

## **THE POSSIBILITY OF TRANSFER(?): A COMPREHENSIVE APPROACH TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA'S RULE 11BIS TO PERMIT TRANSFER TO RWANDAN DOMESTIC COURTS**

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*The International Criminal Tribunal for Rwanda's (ICTR or Tribunal) Rule of Procedure and Evidence 11bis allows the Tribunal to transfer accused persons to domestic courts in order to expedite the hearing of the thousands of genocide cases still waiting on the ICTR's overloaded docket. So long as certain baseline requirements are met, Rule 11bis, on its face, does not distinguish between domestic Rwandan courts and other jurisdictions. However, despite granting requests for transfer to other countries' courts, the Tribunal has repeatedly denied applications for transfer to Rwanda notwithstanding numerous requests. Further, behind such requests lies the pressing need to resolve all outstanding cases before the Tribunal's looming 2013 termination date.*

*This Note explores the requirements for a successful transfer to a domestic jurisdiction set forth in Rule 11bis and how the Government of Rwanda has labored, through legislated judicial reform, to meet those requirements. After analyzing the history and founding principles behind the formation of the ICTR, the Note then explores how the Tribunal has applied the 11bis requirements for transfer applications to countries other than Rwanda and to Rwanda itself, as well as the International Criminal Tribunal for the former-Yugoslavia's (ICTY) application of the Rule. Finding an inconsistent application of the Rule between applications for transfer outside Rwanda and to Rwanda itself, the Note offers a more comprehensive balancing test that the ICTR should consider when determining whether to transfer cases to domestic courts. Finally, this Note argues that in weighing countervailing judicial interests expressed in the formation of the ICTR against specific due process concerns, the Tribunal may, in specific cases, be able to transfer cases to Rwanda, thus contributing to the overall interests of justice and the utilitarian goal of unloading the Tribunal's docket.*

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#### INTRODUCTION

On November 3, 1999, the International Criminal Tribunal for Rwanda (ICTR or Tribunal) ruled that Jean-Bosco Barayagwiza’s one-and-one-half year detention prior to being charged violated his human rights and consequently ordered his release.<sup>1</sup> The possible release of a man accused of inciting mass genocide through the use of his radio station due to a procedural technicality created an uproar in Rwanda, resulting in the Rwandan government’s (GOR) severance of diplomatic relations with the international court, which were not restored until February 2000.<sup>2</sup> While the court eventually revised its opinion to deny his release,<sup>3</sup> this episode illustrates the tension that may arise when an international court is charged with adjudicating cases relating to mass atrocities that were carried out

1. See *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision, ¶ 106 (Nov. 3, 1999) [hereinafter *Barayagwiza*, Decision]; see Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT’L L.J. 163, 180–81 (2000); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1284 (2000).

2. See Drumbl, *supra* note 1, at 1284; Carroll, *supra* note 1, at 180–81.

3. See *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), ¶ 72 (Mar. 31, 2000) (holding that although the defendant’s rights were violated, such violation does not merit dismissal of the charges and release).

against citizens of a specific sovereign nation.<sup>4</sup> This has called into question the primary purpose of such international tribunals: is their mission to hold perpetrators of mass atrocity accountable and bring them to justice or to serve the sometimes competing goals and interests of the international legal community in establishing international legal norms, which may involve a strict application of Western due process rights?<sup>5</sup>

From a practical perspective, the question was moot at the time of *Prosecutor v. Barayagwiza*;<sup>6</sup> Rwanda was still in the process of rebuilding its judiciary after its total destruction during the 1994 Genocide and was having a difficult enough time dealing with its overcrowded prisons and broken judicial system.<sup>7</sup> However, fifteen years after the genocide, Rwanda has made great strides in developing a legal system<sup>8</sup> and has adjudicated more genocide cases than any other country in the world.<sup>9</sup> In fact, the ICTR Appeals Chamber has even noted the independence of the Rwandan judiciary, pointing out that the courts and government continue to work with the Tribunal despite the Tribunal's acquittal of five defendants.<sup>10</sup>

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4. See Drumbl, *supra* note 1, at 1285; Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 427 (2006).

5. See Drumbl, *supra* note 1, at 1285; see also Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 407–08 (1998) (emphasis omitted) (ad hoc tribunals serve to address “fundamental humanitarian interests of concern” as well as “threat[s] to international peace and security”); Frederik Harhoff, *Consonance or Rivalry? Calibrating the Efforts to Prosecute War Crimes in National and International Tribunals*, 7 DUKE J. COMP. & INT'L L. 571, 584–85 (1997) (“One must always recognize that the Tribunal was established not only to restore peace and justice in Rwanda, but also to maintain international peace and security as a new institution which could pave the way for the prevention of such atrocities in the future on a more general level. . . . [O]n this point, the Tribunal has its own agenda.”).

6. Case No. ICTR-97-19-AR72, Decision, ¶ 106 (Nov. 3, 1999).

7. See Jessica Raper, *The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide*, 5 PEPP. DISP. RESOL. L.J. 1, 26–28 (2005).

8. See, e.g., *Prosecutor v. Kayishema*, Case No. ICTR-01-67-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, ¶ 56 (Dec. 16, 2008) [hereinafter *Kayishema*, Trial Chamber's Transfer Decision] (“The Chamber concludes that Rwanda has made notable progress in improving its judicial system.”); *Prosecutor v. Gatete*, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 95 (Nov. 17, 2008) [hereinafter *Gatete*, Transfer Decision] (same); Erike Møse, *The ICTR's Completion Strategy—Challenges and Possible Solutions*, 6 J. INT'L CRIM. JUST. 667, 674 (2008) (noting that “Rwanda has made progress in reforming its judicial system”).

9. See Drumbl, *supra* note 1, at 1287.

10. See *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, ¶ 28 (Oct. 8, 2008) [hereinafter *Munyakazi*, Appeals Chamber Transfer Decision]. Further underscoring the confidence that the International Criminal Tribunal for Rwanda (ICTR) has in the Rwandan judiciary, the ICTR Prosecutor recently declined to seek the referral of four former Rwandan Patriotic Front (RPF) members who are currently being tried in Rwandan courts, noting that the trial was open and public and that ICTR monitors confirmed that fair trial standards were observed. See U.N. SCOR, 64th Sess., 6134th mtg. at 33, U.N. Doc. S/PV.6134 (June 4, 2009) [hereinafter Security Council Meeting 6134].

At the same time, the ICTR jointly with its sister, the International Criminal Tribunal for the former-Yugoslavia (ICTY), has proven to be very expensive.<sup>11</sup> Together, they account for over ten percent of the United Nations' overall budget, with the ICTR averaging \$45.5 million per conviction.<sup>12</sup> In part because of this enormous expense, the Security Council has mandated that the Tribunals begin to conclude their work.<sup>13</sup> As part of the ICTR's completion strategy, in compliance with United Nations Security Council Resolutions 1503<sup>14</sup> and 1534,<sup>15</sup> the Prosecutor hopes to transfer some of its remaining cases to Rwanda for adjudication by the national courts.<sup>16</sup>

However, the ICTR's Trial and Appeals Chambers' strict application of Rule 11bis of its Rules of Procedure and Evidence<sup>17</sup> has prevented such transfers.<sup>18</sup> Most recently, the Appeals Chamber denied the transfer of Ildephonse Hategekimana to Rwanda on the basis that Rwandan courts do not provide sufficient fair trial guarantees as required under Rule 11bis.<sup>19</sup> The ICTR continues to question the sufficiency of Rwandan law and practice despite the fact that the Rwandan legislature has continuously revised its genocide laws and laws pertaining to ICTR cases, particularly in order to accord with ICTR requirements.<sup>20</sup> In so doing, and in contrast with its application of 11bis to requests for transfer to non-Rwandan venues,<sup>21</sup> the ICTR not only looks to see whether Rwandan domestic law is sufficient but also conducts a factual determination of whether such law is applied.<sup>22</sup> As a result, the Tribunal, in the Rwandan context, approaches the 11bis analysis as a mixed question of law and fact and thus finds grounds to exclude transfer.<sup>23</sup>

This Note analyzes the arguments for and against transferring cases from the ICTR to Rwandan domestic courts in light of the ICTR's 11bis procedural requirements and recent Rwandan legislation. While some

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11. See Higonnet, *supra* note 4, at 427–29.

12. See *id.* at 427 & n.309.

13. See Daryl A. Mundis, *The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT'L L. 142, 143 (2005). But see RICHARD J. GOLDSTONE & ADAM M. SMITH, INTERNATIONAL JUDICIAL INSTITUTIONS 103–04 (2009) (noting in particular that the Tribunals were never intended to be permanent institutions).

14. S.C. Res. 1503, ¶ 6, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

15. S.C. Res. 1534, ¶ 4, U.N. Doc S/RES/1534 (Mar. 26, 2004).

16. See The President of the ICTR, *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶ 50, delivered to the Security Council, U.N. Doc. S/2009/247 (May 14, 2009) [hereinafter *ICTR Completion Strategy, May 2009*].

17. ICTR R. P. & EVID. 11bis.

18. *ICTR Completion Strategy, May 2009, supra* note 16, at ¶¶ 44, 50.

19. See *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, ¶ 40 (Dec. 4, 2008) [hereinafter *Hategekimana*, Appeals Chamber Transfer Decision].

20. See, e.g., *ICTR Completion Strategy, May 2009, supra* note 16, at ¶ 50 ("The Government of Rwanda is in the process of further amending its laws in order to remove any remaining legal hurdles for the transfer of cases from the Tribunal to be heard in Rwanda.").

21. See *infra* Part I.B.3.a–b.

22. See *infra* Part I.B.3.c.

23. See *infra* Part I.B.3.c.

literature has focused on the issue of transferring cases from the ICTR to Rwanda, such scholarly work has considered *11bis* in the context of the now obsolete pre-2007 Rwandan domestic law.<sup>24</sup> This Note, then, aims to revisit the transfer issue—in particular, the ICTR’s continual refusal to transfer cases to Rwanda—in light of the country’s recent legislation and judicial reform. In Part I, this Note discusses the background of the formation of the ICTR, its jurisdictional relationship with domestic courts, in particular Rwanda’s, and the applicable Rwandan laws pertaining to genocide cases transferred from the ICTR. This Note then discusses the ICTR’s methodology in determining whether to transfer a case to a national jurisdiction. In so doing, this Note conducts a brief comparison with the ICTY methodology, drawing upon rulings in referral cases from both tribunals in order to illustrate how the Tribunal treats requests for transfers to Rwanda differently from requests to other venues.

In Part II, this Note discusses the opposing viewpoints concerning the transfer requirements, mainly those in support of the Tribunal’s emphasis on due process requirements and those who advocate that the ICTR should place greater importance on the overall purposes and goals of the Tribunal.

Finally, in Part III, this Note argues that when considering jurisdictional limits and priorities in cases involving international courts and the courts of the country in which and against whose citizens the crimes were committed, countervailing judicial interests may outweigh an assurance of the strict application of Western due process protections in the home country. A multiplicity of factors—such as the contribution a particular case may have toward furthering the Tribunal’s goals of facilitating the national justice and reconciliation processes and buttressing the domestic judiciary—should be weighed against the Tribunal’s interests in guaranteeing the defendants’ right to a fair trial through the assurance of specific due process protections. Such a particularized assessment would comprise a comprehensive balancing approach, considering both adequate due process protections for the defendant and factors contributing to the overall interest of justice.

