime and by taking into account such circumstances, thus allowing for the imposition of maximum penalties available.

24. In light of the further development of international criminal law, the notion has gradually won acceptance in Norway that a more specific catalogue of international crimes should be included in the Penal code in the future. In parallel with the development of the International Criminal Court, a general revision of the Norwegian Penal code is being prepared. Instead of delaying ratification of the Rome Statute until such a revision was completed, it was decided that Norway should ratify the Rome Statute and that the revision process should continue. This was done, however, on the clear understanding that Norway already had criminal jurisdiction over the crimes through criminalization of the conduct concerned and the impact

of international legal obligations in the application of Norwegian laws. Norway ratified the Rome Statute on 16 February 2000.

25. The Norwegian Penal Code Commission submitted its report in the first half of 2002, cf. NOU 2002:4, in which it *inter alia* recommended that Norway introduce as separate criminal offences those crimes which are listed in articles 6, 7 and 8 of the Rome Statute by transforming the relevant provisions of the Statute into Norwegian legislation, see p. 274 ff.

26. The Commission did not challenge the prevalent legal opinion that most if not all crimes covered by the Rome Statute would also fall under Norwegian jurisdiction as described above.

**Norwegian jurisdiction over the international crime of genocide**

27. Article 2 of the Statute for the Rwanda Tribunal mirrors the definition of genocide laid down in Articles 2 and 3 of the 1948 Convention:

> *The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.*
>
> *Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
> *( a ) Killing members of the group;*
> *( b ) Causing serious bodily or mental harm to members of the group;*
> *( c ) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
> *( d ) Imposing measures intended to prevent births within the group;*
> *( e ) Forcibly transferring children of the group to another group.*
>
> *3. The following acts shall be punishable:*
> *( a ) Genocide;*
> *( b ) Conspiracy to commit genocide;*
> *( c ) Direct and public incitement to commit genocide;*
> *( d ) Attempt to commit genocide;*
> *( e ) Complicity in genocide.*

28. Section 233 of the Norwegian Penal code criminalises the intentional killing of any person, and section 231 is likewise applicable to serious bodily or mental harm. Section 233 lays down that any person who causes another person's death, or who aids and abets thereto, is guilty of homicide and shall be liable to imprisonment for a term of not less than six years.

However, its second paragraph defines a particular crime of homicide under especially aggravated circumstances, which is worthy of the severest punishment available under Norwegian law, i.e. a term of imprisonment not exceeding 21 years. The crime of genocide will in Norwegian penal law undoubtedly be subsumed under this provision.

29. If a person is indicted in Norway for conduct amounting to genocide, an indictment will describe relevant acts committed by the indicted person with reference to the concept of genocide and related norms as established in international law. In particular, it is assumed that the objective and subjective elements of the crime as defined in an international legal instrument binding on Norway, will be assessed since they are relevant to the application of "especially aggravating circumstances". Further, the indictment will list all relevant provisions of the Penal code applicable to cover all aspects of the alleged offences. The court will in turn decide on the basis of the indictment if the person is guilty of having committed the offences under the aggravating circumstances set out, applying *inter alia* the procedural guarantees of burden of proof and equality of arms.

30. As far as the facts of the matter are concerned, there is no provision for the exclusion of proof of intent of genocide even if the Penal code as such does not explicitly define the crime of genocide.

31. When a person is convicted of having committed a crime under especially aggravating circumstances a more severe penalty will result. The courts will determine whether there are such aggravating circumstances based on the facts laid out in the indictment and observing the burden of proof.

32. Norwegian case law provides examples that e.g. racist motives may constitute an especially aggravating circumstance, cf. Appellate court case LB 2002-850. The intent to destroy an ethnic group would without doubt present the most severe example imaginable of this requirement. If in a given case the gravity of the conduct of the accused would qualify as genocide, the full scope of this crime as defined under international law should be tried by the court. Norwegian criminal law is fully in conformity with the general principle of international law that the application of penalties must reflect the gravity of the crimes concerned.

*Sources of law:*

33. When interpreting the applicable legal rules, a Norwegian court will generally take into consideration a number of sources of law in order to determine the case before it:

statutory law

*travaux préparatoires*/parliament's intentions as legislator
customary law
case law
principles of law
international law
legal theory
equity

*Principles of interpretation:*

34. The above list of relevant sources reflects the impact of international law in Norwegian law, through the presumption of conformity of the latter with the former, within the limits of the principle of legality (*nullum crimen sine lege*) in Norwegian criminal law.

35. Through consistent and longstanding jurisprudence, the Norwegian Supreme Court has confirmed this principle of presumption, which demands that Norwegian law is interpreted and applied in harmony with Norway's international legal obligations, unless the contrary has been expressly stated by the legislator. As stated above, the legislator has consistently signalled that Norway's obligations to combat international crimes shall be duly reflected in the interpretation and application of the Penal code.

36. It is well established in Norwegian law that the will of the legislator as expressed in the *travaux préparatoires* is always an important source of law in the interpretation and application of provisions of statutory law.

37. When applicable, Norwegian courts may also take into consideration case law from international criminal courts as a means of interpreting the definition of international crimes.

*Provisions on aiding and abetting crime and attempts:*

38. The Norwegian Penal code has broadly defined, general provisions on aiding and abetting the commission of crime and attempts. These cover conspiracy, direct and public incitement to commit crime, attempt to commit crime and complicity.

39. In this context it should be noted that the relevant provisions in the Penal code themselves include the aid and conspiracy, which are deemed to cover any form of participation, either psychological or physical and at any given time. It thus covers conspiracy to commit genocide, direct and public incitement to commit genocide, as well as complicity in genocide. In addition, the conduct of publicly urging or instigating the commission of a

criminal act or extolling such act is laid down as an independent criminal act, cf. section 140 of the Penal code.