#### I. FROM THE KILLING FIELDS TO THE HALLS OF JUSTICE: THE RWANDAN GENOCIDE, THE INTERNATIONAL COURT IT CREATED, AND THE RESULTING LEGAL REGIMES

This part explores the historical and legal background of the ICTR and applicable transfer jurisprudence. Specifically, this section discusses the post-genocide situation of Rwanda and its role in the formation of the ICTR, the ICTR’s mandate in relation to courts of national jurisdiction, the Tribunal’s and Rwanda’s transfer regimes, and, finally, how the ICTR has applied its transfer requirements to Rwanda to date. This history illustrates how, despite Rwanda’s efforts at creating a legal regime compliant with

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24. See, e.g., Alhagi Marong, Charles Chernor Jalloh & David Kinnecome, *Concurrent Jurisdiction and the ICTR: Should the Tribunal Refer Cases to Rwanda?*, in *FROM HUMAN RIGHTS TO INTERNATIONAL CRIMINAL LAW* 159, 165 (Emmanuel Decaux, Adam Dieng & Malick Sow eds., 2007). See generally *infra* Part II.A.

ICTR standards and its own national interest in adjudicating these genocide cases, the Tribunal continues to insist that the Rwandan system falls short of meeting its stringent transfer requirements.

*A. The 100 Days and Its Court: The Rwandan Genocide and the Establishment of the International Criminal Tribunal for Rwanda*

1. General History of the Genocide and the Need for an International Court

In 1994, Rwanda witnessed the most brutal genocide the world has seen since the Holocaust. In less than 100 days, the extremist Hutu Power regime mobilized the masses to massacre around 500,000 to 1,000,000 fellow Rwandans, targeted for their Tutsi “ethnicity” or moderate Hutu views.<sup>25</sup> The machetes of the Hutu killing machine exceeded the Nazis’ profane efficiency at its peak, at a killing rate five times higher than that of the Nazi apparatus.<sup>26</sup> After the advancing Rwandan Patriotic Front (RPF) defeated the genocidal regime, the country was left in shambles and the judiciary was utterly destroyed.<sup>27</sup> Not one court was left operating<sup>28</sup> and of the roughly 800 lawyers and judges in Rwanda before the genocide, only forty were still alive.<sup>29</sup> The population was traumatized and impoverished and the infrastructure lay in ruins.<sup>30</sup>

Yet despite the lack of human and material capital, the new Rwandan government announced that it would prosecute all those who participated in the atrocities.<sup>31</sup> The government immediately embarked upon an aggressive policy of arresting and detaining those suspected of participating in the genocide, often arresting anyone who appeared to be a *genocidaire*.<sup>32</sup> The numbers of those arrested steadily increased over the ensuing years, rising from around 10,000 detainees in 1994 to 130,000 by 1998, at a rate of one thousand to three thousand per month.<sup>33</sup>

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25. See Peter H. Sennett & Gregory P. Noone, *Working With Rwanda Toward the Domestic Prosecution of Genocide Crimes*, 12 ST. JOHN'S J. LEGAL COMMENT. 425, 430 (1997); see also Phil Clark, *Hybridity, Holism, and “Traditional” Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT'L L. REV. 765, 766 & n.5 (2007) (“Most writers estimate the number of Tutsi deaths during the genocide to be in the range of 500,000 to 1,000,000.”). For a detailed account of the Rwandan genocide, see PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998).

26. See Drumbl, *supra* note 1, at 1246.

27. See Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 565 (1998); Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 352–53 (1997).

28. See Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 FLA. J. INT'L L. 421, 435 (1994).

29. Carroll, *supra* note 1, at 172.

30. See L. Danielle Tully, Note, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT'L & COMP. L. REV. 385, 385 (2003).

31. See *id.* at 389.

32. See Drumbl, *supra* note 27, at 565–66.

33. Tully, *supra* note 30, at 389; see also Carroll, *supra* note 1, at 189–90; Raper, *supra* note 7, at 28.

At the outset, it was apparent to the GOR that it did not have the physical capacity to try the accused for genocide.<sup>34</sup> Therefore, the government asked the United Nations Security Council, of which Rwanda was a member at the time, to convene an international tribunal to adjudicate cases related to the 1994 genocide.<sup>35</sup> The Security Council responded by passing Resolution 955, thereby establishing the International Criminal Tribunal for Rwanda.<sup>36</sup> The Council listed six motivating factors and purposes in the resolution: 1) concern that genocide and other “systematic, widespread, and flagrant violations of international humanitarian law” were committed in Rwanda; 2) concern that the situation constituted a “threat to international peace and security;” 3) to put a stop to such atrocities and punish the perpetrators; 4) to use the prosecutions to facilitate the “process of national reconciliation and to the restoration and maintenance of peace;” 5) that the prosecutions will aid in halting violations and provide redress; and 6) to strengthen the courts in Rwanda, especially regarding the volume of suspects.<sup>37</sup>

Although the motivating factors for the resolution largely dealt with Rwanda’s domestic concerns—in fact, only the second point, “threat to international peace and security,” constitutes the legal basis for international intervention under a Chapter VII U.N. Security Council action<sup>38</sup>—the Rwandan government very quickly disagreed with elements of the resultant Tribunal’s form and function.<sup>39</sup> Specifically, Rwanda protested 1) the Tribunal’s limited temporal jurisdiction, 2) its rather limited personnel and resources, 3) its lack of prioritization of cases to be tried, 4) the participation of countries complicit in the genocide in the formation of the Tribunal, 5) that those convicted will be imprisoned outside of Rwanda, 6)

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34. In fact, in the first five years after the genocide, Rwandan courts heard 3700 of over 125,000 cases—around three percent of all prisoners. *See* Drumbl, *supra* note 1, at 1287–88.

35. *See* S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (“[The Security Council] [*d*]ecides hereby, having received the request of the Government of Rwanda . . . to establish an international tribunal . . . .”); Carroll, *supra* note 1, at 175; Todd Howland & William Calathes, *The U.N.’s International Criminal Tribunal, Is It Justice or Jingoism for Rwanda? A Call for Transformation*, 39 VA. J. INT’L L. 135, 141 (1998); Marong et al., *supra* note 24, at 165; Madeline H. Morris, *Justice in the Wake of Genocide: The Case of Rwanda*, 3 ILSA J. INT’L & COMP. L. 689, 690 (1997).

36. S.C. Res. 955, *supra* note 35, ¶¶ 1–8.

37. *Id.* preambular paras. Scholars have noted that the motivating factors of the individual member States of the Security Council for forming the ICTR were far from unanimous. For instance, Russia emphasized retributory punishment, France the hope that public prosecutions would contribute towards establishing peace, the United Kingdom, Spain, and others the hope that justice would contribute towards reconciliation, while the Czech Republic disagreed, noting that reconciliation is far too complex. *See* Howland & Calathes, *supra* note 35, at 143–44. For an exhaustive presentation of the member States’ motivating factors, see U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453 (Nov. 8, 1994) [hereinafter 955 Meeting].

38. U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations . . . to maintain or restore international peace and security.”).

39. *See* 955 Meeting, *supra* note 37, at 14–16.



the prohibition of the use of the death penalty, and 7) that the Tribunal's seat would be located outside of Rwanda.<sup>40</sup>

Regarding the first point, the GOR was concerned that the Tribunal's temporal jurisdiction, limited to the year of 1994,<sup>41</sup> would exclude those who took steps in planning and preparing the genocide prior to that time from prosecution and thus not serve to "eradicat[e] the culture of impunity or creat[e] a climate conducive to national reconciliation."<sup>42</sup> Some members of the Rwandan delegation were convinced that the Security Council negotiations and the resulting resolution were just a "fig-leaf-after-the-fact" to hide the international community's apathy during the genocide and an attempt to set a precedent, together with the ICTY, toward establishing an international criminal court.<sup>43</sup> Rwanda's delegate to the Security Council at the time echoed this concern, stating that "the establishment of so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and the victims of genocide."<sup>44</sup> In turn, Rwanda voted against the resolution—the only Security Council member to do so.<sup>45</sup> Nevertheless, after the vote the Rwandan government agreed to cooperate with the Tribunal and has supported it, to varying degrees, since.<sup>46</sup> This tenuous relationship between the Rwandan government and the ICTR never fully dissipated and is evident throughout the subsequent jurisdictional conflict and in the current controversy over whether to transfer cases from the ICTR to the national Rwandan courts.

This conflict over the Tribunal's transfer mechanism can only be understood in the context of the ICTR's primary concurrent jurisdiction in relation to national jurisdictions, as outlined in the following section.

## 2. The ICTR and Primary Concurrent Jurisdiction

The establishment of the ICTR marked the first time the principles of primacy and concurrent jurisdiction—as well as virtually any other principle of international law—were applied to a conflict that was not

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40. *See id.* Eventually, points one, two, six, and seven became the real points of contention between the ICTR and the Rwandan government. *See* Erika R. George, *After Atrocity Examples from Africa: The Right to Education and the Role of Law in Restoration, Recovery, and Accountability*, 5 *LOY. U. CHI. INT'L L. REV.* 59, 71 (2007); Morris, *supra* note 27, at 353–57.

41. *See infra* Part I.A.2.

42. 955 Meeting, *supra* note 37, at 14–15. Professor Madeline Morris suggests that the temporal mandate may not be as limiting as the Rwandan delegate to the Security Council feared, when considered together with the Tribunal's subject matter jurisdiction, if "aiding and abetting prior to 1994 of crimes that were completed in 1994" is ruled to be within the Tribunal's mandate. Morris, *supra* note 27, at 354.

43. Morris, *supra* note 27, at 357.

44. 955 Meeting, *supra* note 37, at 15.

45. *See id.* at 15–16.

46. *See, e.g.,* Carroll, *supra* note 1, at 180–81 (noting that, despite Rwanda's "tenuous" relationship with the ICTR, Rwanda's Government (GOR) "believed it was in Rwanda's best interest" to cooperate with the Tribunal). For an example of the Tribunal's strained relationship with the GOR, see *supra* notes 1–4 and accompanying text.

international in nature.<sup>47</sup> Previous international tribunals, such as the Nuremberg and Tokyo tribunals after World War II and the ICTY, were convened in the aftermath of conflicts that were of clear international character.<sup>48</sup> While this may have been a significant departure from most international humanitarian law doctrine,<sup>49</sup> international actors circumvented this legal obstacle by framing the conflict in international terms, characterizing the scale of the atrocities as a threat to international stability.<sup>50</sup> Moreover, Rwanda, the country whose sovereignty was at issue, supported the departure from established doctrine when it specifically requested that the international community assist in prosecuting genocide offenders, given the condition of its own shattered judiciary.<sup>51</sup>

Thus sidestepping this academic debate regarding applying international law to a domestic conflict, the international community—acting under the aegis of the U.N. Security Council—invested the ICTR with primary concurrent jurisdiction. Rather than exclusive, the ICTR exercises concurrent jurisdiction because it shares subject matter, temporal, and territorial jurisdiction with any other state that exercises jurisdictional claims over Genocide cases.<sup>52</sup> Yet it also exercises primacy in that it may compel states with competing jurisdictional claims to transfer a case to the Tribunal.<sup>53</sup> This primary concurrent jurisdiction is at the root of the transfer debate between Rwanda and the ICTR.

#### *a. Concurrent Jurisdiction*

The ICTR's concurrent jurisdiction with national courts, particularly Rwanda's, created a situation where multiple courts could claim jurisdiction over a particular case. Concurrent jurisdiction "describes any situation where two or more national courts or at least one national court and an international court have legal authority to adjudicate the same issue."<sup>54</sup> The Statute of the ICTR<sup>55</sup> makes it clear that the Tribunal and domestic courts, including those of Rwanda, share jurisdiction over genocide cases. Article 8(1) of the Statute states that "[t]he International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in

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47. See Magnarella, *supra* note 28, at 431.

48. See *id.* Though technically military tribunals, the Nuremberg and Tokyo Tribunals are generally viewed as marking the beginning of the age of the international ad hoc tribunal system. See GOLDSTONE & SMITH, *supra* note 13, at 40–64; George, *supra* note 40, at 61.

49. See Magnarella, *supra* note 28, at 431 ("[T]he ICTR represents an important extension of international humanitarian law to internal conflicts.").

50. See 955 Meeting, *supra* note 37, at 3–4, 6–7.

51. See *supra* Part I.A.1.

52. See Marong et al., *supra* note 24, at 162–63.

53. See Morris, *supra* note 27, at 365.

54. Marong et al., *supra* note 24, at 162.

55. Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1602 [hereinafter ICTR Statute].

the territory of neighboring States.”<sup>56</sup> This is an explicit recognition that cases relating to the 1994 Genocide and falling within the stated territorial, temporal, and subject matter jurisdiction can be heard in either domestic courts or at the Tribunal.

Specifically, Security Council Resolution 955 empowers the Tribunal to “prosecut[e] 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 neighboring States, between 1 January 1994 and 31 December 1994.”<sup>57</sup> In particular, the ICTR has subject matter jurisdiction over the crimes of genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as defined by the ICTR Statute.<sup>58</sup> The Tribunal has territorial jurisdiction over “the territory of Rwanda including its land surface and airspace as well as to the territory of neighboring States”<sup>59</sup> and temporal jurisdiction covering the “period beginning on 1 January 1994 and ending on 31 December 1994.”<sup>60</sup> The ICTR’s jurisdiction is thereby clearly delineated.

However, Rwanda’s own jurisdiction over cases relating to the 1994 Genocide is not in dispute. After all,

Rwanda can establish jurisdiction over those indicted by the ICTR under the territoriality principle (almost all of the crimes occurred on Rwandan soil), the nationality principle (the crimes were committed by Rwandans, and . . . all of the suspects whose cases may be transferred to Rwanda are Rwandan), and the passive personality principle (the victims were Rwandan).<sup>61</sup>

Other states may also try to claim jurisdiction over international war crimes and crimes against humanity under theories of universal jurisdiction.<sup>62</sup> Yet since Rwanda has traditional jurisdictional claims over those cases committed in its territory, by its own people, and against its own people, the government does not need to resort to such sweeping international legal

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56. *Id.* art. 8(1).

57. S.C. Res. 955, *supra* note 35, ¶ 1.

58. ICTR Statute, *supra* note 55, arts. 2–4.

59. *Id.* art. 7.

60. *Id.*

61. Marong et al., *supra* note 24, at 187; *see also* Brown, *supra* note 5, at 391–92 (discussing the traditional sources of national jurisdiction over international crimes).

62. Generally, universal jurisdiction is the legal principle that recognizes the right “of all states to prosecute those believed to be responsible for certain special crimes of concern to the entire international community,” which “[t]oday . . . applies to the serious violations of international humanitarian law.” Brown, *supra* note 5, at 392. Some states have invoked this principle to initiate their own proceedings against perpetrators of crimes occurring in Rwanda in 1994. Judge Andrew Merelles of Spain has issued indictments against high-ranking Rwandan officials on charges of committing atrocities on the side of the RPF and Rwandan Defense Force (RDF) between 1990 and 2002 on the basis of universal jurisdiction. *See generally The Spanish Indictment of High-Ranking Rwandan Officials*, 6 J. INT’L CRIM. JUST. 1003 (2008).

principles.<sup>63</sup> Since Rwanda and the ICTR then explicitly share jurisdiction over the same crimes, it was inevitable that they at times would both seek jurisdiction over the same case.<sup>64</sup>

The question then, is how to determine which court—foreign, Rwandan, or the Tribunal—should hear a case concerning the 1994 Genocide.<sup>65</sup> The Security Council's solution to this jurisdictional dilemma is to mandate the primacy of the international Tribunal over any other court that may assert a competing claim.

*b. The ICTR's Primacy Over Cases of Concurrent Jurisdiction*

The relationship between the ICTR and domestic courts, including those of Rwanda, is complicated by the fact that the Tribunal is given primacy over cases falling within its jurisdiction. The principle of primacy stipulates that the ICTR has superior claims to cases that fall within its subject matter, temporal, and territorial jurisdiction.<sup>66</sup> This means that at any stage of the proceedings, the ICTR can demand that a national court transfer a case over which it had previously asserted jurisdiction to the Tribunal.<sup>67</sup> Once the ICTR chooses to hear a case, national jurisdictions are precluded from pursuing litigation for the same crimes.<sup>68</sup> In this manner, the ICTR preempts national prosecution and prevents the possibility of double jeopardy.<sup>69</sup> Primacy was chosen for two main reasons. First, the international community wanted to ensure that all genocide cases were to be dealt with fairly and judiciously.<sup>70</sup> The ability to assert primacy over national jurisdictions enables the Tribunal to cure instances where domestic courts fail to adequately try perpetrators<sup>71</sup> or carry out victor's justice.<sup>72</sup> Second, by creating an international body that has the ability to authoritatively rule on all cases relating to international criminal law regarding the Rwandan genocide, the Tribunal can serve to add to the burgeoning corpus of international humanitarian law.<sup>73</sup> This section discusses, in more detail, the nature of primacy of the ICTR in relation to other courts and the rationale for its implementation.

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63. See Marong et al., *supra* note 24, at 187 (“[W]ithout looking to universal jurisdiction . . . Rwandan national courts have several independent bases for asserting jurisdiction over genocide-related crimes.”).

64. See Carroll, *supra* note 1, at 180; Morris, *supra* note 27, at 362–63.

65. See Marong et al., *supra* note 24, at 164.

66. See Morris, *supra* note 27, at 365.

67. See ICTR Statute, *supra* note 55, art. 28(2)(e).

68. See *id.* art. 9(1) (“No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.”).

69. See *id.*

70. See GOLDSTONE & SMITH, *supra* note 13, at 99.

71. See Brown, *supra* note 5, at 404.

72. See Carroll, *supra* note 1, at 172–73. For an explanation of victor's justice, see *infra* notes 93–94 and accompanying text.

73. See GOLDSTONE & SMITH, *supra* note 13, at 103; see also Brown, *supra* note 5, at 408 (asserting that primacy is the only way “to ensure uniformity in the legal process” (emphasis omitted)).

The ICTR's primacy is outlined in its founding documents. Article 8(2) of the ICTR Statute states that the Tribunal "shall have primacy over the national courts of all States," and that "[a]t any stage of the procedure, the [ICTR] may formally request national courts to defer to its competence."<sup>74</sup> Further, since the ICTR was established via a Chapter VII Security Council Resolution, all United Nations Member States are bound to comply.<sup>75</sup> Resolution 955 makes requisite compliance explicit, stating

all States shall cooperate fully with the International Tribunal . . . in accordance with the present resolution and the Statute of the [ICTR] 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 . . . orders issued by a Trial Chamber.<sup>76</sup>

Further clarifying the relationship between the Tribunal and national courts, Article 28 of the ICTR Statute states that "[s]tates shall cooperate with the [ICTR] in the investigation and prosecution of persons."<sup>77</sup> Therefore, not only are states obligated to comply with the Tribunal's directives concerning carrying out arrest warrants,<sup>78</sup> detaining suspects,<sup>79</sup> providing evidence,<sup>80</sup> and the like, states are obligated to transfer any cases falling within the ICTR's jurisdiction that the Tribunal may request.<sup>81</sup>

It is important to note, in this respect, that the nature of the ICTR's primacy is not one of traditional judicial review, as is the U.S. Supreme Court's primacy over lower courts in the United States.<sup>82</sup> Rather, the ICTR's primacy is one of first instance,<sup>83</sup> in which the Trial Chamber can request a domestic court to transfer a case, at any stage of the proceedings

74. ICTR Statute, *supra* note 55, art. 8(2).

75. U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

76. S.C. Res. 955, *supra* note 35, ¶ 2.

77. ICTR Statute, *supra* note 55, art. 28(1). Article 28 continues to enumerate specific instances of required cooperation, stating:

States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

- (a) The identification and location of persons;
- (b) The taking of testimony and the production of evidence;
- (c) The service of documents;
- (d) The arrest or detention of persons;
- (e) The surrender or the transfer of the accused to the International Tribunal for

Rwanda.

*Id.* art. 28(2).

78. *See* ICTR R. P. & EVID. 56 ("The State to which a warrant of arrest or a transfer order for a witness is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 28 of the Statute.").

79. *See id.* 57 ("Upon the arrest of the accused, the State concerned shall detain him . . .").

80. *See id.* 8 ("[The Prosecutor] may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with Article 28 of the Statute.").

81. *See id.* 10(C) ("The State to which the formal request for deferral is addressed shall comply without undue delay in accordance with Article 28 of the Statute.").

82. *See* Drumbl, *supra* note 1, at 1315.

83. *See id.*

and from any level of court.<sup>84</sup> In a specific sense, though, under the Tribunal's usage of *non bis in idem*, the ICTR may also act as a court of last resort in the instance that the Tribunal finds a national proceeding to be inadequate.<sup>85</sup> While no domestic court may try a suspect for crimes falling under the ICTR's jurisdiction "for which he or she has already been tried by the [ICTR],"<sup>86</sup> the ICTR *may* try someone who was already tried before a domestic court providing 1) the Tribunal finds that the national court characterized the crime as "ordinary," 2) the "domestic proceedings were not impartial or independent," 3) the proceedings "shield[ed] the accused from international criminal responsibility," or 4) "the case was not diligently prosecuted."<sup>87</sup> Despite this authority to review national proceedings, the Tribunal's main purpose nevertheless is to hear cases in the first instance.<sup>88</sup>

Powerful theoretical reasoning buttresses the principle of primacy. First, there is a "perennial danger" of national courts characterizing international crimes as "ordinary crimes" and operating to "defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute."<sup>89</sup> Therefore, international tribunals in general may be inclined to assert their primacy in cases where "national trials lack credibility in making fair determinations . . . for serious international crimes,"<sup>90</sup> as the ICTR's *non bis in idem* exception reinforces. Second, international tribunals' primacy may be used to promote and protect "compelling humanitarian interests in the context of a situation identified as a threat to international peace and security."<sup>91</sup> Ensuring the ability of international tribunals to try international crimes against humanity provides an opportunity to develop international legal precedent and norms.<sup>92</sup>

Finally, in the case of Rwanda, the Commission of Experts that made recommendations to the Security Council before the drafting of Resolution 955 was worried that, "given the scale and brutality of the crimes . . . committed," prosecution in Rwanda "would lead to vengeance

84. See ICTR Statute, *supra* note 55, art. 8(2) ("At any stage of the procedure, the [ICTR] may formally request national courts to defer to its competence." (emphasis added)); see also Harhoff, *supra* note 5, at 574 ("[T]he Tribunal may request national courts to defer to the competence of the Tribunal at any stage in their procedures.").