40. In general, a violation of the abovementioned provisions in section 233 on aiding and abetting is liable to the most severe punishments available under Norwegian criminal law.

41. An attempt to commit a crime and an attempt to aid and abet in the commission of a crime are punishable on a par with the main offence itself. When determining if an attempt is punishable in relation to acts that are intended to lead to the commission of a crime, it should be noted that the threshold of punishable attempt to commit that crime is passed in Norwegian law whenever the commission of the crime is intended to begin. According to section 51 of the Penal code, an attempt shall be punished by a milder penalty than a completed felony. The maximum penalty provided for the completed criminal act may nevertheless be applied. This may be the case where an attempt has led to a result that would have justified the application of such a penalty, if this result had been intended by the offender.

*Principle of accumulation:*

42. The crime of genocide is qualified both by the particularly grave intent on part of the guilty and the number of casualties that has been or may be suffered. The Norwegian Penal code deals with qualified intent as a category of especially aggravated circumstances. It deals with the number of victims by also applying the principle of accumulation.

43. If an offence coincides with two or more penal provisions, or when two or more offences are committed through the same conduct, general provisions on concurrence in the Penal code apply. They authorize the courts to apply all provisions in the Penal code that reflect various aspects of the crime or interests protected by the penal provision, e.g. as in the deportation case mentioned above.

44. This also means that each different situation falling under the same criminal provision will be tried individually, and that the penalty available would accumulate, up to the maximum sentence in Norway.

*Universal jurisdiction:*

45. According to section 12 (4) (a) of the Penal code, Norwegian criminal law shall be applicable, within any limits set out by international law, to acts committed abroad by a foreigner including when the act is a violation of section 233 (homicide) or sections 227 – 229 (bodily harm). An indictment based on section 12 (4) (a) shall in this case be decided by the

King (i.e. the cabinet of ministers), according to section 13 first paragraph of the Penal code. If an indicted person accused of acts amounting to genocide is tried before Norwegian courts on the basis of an agreement between the requesting international court and the Norwegian government, the indictment in the case will fully reflect the aggravating circumstances under which the alleged offences have been carried out.

*Cessation of penalties:*

46. According to section 67 of the Penal code, the statute of limitations after which an act is no longer punishable under Norwegian law, is 25 years when imprisonment for a term not exceeding 21 years may be imposed, e.g. grave bodily injury and homicide. This limitation would not apply in the present case.

**Conclusion**

Based on the above assessment of relevant sources of Norwegian law, it is assumed that Norway has jurisdiction *ratione materiae* with regard to relevant conduct in 1994 covered by the definition of crimes set out in the Statute of the ICTR.

**Annex: Overview of applicable provisions of the penal code**

The following provisions, as provided in English translation of the Penal code, were in force prior to 1994:

*Section 233*

*Any person who causes another person's death, or who aids and abets thereto, is guilty of homicide and shall be liable to imprisonment for a term of not less than six years.*

*If the offender has acted with premeditation or has committed the homicide in order to facilitate or conceal another felony or to evade penalty for such felony, imprisonment for a term not exceeding 21 years may be imposed. The same applies in cases of repeated offences and also when there are especially aggravated circumstances.*

*Section 229*

*Any person who injures another person in body or health or reduces any person to helplessness, unconsciousness or any similar state, or who aids and abets thereto, is guilty of occasioning bodily harm and shall be liable to imprisonment for a term not exceeding three years, but not exceeding six years if any illness or inability to work lasting more than two weeks or any incurable defect or injury is caused, and not exceeding eight years if death or considerable injury to body or health results.*

*Section 231*

*Any person who causes considerable injury to the body or health of another person, or who aids and abets thereto, is guilty of occasioning grievous bodily harm and shall be liable to imprisonment for a term of not less than two years. If the act is premeditated, imprisonment for a term not exceeding 21 years may be imposed if the felony results in a person's death.*

*Section 232 (excerpts)*

*If a felony mentioned in sections 228 to 231 is committed in intent in a particularly painful manner or by means of poison or other substances which are highly dangerous to health, or with a knife or other particularly dangerous instrument, or under other especially aggravating circumstances, a sentence of imprisonment shall always be imposed, and for a felony against section 231 a term of imprisonment not exceeding 21 years may be imposed in every case and otherwise the penalty may be increased by up to three years. [..] In deciding whether other especially*

*aggravating circumstances exist, particular importance shall be attached to whether the offence has been committed against a defenceless person, whether there was a racial motive, whether it was unprovoked, whether it was committed by several persons jointly, and whether it constitutes ill treatment.*

*Section 140*

*Any person who publicly urges or instigates the commission of a criminal act or extols such an act or offers to commit or to assist in the commission of it, or who aids and abets such urging, instigation, extolling, or offer, shall be liable to fines or to detention or imprisonment for a term not exceeding eight years, but in no case to a custodial penalty exceeding two-thirds of the maximum applicable to the act itself.*

*Criminal acts shall here include acts the commission of which it is criminal to induce or instigate.*

*Section 49 first paragraph*

*When a felony is not completed, but an act has been done whereby the commission of the felony is intended to begin, this constitutes a punishable attempt.*

*Section 51*

*An attempt shall be punished by a milder penalty than a completed felony. The penalty may be reduced to less the minimum provided for such felony and to a milder form of punishment.*

*The maximum penalty provided for the completed felony may be applied if the attempt has led to any such result as, if it had been intended by the offender, could have justified the application of so high a penalty.*