85. See ICTR Statute, *supra* note 55, art. 9. The doctrine of *non bis in idem*, commonly referred to as "the double-jeopardy bar," generally bars a defendant from being tried more than once for the same offense. See BLACK'S LAW DICTIONARY 1150 (9th ed. 2009).

86. *Id.* art. 9(1); see also *supra* notes 68–69 and accompanying text.

87. *Id.* art. 9(2). This implicitly allows for the Tribunal's Trial Chambers to hear a case that was heard on appeal by a national supreme or high court as long as one of the above conditions is met.

88. See Drumbl, *supra* note 1, at 1315.

89. Prosecutor v. Tadic, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 58 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

90. Brown, *supra* note 5, at 407.

91. *Id.*

92. See GOLDSTONE & SMITH, *supra* note 13, at 103; see also Brown, *supra* note 5, at 408.

and 'victor's justice.'"<sup>93</sup> Victor's justice is generally defined as a post-conflict judicial process in which "the victors exercis[e] judicial revenge on the vanquished."<sup>94</sup> In such a situation, primacy may be necessary to ensure that justice is carried out fairly and without bias.<sup>95</sup>

The above justifications for primacy deal with situations in which, in the interests of justice, the ICTR must compel domestic jurisdictions to defer to its authority. The issue is complicated, however, when the discussion turns to whether to transfer a case from the ICTR to a national jurisdiction such as Rwanda, rather than to compel a case transfer from a national jurisdiction to the Tribunal.<sup>96</sup> In fact, jurisdictional conflict and related concerns over sovereignty, which came to the fore during ICTR and ICTY proceedings, influenced the similar yet distinctly different system of complementarity that forms the basis of the International Criminal Court's (ICC) jurisdiction. The next section briefly explores complementarity as practiced by the ICC, the continued relevancy of debates regarding other theories of jurisdiction in light of the ICC, and how Rule 11bis, in effect, has the capability of transforming the primacy of the ICTR to a modified system governed by complementarity.

*c. Complementarity, the International Criminal Court, and the Future of Ad Hoc Tribunals*

The creation and operation of the Rwandan and Yugoslav ad hoc tribunals contributed significantly to the subsequent formation of a permanent International Criminal Court (ICC) and the form that it took.<sup>97</sup> Aside from learning from their successes, the drafters of the Rome Statute of the International Criminal Court (Rome Statute)<sup>98</sup> were aware of some of the difficulties the ICTs encountered, including issues concerning primary concurrent jurisdiction and sovereignty, particularly Rwanda's tension with the ICTR.<sup>99</sup> Guided by these concerns, the drafters invested the ICC with

93. Carroll, *supra* note 1, at 172; *see also* Marong et al., *supra* note 24, at 186 (there exists "the possibility . . . in the case of Rwanda, that authorities will mete out victor's justice").

94. GOLDSTONE & SMITH, *supra* note 13, at 64; *see also* Carroll, *supra* note 1, at 172; Marong et al., *supra* note 24, at 186; Morris, *supra* note 27, at 371.

95. *See* Carroll, *supra* note 1, at 172–73; *see also* Marong et al., *supra* note 24, at 186.

96. Professor Morris describes concurrent jurisdiction as "stratified," which, in her view, can lead to "anomalies of inversion," in which an inverse disparity is created wherein the leaders of the genocide, tried at the ICTR, receive more protections and softer punishments than lesser criminals tried locally in Rwanda. Madeline H. Morris, *Rwandan Justice and the International Criminal Court*, 5 ILSA J. INT'L & COMP. L. 351, 354 (1999); Morris, *supra* note 27, at 371–72. For a more detailed discussion of possible negative effects of primacy and how it influences the transfer discussion, *see infra* Part II.B.1.a.

97. *See* GOLDSTONE & SMITH, *supra* note 13, at 110; Brown, *supra* note 5, at 416–30; Morris, *supra* note 27, at 362–73. *See generally* Morris, *supra* note 96; Evo Popoff, Note, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases*, 33 GEO. WASH. INT'L L. REV. 363 (2001).

98. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 1002 [hereinafter Rome Statute]. The Rome Statute is the ICC's founding document.

99. *See* Morris, *supra* note 96, at 355.

complementary jurisdiction instead of primacy, in which the Court may only hear a case if domestic courts normally exercising jurisdiction prove unwilling or unable to do so.<sup>100</sup> Despite the ICC's mission of becoming a permanent international court, further exploration of the ad hoc system's transfer requirements is necessary largely because: 1) the courts conduct similar analyses of when it may be necessary to invoke transfer; 2) the ICC most likely will not preclude the formation of other ad hoc or hybrid international courts; and 3) a workable transfer regime may allow the ICTR to more readily reach its 2013 deadline.

The ICTs' application of their transfer requirements, though markedly different than those of the ICC, may prove useful in the ICC's future interpretation of its own transfer requirements. Like the primacy of the ICTs, complementarity is a subset of concurrent jurisdiction. However, in contrast with the ICTs, the ICC cannot compel a domestic court to transfer a case to the court unless it determines that the domestic court is "unwilling or unable to act."<sup>101</sup> The "unwilling or unable" requirement, however, does invoke an analysis similar to that of an ICT transfer decision—the domestic judicial system may have collapsed or become overwhelmed (and is thus "unable" to try perpetrators) or may choose to prosecute either to suppress dissidents, mete out victor's justice, or let perpetrators off the hook (and is thus "unwilling").<sup>102</sup> Even in light of complementary jurisdiction, then, an exploration of the ICTs' transfer analysis may continue to prove useful in the pursuit of determining when the ICC should defer to a domestic judiciary.<sup>103</sup>

Moreover, even with the advent of the ICC, there is no consensus that the ad hoc or hybrid systems have been replaced.<sup>104</sup> The hybrid system—thus far including such courts as the Special Panels for Serious Crimes in East Timor (SPSC), Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC)—integrates aspects of Western judicial systems and traditional judicial methods.<sup>105</sup> Both independent international systems can fill gaps where the ICC cannot exercise subject matter jurisdiction—it may only hear cases concerning state parties to the Rome Treaty that arose after July 1, 2002 and relate to genocide, crimes against humanity, serious war crimes, and crimes of

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100. See GOLDSTONE & SMITH, *supra* note 13, at 113; Morris, *supra* note 96, at 355.

101. See Morris, *supra* note 96, at 356.

102. See *id.* at 356–58.

103. Cf. *id.* (extrapolating from the ICTR experience situations when the ICC should confer with domestic courts).

104. See GOLDSTONE & SMITH, *supra* note 13, at 115–30; Higonnet, *supra* note 4, at 348–49; Zachary D. Kaufman, Book Review, 10 YALE HUM. RTS. & DEV. L.J. 209, 212 (2007) (reviewing Steven D. Roper & Lilian A. Barria, *DESIGNING CRIMINAL TRIBUNALS: SOVEREIGNTY AND INTERNATIONAL CONCERNS IN THE PROTECTION OF HUMAN RIGHTS* (2006)). See generally James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616 (2005) (discussing the future of the hybrid system); Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693 (2008).

105. See generally David Cohen, "Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future, 43 STAN. J. INT'L L. 1 (2007).



aggression.<sup>106</sup> For example, the Special Tribunal for Lebanon was convened in 2007 for the sole specific purpose of investigating the assassination of former Lebanese Prime Minister Rafiq Hariri.<sup>107</sup> In any event, it is not hard to imagine a scenario where an international court will once again face the question of when to begin to defer to a national jurisdiction that exercises traditional sovereign jurisdiction over the trials.<sup>108</sup> Ad hoc tribunals may thus be necessary in situations involving crimes or incidents that do not fit the ICC's limited temporal and subject matter jurisdiction.

Finally, as the ICTs have extended their mandate, now until 2013,<sup>109</sup> a workable transfer system may enable the tribunals to meet this new deadline. In fact, Professor William Burke-White illustrates that the transfer system, as applied at the ICTY, has enabled the Tribunal to begin to relieve its caseload.<sup>110</sup> He asserts that as applied by the Yugoslav Tribunal, the monitoring and revocation mechanisms included in 11*bis* have in fact transformed the ICTY's jurisdiction from primary to modified complimentary, in which the Tribunal will continue to transfer cases to the Bosnian courts unless the domestic courts, subsequent to transfer, prove themselves to be unwilling or unable.<sup>111</sup> This has not, however, been the practice with respect to Rwanda. Rather, the Rwanda Tribunal has continued to apply a strict reading of the 11*bis* transfer requirements, thus denying transfers to the Rwandan courts.<sup>112</sup> Therefore, the implementation of a similar workable ICTR transfer regime may likewise ease the Tribunal's docket.

The preceding section detailed the ICTR's jurisdictional relationship with domestic courts, how such primary concurrent jurisdiction has created conflicts between the Tribunal and Rwandan courts, and how the resolution of this conflict may impact the future of both the specific operations of the ICTR and broad operations of the international system. The next sections detail the ICTR's transfer requirements, Rwanda's legislative attempts to meet those requirements, and the Tribunal's application of the transfer requirements with respect to Rwanda and Europe. A proper understanding

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106. See Rome Statute, *supra* note 98, arts. 5, 11, 12.

107. See GOLDSTONE & SMITH, *supra* note 13, at 124–34.

108. See Amelia S. Canter, Note, "For These Reasons, The Chamber: Denies the Prosecutor's Request for Referral": The False Hope of Rule 11 Bis, 32 FORDHAM INT'L L.J. 1614, 1656 (2009).

109. See ICTR/UN—ICTR Appeals Chamber to Continue Work Until Mid-2013, HIRONDELLE NEWS AGENCY (June 12, 2009), <http://www.hirondellenews.com/content/view/12483/179/>.

110. See William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT'L L. 279, 328–35 (2008) (describing how the International Criminal Tribunal for the Former Yugoslavia (ICTY) used the 11*bis* transfer mechanism specifically to help fulfill its Completion Strategy).

111. See *id.* at 319–28. For an explanation of the Tribunal's monitoring and revocation mechanisms, see *infra* notes 148–49 and accompanying text.

112. See *infra* Part I.B.3.c.

of the Tribunal's transfer requirements, Rwanda's responses, and the ICTR's application of the rule to the Rwandan context is necessary to evaluate whether transfer is appropriate and justified.

*B. The ICTR's Transfer Regime: Sending a Case from the Tribunal to a National Jurisdiction*

The United Nations Security Council has laid out the guidelines for a broad transfer policy to help facilitate the ICTR's completion of its mandate by 2010.<sup>113</sup> Security Council Resolution 1534 calls upon the ICTR to implement a completion strategy in order to "complete all work in 2010," which can in part be achieved by transferring cases to "competent national jurisdictions."<sup>114</sup> Resolution 1534 draws upon Resolution 1503, which specifically urges the ICTR to "formalize a detailed strategy . . . to transfer cases involving intermediate and lower-rank accused to competent national jurisdictions, as appropriate, *including Rwanda*."<sup>115</sup> Consistent with this directive, the ICTR Prosecutor, in his June 4, 2009 statement to the Security Council, acknowledged that "[s]uccessful completion of the Tribunal's mandate . . . depends on a large extent on the ability of the Tribunal to transfer the cases of nine (9) of the fugitives and some of the detained indictees for trial within Rwanda and other national jurisdictions."<sup>116</sup> To date, the ICTR Prosecutor has successfully transferred fifty-five non-indicted suspects to Rwanda and one to Belgium,<sup>117</sup> in accordance with the discretionary latitude the Prosecutor is given when dealing with non-indicted suspects.<sup>118</sup> However, the Trial Chamber has approved transfer of only two indicted suspects, both to France.<sup>119</sup> Otherwise, all other attempts

113. At the time of this writing, the Appeals Chamber has extended the deadline to mid-2013 at the earliest. *See supra* note 109.

114. S.C. Res. 1534, *supra* note 15, ¶¶ 3–4.

115. S.C. Res. 1503, *supra* note 14 (emphasis added).

116. Hassan B. Jallow, Statement of the Prosecutor of the ICTR to the U.N. Security Council (June 4, 2009) (transcript available at <http://www.unict.org/tabid/155/Default.aspx?id=1029>).

117. *See* Hassan B. Jallow, Statement of the Prosecutor of the ICTR to the U.N. Security Council (June 18, 2010) (transcript available at <http://www.unict.org/tabid/155/Default.aspx?id=1144>) (bringing the total number of cases transferred up to fifty-five); THE ISSUES AT STAKE IN THE CLOSURE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA (ICTY) AND RWANDA (ICTR) 6 (2009) [hereinafter ISSUES AT STAKE], available at [www.fidh.org/IMG/pdf/NoteTPI521ANG2009.pdf](http://www.fidh.org/IMG/pdf/NoteTPI521ANG2009.pdf); Marong et al., *supra* note 24, at 160; Møse, *supra* note 8, at 672.

118. *See* The President of the ICTR, *Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶ 39, delivered to the Security Council, U.N. Doc. S/2006/358 (June 1, 2006) [hereinafter *ICTR Completion Strategy, June 2006*] ("[T]he decision to transfer cases to national jurisdictions is a judicial one in cases where indictments exist . . ."); Møse, *supra* note 8, at 672 ("Such transfers [of non-indicted suspects] depend on prosecutorial discretion and are administrative in nature, based on cooperation between the ICTR Prosecutor and national prosecuting authorities.").

119. *See* Prosecutor v. Munyeshyaka, Case No. ICTR-2005-87-I, Decision on the Prosecutor's Request for the Referral of Wenceslas Munyeshyaka's Indictment to France (Nov. 20, 2007) [hereinafter *Munyeshyaka, Transfer Decision*]; Prosecutor v. Bucyibaruta, Case No. ICTR-2005-85-I, Decision on Prosecutor's Request for Referral of Laurent

to transfer indicted defendants to national jurisdictions, including Rwanda, have failed.<sup>120</sup> The reason for this discrepancy between the success of non-indicted referrals and the failure of indicted referrals is the Tribunal's strict application of Rule 11*bis*' transfer requirements, which applies solely to referral requests for indicted suspects.<sup>121</sup> Chiefly, as the remainder of this section illustrates, the Tribunal's strict interpretation of 11*bis*' fair trial requirement has been an obstacle to transferring cases from the Tribunal to Rwanda.

### 1. Requirements for Transfer to a National Jurisdiction Under Rule 11*bis*

The ICTR Rules of Procedure and Evidence provide a mechanism whereby the Tribunal may transfer a case to a national jurisdiction. Rule 11*bis* stipulates the conditions under which the Tribunal may transfer an indictment to another court.<sup>122</sup> The rule outlines, inter alia, to which suspects it applies,<sup>123</sup> to which states it applies,<sup>124</sup> certain judicial and due process thresholds such states must meet,<sup>125</sup> and monitoring<sup>126</sup> and revocation mechanisms.<sup>127</sup> In considering transfer requests, the Tribunal has been mostly concerned with ensuring the defendants' right to a fair trial in the transfer country.<sup>128</sup>

If the Prosecutor wishes to transfer the case of an indicted defendant to a national jurisdiction, she must submit a request to the President of the ICTR, who in turn designates a Trial Chamber to conduct a hearing on whether the transfer is acceptable.<sup>129</sup> While an accused cannot be tried in

Bucyibaruta's Indictment to France (Nov. 20, 2007) [hereinafter *Bucyibaruta*, Transfer Decision].

120. See ISSUES AT STAKE, *supra* note 117, at 7. The Prosecutor submitted five cases to the Trial Chambers for consideration for transfer to Rwanda; all requests were denied. Three of those five were subsequently heard and denied on appeal. See *id.*; see also *ICTR Completion Strategy, May 2009, supra* note 16, ¶ 50. Additionally, the ICTR denied the referral of one case to Norway, subsequently granted referral to the Netherlands, but then revoked such referral when a Dutch court ruled it did not have jurisdiction over an unrelated case involving crimes against humanity. See *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-11*bis*, Decision on Prosecution's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11*bis*(F) & (G), ¶¶ 11–12 (Aug. 17, 2007) [hereinafter *Bagaragaza*, Referral Revocation Decision]. See generally Alhagi Marong, *The ICTR Transfers Michel Bagaragaza to the Netherlands for Trial*, ASIL INSIGHTS, (June 18, 2007), <http://www.asil.org/insights070618.cfm>.

121. See *ICTR Completion Strategy, June 2006, supra* note 118, ¶ 39; ISSUES AT STAKE, *supra* note 117, at 6–7; Møse, *supra* note 8, at 672–74.

122. ICTR R. P. & EVID. 11*bis*. The ICTR's Rules of Procedure and Evidence were written pursuant to Article 14 of the ICTR Statute, which calls for the judges of the Tribunal to adopt such rules. See *ICTR Statute, supra* note 55, art. 14.

123. See *ICTR R. P. & EVID. 11bis(A)*.

124. See *id. 11bis(A)(i–iii)*.

125. See *id. 11bis(C), (D)(ii)*.

126. See *id. 11bis(D)(iv)*.

127. See *id. 11bis(F)*.

128. See *infra* notes 140–47 and accompanying text.

129. See *ICTR R. P. & EVID. 11bis(A), (B)*. The Trial Chamber may order such a referral on its own accord as well. See *id. 11bis(B)*.

absentia,<sup>130</sup> the Trial Chamber may conduct a referral hearing if the suspect is not yet in custody.<sup>131</sup> In order for a state to have jurisdiction over a case, the state must be one “(i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case.”<sup>132</sup> If the Trial Chamber finds that the requested host state satisfies one of the three jurisdictional requirements, the Chamber must also satisfy itself that “the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.”<sup>133</sup>

A key element in determining the sufficiency of a national jurisdiction under 11*bis* is whether the transfer country possesses a legal framework under which it may try crimes similar to the Tribunal.<sup>134</sup> The Appeals Chamber, in accordance with the view of the Trial Chambers, has read a general competency requirement into 11*bis*'s requirements for national jurisdiction.<sup>135</sup> Competency, according to the Tribunal, is a judicial determination in which a Trial Chamber “must consider whether it has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.”<sup>136</sup> To satisfy the first prong, the

130. See ICTR Statute, *supra* note 55, art. 20(4)(d) (“[T]he accused shall be entitled . . . (d) [t]o be tried in his or her presence, and to defend himself or herself in person or through legal assistance . . .”).

131. See ICTR R. P. & EVID. 11*bis*(A) (“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 [to] determine whether the case should be referred to the authorities of a State.” (emphasis added)). Therefore, the Prosecutor may submit referral requests for the nine fugitives as he proposed, even if they are already indicted. See Jallow, *supra* note 116; see also, e.g., Prosecutor v. Bucyibaruta, Case No. ICTR-05-85-I, Designation of a Trial Chamber for the Referral of the Case to a State, ¶ 3 (July 11, 2007) (granting request to designate Trial Chamber for a referral hearing even though “the accused is not in the custody of the Tribunal”).

132. ICTR R. P. & EVID. 11*bis*(A)(i–iii).

133. *Id.* 11*bis*(C).

134. See *infra* note 136.

135. See *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 4 (“Rule 11*bis* of the Rules allows a designated Trial Chamber to refer a case to a competent national jurisdiction for trial . . .”); Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-R11*bis*, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11*bis*, ¶ 4 (Oct. 30, 2008) [hereinafter *Kanyarukiga*, Appeals Chamber Transfer Decision] (same); *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 4 (same).

136. *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 4; *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 4; *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 4. Courts apply the same general competency test to analyze whether states have jurisdiction and are “adequately prepared” for the purposes of Rule 11*bis*(A)(iii). See *Bucyibaruta*, Transfer Decision, *supra* note 119, ¶ 8 (“In determining whether or not a State has jurisdiction within the meaning of Rule 11*bis* . . . the Chamber must consider whether such a State has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate sentencing structure.”); *Munyeshyaka*, Transfer Decision, *supra* note 119, ¶ 8 (“In assessing whether or not a State has jurisdiction within the meaning of Rule 11*bis*, the Chamber must consider whether such a State has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate sentencing structure.”); Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-11*bis*, Decision on Prosecutor’s Request for Referral of the Indictment to the Kingdom of the Netherlands, ¶¶ 9–12 (Apr. 13, 2007) [hereinafter *Bagaragaza*, Trial

Tribunal must find that the state has criminalized the alleged conduct as an international crime listed in the Statute and not as a mere “ordinary” crime.<sup>137</sup> International crimes codified by the transfer state need not be identical to those listed in the ICTR, but rather “similar in substance.”<sup>138</sup> To satisfy the second prong, “[t]he penalty structure within the State must provide an appropriate punishment for the offences for which the accused is charged, and conditions of detention must accord with internationally recognized standards.”<sup>139</sup>

If the Tribunal is satisfied that the transfer state meets the competency requirement, it then “shall satisfy itself that the accused will receive a fair trial.”<sup>140</sup> In so doing, the Tribunal considers “whether the accused will be accorded the rights set out in Article 20 of the Tribunal’s Statute.”<sup>141</sup> Article 20 of the ICTR Statute lists the defendants’ rights, such as the right of the presumption of innocence, to be tried without undue delay, to be tried in one’s own presence, the right to an attorney and, if the defendant is indigent, to be provided one free of charge, and the right to examine and cross examine witnesses for the prosecution and defense under the same conditions.<sup>142</sup> Through the application of Article 20(2) of the ICTR

Chamber’s Transfer Decision] (conducting the same competency test to determine whether the Netherlands has jurisdiction and is adequately prepared to try to the case).

137. See *Bucyibaruta*, Transfer Decision, *supra* note 119, ¶ 8 (“A case can be referred to the national courts of a State only where the State concerned will charge and convict the persons responsible for those international crimes listed in the Statute as opposed to ordinary law crimes.”); *Bagaragaza*, Trial Chamber’s Transfer Decision, *supra* note 136, ¶ 11 (“The Tribunal only has authority to refer cases where the State ‘will charge and convict [or acquit] only for those international crimes listed in its Statute’ as opposed to ‘ordinary crimes’ such as homicide.” (quoting Prosecutor v. Bagaragaza, Case No. ICTR-05-86-AR11bis, Decision on Rule 11bis Appeal (AC), ¶ 16 (Aug. 30, 2006) (alteration in original)); see also *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 6–12 (analyzing whether Rwandan law adequately criminalizes the charged crimes in accordance with Rule 11bis).

138. *Gatete*, Transfer Decision, *supra* note 8, ¶ 21 (finding Rwandan law sufficiently similar to the Statute’s definition of criminal responsibility).

139. *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 4 (citing *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 4); *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 4 (citing *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 4); *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 4 (citing Prosecutor v. Radovan Stankovic, Case No. IT-96-23/2-PT, Decision on Referral of Case under Rule 11bis, ¶ 32 (May 17, 2005)).

140. ICTR R. P. & EVID. 11bis(C); see also *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 4 (“The Trial Chamber must also consider whether the accused will receive a fair trial . . .”); *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 4; *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 4.

141. *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 4 (“The Trial Chamber must also consider whether the accused will receive a fair trial . . .”); *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 4; *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 4.

142. ICTR Statute, *supra* note 55, art. 20. In its entirety, Article 20 provides for the equality of all persons before the Tribunal; the right to a fair and public hearing; the presumption of innocence; the right to be informed of the nature and cause of the charges; adequate time and access to facilities to prepare a defense; the right to communicate with an attorney of one’s own choosing; the right to be tried without undue delay; the right to be tried in one’s own presence; the right to representation of an attorney, to be informed of this

Statute,<sup>143</sup> which invokes Article 21's protection of witnesses,<sup>144</sup> as well as Article 20's equal access to witnesses provision,<sup>145</sup> the Tribunal also requires the transfer state to provide an effective witness protection program.<sup>146</sup> Lastly, Rule 11bis(C) specifies that "the death penalty will not be imposed or carried out" in the transfer state.<sup>147</sup>

Rule 11bis also provides for certain safeguards to help ensure the administration of justice and states' compliance with due process proceedings. Specifically, Rule 11bis(D)(iv) provides that "the Prosecutor may send observers to monitor the proceedings in the courts of the State concerned,"<sup>148</sup> while 11bis(F) provides that the ICTR, at the request of the Prosecutor, may revoke the transfer order at any time before the state court reaches a verdict.<sup>149</sup> While the Tribunal recognizes the benefit of these safeguards, it has held that they alone may not be sufficient to overcome a defect in a state's ability to provide an enumerated due process right, such as witness protection, especially since the decision to send monitors and request revocation lies within the discretion of the Prosecutor.<sup>150</sup> In sum, then, the Tribunal has interpreted and applied 11bis to mean that a transfer country must have a legal framework which criminalizes the conduct of the accused, must not impose the death penalty, and must guarantee that defendants will receive a fair trial by ensuring each of the defendants' rights stipulated in the ICTR Statute. Barring the satisfaction of any of the requirements—despite the monitoring and revocation mechanisms—the

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right, and, if indigent, to be provided with one free of charge; the right to examine and cross examine witnesses for the prosecution and defense under equal conditions; the provision of an interpreter free of charge; and the right not to testify against oneself or be compelled to confess guilt. *See id.*

143. *Id.* art. 20(2) ("[T]he accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.").

144. *Id.* art. 21 ("The [ICTR] shall provide . . . for the protection of victims and witnesses.").

145. *Id.* art. 20(4)(e).

146. *See, e.g., Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 40 (denying referral motion in part because of lack of adequate protection of and access to witnesses); *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 35 (dismissing the prosecution's grounds for appeal based on inadequate witness protection); *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 45 (dismissing the prosecution's grounds for appeal based on inadequate witness protection).

147. ICTR R. P. & EVID. 11bis(C).

148. *Id.* 11bis(D)(iv).

149. *Id.* 11bis(F).

150. *See Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 29 (holding that the Trial Chamber's error in failing to consider certain monitoring mechanisms was inconsequential, as "these procedures and remedies would not necessarily solve the current problems related to the availability and protection of witnesses" and that monitoring and revocation "lie within the sole discretion of the Prosecution"); *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 38 ("[T]hese procedures and remedies would not necessarily solve the current problems related to the availability and protection of witnesses [and] the decision to send monitors and the right to request . . . revocation lie within the sole discretion of the Prosecution."); *Gatete*, Transfer Decision, *supra* note 8, ¶ 94 (holding that although the monitoring system in place "has led to the rejection of some of the objections against transfer . . . monitoring will not . . . solve the problems relating to availability and protection of witnesses").

Tribunal will not transfer a case to a national jurisdiction.<sup>151</sup> This next section discusses Rwanda's attempts at legislating to meet the ICTR's high standard under 11*bis*.

## 2. Rwanda's Legislative Responses to 11*bis* Requirements

The government of Rwanda implemented Organic Law No. 11/2007 (Transfer Law) as part of a continuous effort to align Rwandan law dealing with transfer cases from the ICTR with the ICTR Statute itself in order to facilitate the successful transfer of cases from the ICTR to Rwandan courts.<sup>152</sup> The Transfer Law created a dual system in Rwanda, in which certain legal provisions, procedures, and guarantees apply specifically to cases transferred from the ICTR or other states to Rwanda but not to cases that originate in the domestic system.<sup>153</sup> Contrary to genocide cases that originate in Rwandan courts,<sup>154</sup> those that are transferred from the ICTR are heard exclusively by the High Court in the first instance<sup>155</sup> and by the Supreme Court on appeal.<sup>156</sup> Similarly, in the event that the Transfer Law may conflict with any other law, the provisions within the Transfer Law prevail.<sup>157</sup>

Since the enactment of the Transfer Law, the GOR has continuously written and updated legislation in response to the ICTR's denial of referrals.<sup>158</sup> The preambular paragraphs to the Transfer Law itself state that the Parliament adopted the law "[c]onsidering [the] Statute of the [ICTR] and its Rules of Procedure and Evidence [and] [c]onsidering . . . particularly the requirements to transfer cases from the ICTR to national jurisdictions,

151. *See infra* Part I.B.3.c.

152. *See* Law No. 11/2007 of Mar. 16, 2007, Official Gazette of the Republic of Rwanda, Mar. 19, 2007, Preamble.

153. *See id.* art. 24.

154. The 2004 *Gacaca* Law categorizes genocide crimes into three categories. *See* Law No. 16/2004 of June 19, 2004, Official Gazette of the Republic of Rwanda, June 19, 2004, art. 51, *modified and complemented by* Law No. 13/2008 of 19/05/2008, *available at* [http://www.amategeko.net/display\\_rubrique.php?ActDo=all&Information\\_ID=1262&Parent\\_ID=30692916&type=public&Langue\\_ID=An&rubID=30692917](http://www.amategeko.net/display_rubrique.php?ActDo=all&Information_ID=1262&Parent_ID=30692916&type=public&Langue_ID=An&rubID=30692917). All cases except those involving people who planned and organized the genocide or those who held significant leadership positions and participated in or encouraged others to participate in the genocide (the first two subsections of the first category) are heard in the *gacaca* courts. *See id.* arts. 2, 51. Those aforementioned exceptions are heard by ordinary or military courts. *See id.* art. 2.

155. *See* Law No. 11/2007 of Mar. 16, 2007, Official Gazette of the Republic of Rwanda, Mar. 19, 2007, art. 2.

156. *See id.* art. 16.

157. *See id.* art. 25.

158. *See, e.g.*, Security Council Meeting 6134, *supra* note 10, at 31. Rwandan Prosecutor General Martin Ngoga addressed the Council, saying,

[d]espite [2008's] disappointing decision by the Trial and Appeals Chambers to reject the Prosecutor's request to transfer cases to Rwanda . . . we have undertaken a review and proposed amendments to the law governing the transfer of cases and the law abolishing the death penalty, and we have established a witness protection unit within the judiciary.

*Id.*

including Rwanda.”<sup>159</sup> As a result, the Transfer Law and its progeny include expansive due process protections and severe limitations on the application of the death penalty (resulting in its eventual abolishment) in order to accord with the ICTR’s *11bis* transfer requirements.

*a. The Transfer Law’s Due Process Protections*

The Transfer Law provides for extensive due process protections for defendants, in tandem with the ICTR Statute and Rules of Procedure and Evidence. Article 13 enumerates the rights of the accused in a virtually identical manner to those listed in Article 20 of the ICTR Statute.<sup>160</sup> Some have argued that Rwanda already guaranteed these rights through its ratification of the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples’ Rights (Banjul Charter)<sup>161</sup> together with Rwanda’s Constitutional provision making international treaties “more binding than organic laws and ordinary laws.”<sup>162</sup> Regardless of such prior obligations, Rwanda’s implementation of the Transfer Law makes such obligations explicit.<sup>163</sup> Additionally, Article 14 of the Transfer Law guarantees that the GOR shall provide “appropriate protection for witnesses and shall have the power to order protective measures similar to those set forth in Articles . . . of the ICTR Rules of Procedure and Evidence.”<sup>164</sup> Further, Article 14 guarantees the government’s facilitation of witnesses living abroad and confers upon them “immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials,” along with the provision that the High Court may establish additional protections it deems necessary to

159. Law No. 11/2007 of Mar. 16, 2007, Official Gazette of the Republic of Rwanda, Mar. 19, 2007, Preamble.

160. Compare Law No. 11/2007 of Mar. 16, 2007, Official Gazette of the Republic of Rwanda, Mar. 19, 2007, art. 13, with ICTR Statute, *supra* note 55, art. 20.

161. See Marong et al., *supra* note 24, at 190–91; Tully, *supra* note 30, at 403–04. Article 14 of the ICCPR includes a virtually identical list of rights, see International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, 999 U.N.T.S. 171, at 176–77 [hereinafter ICCPR], as does Article 7 of the Banjul Charter. See African Charter on Human and Peoples’ Rights art. 7, June 27, 1981, 21 I.L.M. 58, at 60 [hereinafter Banjul Charter]. Rwanda ratified the ICCPR on April 16, 1975 and the Banjul Charter on July 15, 1983. See *Gatete*, Transfer Decision, *supra* note 8, ¶ 27 n.44.

162. THE CONSTITUTION OF THE REPUBLIC OF RWANDA OF 04 JUNE 2003 art. 190. Rwanda’s Constitution also enumerates certain due process guarantees. See *id.* arts. 16, 18–20; see also Marong *supra* note 24, at 191.

163. See *Gatete*, Transfer Decision, *supra* note 8, ¶¶ 27–32.

164. Law No. 11/2007 of Mar. 16, 2007, Official Gazette of the Republic of Rwanda, Mar. 19, 2007, art. 14. Specifically, the Transfer Law guarantees those measures mentioned in rules 53, 69, and 75 of the ICTR Rules of Procedure and Evidence. See *id.* Those measures include the non-disclosure of any materials, information, or the identity of witnesses or victims in the interests of justice. See ICTR R. P. & EVID. 53, 69, 75. Additionally, in 2009, ICTR staff began training the Rwandan Witness Protection Service as well as establishing a video link system for allowing long distance testimony, which “should take care of the concerns related to witness protection and provide an alternative for the taking of evidence of witnesses who may be reluctant to travel to Rwanda.” Hassan B. Jallow, Statement of the Prosecutor of the ICTR to the U.N. Security Council (Dec. 3, 2009) (transcript available at <http://www.unictr.org/tabid/155/Default.aspx?id=1035>).



guarantee their safety.<sup>165</sup> The Transfer Law also provides specific protections for the defendants' attorneys, ensuring the right to travel within Rwanda unencumbered and to be free from search, seizure, and arrest, as well as the right to security at their own request.<sup>166</sup> Last, in accordance with Rule 11*bis*, the Transfer Law provides for the possibility of the presence of ICTR monitors during the domestic trial process and recognizes the Tribunal's right to revoke the transfer.<sup>167</sup> Thus, the Transfer Law addresses the main procedural and due process mechanisms that are present in the ICTR Statute and Rules. The Transfer Law similarly addresses the ICTR's concerns regarding the application of the death penalty in Rwandan courts.

*b. From the Death Penalty to Life Imprisonment*

Prior to 2007, the fact that Rwanda still practiced the death penalty was the major obstacle preventing the consideration of the transfer of cases from the ICTR to Rwanda's national courts.<sup>168</sup> As noted above, according to ICTR Rule 11*bis*(C), "the Trial Chamber shall satisfy itself . . . that the death penalty will not be imposed or carried out."<sup>169</sup> Given the fact that one of Rwanda's major objections to the formation of the ICTR was the Tribunal's prohibition of the death penalty,<sup>170</sup> its dissonance with Rule 11*bis*(C)'s provisions is clear. As a result, while Rwanda maintained the death penalty—even during its years of disuse<sup>171</sup>—the ICTR would not seek transfer due in large part to the country's legal allowance of capital punishment.<sup>172</sup>

Rwanda's difficulty in meeting 11*bis* requirements is evident in the ICTR's refusal to recognize Rwanda's subsequent abolition of the death penalty as sufficient to cure Rwanda's 11*bis* deficiency with respect to capital punishment. In July 2007, the Rwandan parliament passed Organic Law No. 31/2007 (Death Penalty Abolition Law), thereby abolishing the

165. Law No. 11/2007 of Mar. 16, 2007, Official Gazette of the Republic of Rwanda, Mar. 19, 2007, art. 14.

166. *See id.* art. 15.

167. *See id.* arts. 19, 20 (establishing that the ICTR Prosecutor has "the right to designate individuals to observe the progress of cases transferred to Rwanda in accordance with article 11*bis* D) iv) of the ICTR Rules" and recognizing that "[i]n the event the ICTR revokes [a transfer order] pursuant to Rule 11*bis* . . . the accused shall be promptly surrendered to the ICTR").

168. *See* The President of the ICTR, *Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶ 36, delivered to the Security Council, U.N. Doc. S/2006/951 (Dec. 8, 2006) [hereinafter *ICTR Completion Strategy, Dec. 2006*] ("Transfer of cases to Rwanda raises several issues. One involves the death penalty, which is applicable in genocide cases, though only rarely implemented."); *cf.* Marong et al., *supra* note 24, at 201 ("[R]eferrals to Rwandan authorities would not be appropriate unless the Rwandan government addresses problems relating to fair trials through legal reforms and official abstention from the use of the death penalty.").

169. ICTR R. P. & EVID. 11*bis*(C); *see also supra* note 133 and accompanying text.

170. *See supra* note 39 and accompanying text.

171. *See* Marong et al., *supra* note 24, at 195 (noting that there have been no executions for genocide-related crimes in Rwanda since 1998).

172. *See ICTR Completion Strategy, Dec. 2006, supra* note 168, art. 36.

death penalty.<sup>173</sup> After its passage, many thought that this law would enable the ICTR Prosecutor to successfully request referrals to Rwanda.<sup>174</sup> Additionally, the Transfer Law, passed just four months earlier, stipulates that “life imprisonment shall be the heaviest penalty imposed upon a convicted person in a case transferred to Rwanda from ICTR,” effectively abolishing the death penalty for ICTR transfer cases.<sup>175</sup> Encouraged by the Rwandan legislation, the ICTR Prosecutor submitted three requests for referral to Rwanda shortly after the passage of the Death Penalty Abolition Law,<sup>176</sup> soon followed by two others.<sup>177</sup>

However, the Tribunal has since repeatedly held that the provisions in the Death Penalty Abolition Law, though sufficient to ensure against the imposition of the death penalty, have in fact created another problem: the Law allows for the possibility of the imposition of the penalty of prolonged life imprisonment in isolation for transfer cases.<sup>178</sup> Though not enumerated in Rule 11*bis* or the ICTR Statute, the Tribunal held that prolonged imprisonment in isolation may be in violation of a defendant’s rights and therefore would not sanction transfers to Rwanda.<sup>179</sup> And while the Tribunal recognized that prolonged detention in isolation has not been definitively recognized as a violation of a human right,<sup>180</sup> it ruled that the possibility of such imposition, arising from an ambiguity in the law, is sufficient to deny transfer.<sup>181</sup> This ambiguity arises from the question of whether the Death Penalty Abolition Law or the Transfer Law is

173. See Law No. 31/2007 of July 25, 2007, Official Gazette of the Republic of Rwanda, July 25, 2007, available at [http://www.amategeko.net/display\\_rubrique.php?Information\\_ID=2088&Parent\\_ID=30698444&type=public&Langue\\_ID=An#a30698445](http://www.amategeko.net/display_rubrique.php?Information_ID=2088&Parent_ID=30698444&type=public&Langue_ID=An#a30698445).

174. See, e.g., The President of the ICTR, *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶ 35, delivered to the Security Council, U.N. Doc. S/2007/676 (Nov. 20, 2007) [hereinafter *ICTR Completion Strategy, Nov. 2007*] (“Since the recent abolition of the death penalty in Rwanda . . . the Prosecutor has filed three requests in terms of Rule 11*bis* for the referral to Rwanda for trial of the cases of three of the accused . . . . The requests are pending judicial determination.”); *ICTR/Transfer—The Transfer Policy of the ICTR Prosecutor Takes Another Hit*, HIRONDELLE NEWS AGENCY (Aug. 24, 2007), <http://hirondellenews.com/content/view/9825/340/> (“The only option . . . for these countries that refuse to try persons accused of genocide would be to extradite them to Rwanda, which is henceforth possible due to its new law that abolishes the death penalty.”).

175. See Law No. 11/2007 of Mar. 16, 2007, Official Gazette of the Republic of Rwanda, Mar. 19, 2007, art. 21.

176. See *ICTR Completion Strategy, Nov. 2007*, *supra* note 174, ¶ 35.

177. See The President of the ICTR, *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶ 50, delivered to the Security Council, U.N. Doc. S/2008/322 (May 13, 2008) [hereinafter *ICTR Completion Strategy, May 2008*] (noting the number of transfer requests pending at five).

178. See, e.g., *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 31–38; *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶¶ 6–17; *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶¶ 8–21.

179. See *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 38.

180. See *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on Prosecutor’s Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, ¶ 25 (June 19, 2008) [hereinafter *Hategekimana*, Trial Chamber’s Transfer Decision].

181. See *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 38.

controlling.<sup>182</sup> The issue in contention is whether the Death Penalty Abolition Law's provision for "life imprisonment with special provisions" may apply to transfer cases,<sup>183</sup> or whether the maximum penalty of life imprisonment as provided in the Transfer Law applies.<sup>184</sup> The Tribunal held the ambiguity lies in whether the Transfer Law, as the law directly on point (*lex specialis*), overrides the possibly contradicting Death Penalty Abolition Law provision, or whether the latter overrides the former as it is later in time, under the principle *lex posterior derogate priori*.<sup>185</sup> Since the Tribunal was unable to determine which law is controlling, it erred on the side of caution and concluded that it was unable to ensure that "life imprisonment with special provisions" will not be applied by the Rwandan courts, and therefore, in large part, denied the referral requests.<sup>186</sup>

Once again responding to the ICTR's latest decisions denying referrals to Rwanda, largely on the basis of the above ambiguity regarding life imprisonment, the Rwandan parliament amended the Death Penalty Abolition Act to exclude the possibility of life imprisonment with special provisions from cases transferred from the ICTR.<sup>187</sup> The Appeals Chamber in *Prosecutor v. Hategekimana*<sup>188</sup> noted that, had the amendment entered into force, "the ambiguity as to the applicable punishment for transfer cases . . . would be resolved."<sup>189</sup> The Tribunal continued, however, that since "there is no information . . . to indicate that this law has entered into

182. See *id.* ¶ 38 ("The Appeals Chamber is therefore unable to conclude that the ambiguity [between the Death Penalty Abolition and Transfer Laws] as to the applicable punishment under Rwandan law for transfer cases has been resolved."); see also *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 16; *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 20.

183. See Law No. 31/2007 of July 25, 2007, Official Gazette of the Republic of Rwanda, July 25, 2007, art. 4, available at [http://www.amategeko.net/display\\_rubrique.php?Information\\_ID=2088&Parent\\_ID=30698444&type=public&Langue\\_ID=An#a30698445](http://www.amategeko.net/display_rubrique.php?Information_ID=2088&Parent_ID=30698444&type=public&Langue_ID=An#a30698445). Specifically, "life imprisonment with special provisions" provides that "1) a convicted person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least twenty (20) years of imprisonment; 2) a convicted person is kept in isolation." *Id.* Article 5 lists the crimes that are subject to this penalty, which include, *inter alia*, "crimes of genocide and crimes against humanity." *Id.* art. 5.

184. See, e.g., *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 31–38; *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶¶ 6–17; *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶¶ 8–21.

185. See, e.g., *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 31–38; *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶¶ 6–17; *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶¶ 8–21.

186. See, e.g., *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 38; *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 16; *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 20.

187. See Law No. 31/2007 of July 25, 2007, Official Gazette of the Republic of Rwanda, July 25, 2007, art. 3, modified and complemented by Law No. 66/2008 of 21/11/2008, Official Gazette of the Republic of Rwanda, Dec. 1, 2008, available at [http://www.amategeko.net/display\\_rubrique.php?Information\\_ID=2088&Parent\\_ID=30698444&type=public&Langue\\_ID=An#a30698445](http://www.amategeko.net/display_rubrique.php?Information_ID=2088&Parent_ID=30698444&type=public&Langue_ID=An#a30698445). The law reads: "[L]ife imprisonment with special provisions . . . shall not be pronounced in respect of cases transferred to Rwanda from the [ICTR] and from other States . . ." *Id.* art. 3.

188. Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (Dec. 4, 2008).

189. *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 38.

force,” the ambiguity remains.<sup>190</sup> This strongly suggests that if referrals are brought to the Appeals Chamber in the future, this ground of denial will be reversed, though not necessarily the others pertaining to fair trial due process protections.

As seen below, when deciding whether to refer cases to Rwanda, the Tribunal undertakes a factual analysis to determine whether Rwandan law is implemented in practice, in contrast with both the Appeals Chamber’s decisions in transferring cases to other countries than Rwanda as well as its decisions concerning transfer cases at the ICTY. Part I.C.3 contrasts the Appeals Chamber’s narrow, strictly legal approach to ICTY and ICTR transfer requests to Europe with the Chamber’s broad interpretation and application of *11bis* requirements when evaluating referrals to Rwanda, considering both factual allegations concerning the situation within the country in addition to its existing laws.

### 3. *11bis* in Practice: Transferring Cases to Europe and Rwanda

#### a. *The ICTY’s Application of 11bis in Transferring Cases to Bosnia and Herzegovina*

Given the similarities between the ICTY’s and ICTR’s form and function,<sup>191</sup> it is useful to briefly examine the ICTY’s application of its transfer requirements, particularly with respect to its successful decisions to transfer cases to Bosnia and Herzegovina.<sup>192</sup> As the subsequent sections illustrate, the ICTY conducts a purely legal analysis of domestic law to ensure that such law comports with *11bis* requirements, whereas the ICTR Appeals Chamber applies both a legal analysis and a factual review of many factors, despite defendants’ similar due process concerns in both courts.<sup>193</sup>

The comparison between the two Tribunals’ transfer requirements is particularly apt because both the ICTY and ICTR share an Appeals Chamber<sup>194</sup> and, importantly, the ICTR’s Rule *11bis* was taken virtually verbatim from the Yugoslav Tribunal’s Rules of Procedure and Evidence.<sup>195</sup> Further, U.N. Security Council Resolution 1503 urges the ICTR to model its completion strategy on that of the ICTY, specifically in

190. *Id.*

191. See *infra* notes 194–95 and accompanying text.

192. See *infra* note 197 and accompanying text.

193. See *infra* notes 198–208 and accompanying text.

194. See ICTR Statute, *supra* note 55, art. 13(4) (“The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.”).

195. See Drumbl, *supra* note 1, at 1231 & n.27 (“[T]he international legal community responded to atrocity in Rwanda simply by using as boilerplate the Statute of the ICTY . . .”). Compare ICTR R. P. & EVID. 11*bis*, with ICTY R. P. & EVID. 11*bis*. Most relevant to this discussion, ICTY’s Rule 11*bis* provides that the designated Trial Chamber may refer an indictment to a state “(i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case.” ICTY R. P. & EVID 11*bis*(A). The Rules also provide that the Trial Chamber must be “satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.” *Id.* 11*bis*(B).

facilitating the transfer of cases to national jurisdictions.<sup>196</sup> Contrary to the ICTR, however, the ICTY has, on numerous occasions, referred cases under Rule 11bis to Bosnia and Herzegovina—the country where the defendants were accused to have committed atrocities.<sup>197</sup> Given the similarities between the 11bis requirements and the existence of a shared Appeals Chamber, it is useful to compare how the Appeals Chamber applied Rule 11bis to ICTY cases with how the same court applied a virtually identical rule to ICTR transfer cases.

The ICTY has been primarily concerned with ensuring that the laws of the transfer state comport with the requirements of Rule 11bis and has refrained from conducting a factual analysis of trial and prison conditions in practice.<sup>198</sup> In so doing, the Appeals Chamber has satisfied itself that the laws of Bosnia and Herzegovina guarantee a fair trial, including, the right to a fair and public hearing, adequate time to prepare a defense, right to counsel, and equal access to witnesses.<sup>199</sup> For example, in *Prosecutor v. Rasevic & Todovic*, the Appeals Chamber held that the Referral Bench did not have an obligation to investigate whether access to witnesses was in fact guaranteed in practice in Bosnia, but merely to ensure that the law provided for such protections.<sup>200</sup> The ICTY has similarly found defendants' fears of

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196. See S.C. Res. 1503, *supra* note 14, preambular paras. (“The Security Council . . . urg[es] the ICTR to formalize a detailed strategy, modelled [*sic*] on the ICTY Completion Strategy, to transfer cases . . . to competent national jurisdictions . . . .”) (emphasis omitted).

197. See President of the ICTY, *Assessment and Report*, ¶ 44, delivered to the Security Council, U.N. Doc. S/2009/252 (May 18, 2009) [hereinafter *ICTY Report, May 2009*] (noting that from 2005 to 2007, eight cases involving thirteen accused were transferred to national jurisdictions, ten to Bosnia, two to Croatia, and one to Serbia); see also ISSUES AT STAKE, *supra* note 117, at 6.

198. See, e.g., *Prosecutor v. Rasevic & Todovic*, Case Nos. IT-97-25/1-AR11bis.1 & IT-97-25/1-AR11bis.2, Decision on Savo Todovic's Appeals Against Decisions on Referral Under Rule 11bis, ¶ 56 (Sept. 4, 2006) [hereinafter *Rasevic & Todovic*, Appeals Chamber Transfer Decision] (“The Referral Bench correctly considered whether it was satisfied that the Appellant would receive a fair trial by establishing that the legislation . . . allows for adequate time and facilities for the preparation of a defence. That is all it was required to do pursuant to Rule 11bis of the Rules.”); *Prosecutor v. Jankovic*, Case No. IT-96-23/2-AR11bis.2, Decision on Rule 11bis Referral, ¶¶ 44–57 (Nov. 15, 2005) [hereinafter *Jankovic*, Appeals Chamber Transfer Decision], available at <http://www.icty.org/x/cases/stankovic/acdec/en/051115.htm> (holding that the Trial Chamber's analysis of the applicable Bosnian law is sufficient to guarantee a fair trial); *Prosecutor v. Stankovic*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11bis Referral, ¶¶ 18–30 (Sept. 1, 2005) [hereinafter *Stankovic*, Appeals Chamber Transfer Decision], <http://www.icty.org/x/cases/stankovic/acdec/en/050901.htm> (dismissing defendant's contentions that he would not receive a fair trial in Bosnia in actuality, finding the Trial Chamber's analysis of the applicable law sufficient); see also Marong et al., *supra* note 24, at 182, 185.

199. See, e.g., *Rasevic & Todovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶¶ 49–84; *Jankovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶¶ 41–62; *Stankovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶¶ 18–30; Marong et al., *supra* note 24, at 181–85.

200. See Appeals Chamber Transfer Decision, *supra* note 198, ¶ 63 (“The Referral Bench was only required to ascertain whether the provisions concerning the measures which may be ordered by the State Court of [Bosnia and Herzegovina] for the protection of witnesses, do not unfairly impinge upon the Appellant's right to a fair trial.”).

receiving victor's justice in Bosnian courts<sup>201</sup> to be without merit, emphasizing the professional role of judges in the courtroom.<sup>202</sup> Additionally, the Appeals Chamber has repeatedly held that Rule 11*bis*' monitoring and revocation provisions in part guarantee the defendants' right to a fair trial in the transfer country, when considered with the Tribunal's other findings regarding fair trial protections.<sup>203</sup> While defendants have repeatedly made allegations that Bosnia's laws are not implemented in practice,<sup>204</sup> that they would risk receiving victor's justice,<sup>205</sup> and that monitoring and revocation are insufficient safeguards due to the fact that only the Prosecutor can recommend monitoring and revocation,<sup>206</sup> the Tribunal has only thus far implemented a strict procedural application of the 11*bis* ICTY transfer rule.<sup>207</sup> This is in stark contrast to the Appeals Chamber's review of ICTR transfer requests, wherein, as detailed below in Part I.B.3.c, the Chamber has conducted a factual review of many factors, particularly the availability of witness protection, and questioned the sufficiency of monitoring and revocation mechanisms regardless of the adequacy of the Rwandan laws in place.<sup>208</sup>

The ICTY Appeals Chamber appears chiefly concerned with the existence of enumerated due process protections in law and not the practical application of such laws. This may be due to the ICTY's involvement with the courts of Bosnia and Herzegovina. As part of the ICTY's completion

201. See, e.g., *Jankovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶ 42 (“[T]he Appellant submits that the Referral Bench failed to properly inform itself . . . (vi) about the existence of potential prejudice towards the Appellant if his case is referred to the authorities of Bosnia and Herzegovina.”).

202. See *id.* ¶ 53 (“The Appellant has not demonstrated that such statements would cause prejudice towards his right to a fair trial, as the judges at the [Bosnia and Herzegovina] State Court are professional . . . judges.”).

203. See *Rasevic & Todovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶¶ 82–84 (finding that the Referral Bench did not err in “satisf[y]ing itself that the appellants would receive a fair trial *in part* on the basis of Rule 11*bis*(D)(iv) monitoring and the Rule 11*bis*(F) revocation mechanisms”); *Jankovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶¶ 55–57; *Stankovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶ 52 (“The Appellant is . . . wrong to suggest that it was improper for the Referral Bench to have satisfied itself that the Appellant would receive a fair trial in part on the basis [of the] monitoring and the . . . revocation mechanism.”).

204. See *Rasevic & Todovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶ 50 (“[T]he Appellant argues that the Referral Bench focused on whether there was a legal framework in place, instead of assessing whether such a framework was in fact implemented.”); *Jankovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶ 42 (“The Appellant argues that the legal structure in Bosnia and Herzegovina in itself is insufficient to guarantee a fair trial and that further inquiry into the implementation of the necessary standards was required.”); *Stankovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶ 19 (“[The defendant] notes that the Referral Bench was satisfied that there are legal instruments in place that *could* result in a fair trial, but that finding, he asserts, is not enough: those legal instruments must actually be shown to be *in use*.”).

205. See *supra* note 201 and accompanying text.

206. See *Rasevic & Todovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶ 80; *Jankovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶ 42.

207. See Marong et al., *supra* note 24, at 181–85.

208. See *infra* notes 243–46 and accompanying text.

strategy,<sup>209</sup> the Tribunal has assisted Bosnia and Herzegovina in setting up a special court to hear cases related to genocide and war crimes.<sup>210</sup> This court is comprised of both international and Bosnian judges, a fact upon which the Tribunal places much importance.<sup>211</sup> Professor Burke-White emphasizes the role that the monitoring and revocation mechanisms play in ensuring fair trials in the Bosnian context.<sup>212</sup> The threat of revocation, he argues, “encourage[s] national courts to meet a relatively high standard of justice.”<sup>213</sup> In this view, the threat of revocation, then, is a sufficient stick to the carrot of transfer to incentivize domestic judges to comport with international fair trial standards.<sup>214</sup> Thus, the ICTY is confident in transferring cases to the Bosnian state courts, despite concerns that there still remains a question over whether an adequate defense is possible at all.<sup>215</sup> Therefore, it may well be that the international community is aware of whether Bosnian due process laws are enforced<sup>216</sup> or, if inequities result, that the ICTY is able to confidently recall the case to The Hague.<sup>217</sup>

The above discussion presents a concise analysis of ICTY 11*bis* rulings, focused on those issues relevant to the Rwandan context. The preceding issues—mainly the Tribunal’s analysis regarding fair trial provisions and monitoring mechanisms—are the most directly analogous to and distinct from the Appeals Chamber’s concerns regarding transferring cases to Rwanda under the ICTR’s Rule 11*bis*.<sup>218</sup> With respect to transfer applications, the ICTY Appeals Chamber has also ruled on defendants’ challenges to the Tribunal’s jurisdiction,<sup>219</sup> the adequacy of national courts to hear genocide and war crimes cases,<sup>220</sup> and disputes over which national court has a “greater nexus” to grant jurisdiction,<sup>221</sup> among other related

209. See President of the ICTY, *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*, ¶ 6, delivered to the Security Council and General Assembly, U.N. Doc. A/57/379-S/2002/985 (Sept. 4, 2002) [hereinafter *ICTY Report, Sept. 2002*]; see also MICHAEL BOHLANDER, *THE TRANSFER OF CASES FROM INTERNATIONAL TRIBUNALS TO NATIONAL COURTS 2–21* (2004), available at <http://liveunictr.altmansolutions.com/Portals/0/English/News/events/Nov2004/Bohlander.pdf>.

210. See BOHLANDER, *supra* note 209, at 2–21; GOLDSTONE & SMITH, *supra* note 13, at 105.

211. See, e.g., *Jankovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶ 53 (“The Appellant has not demonstrated that such statements would cause prejudice towards his right to a fair trial, as the judges at the [Bosnia and Herzegovina] State Court are professional—and partly international—judges.” (emphasis added)).

212. See Burke-White, *supra* note 110, at 322–29.

213. *Id.* at 325.

214. See *id.*

215. See *id.* at 346.

216. Cf. BOHLANDER, *supra* note 209, at 8 (noting that international judges would only be necessary until standards “consistent with those expected by the international and national community” were developed).

217. See Burke-White, *supra* note 110, at 322–29.

218. See *infra* Part I.B.3.c.

219. See, e.g., *Stankovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶¶ 10–17.

220. See, e.g., *Jankovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶¶ 19–27.

221. See *Rasevic & Todovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶¶ 32–48; *Jankovic*, Appeals Chamber Transfer Decision, *supra* note 198, ¶¶ 28–40.

issues. Yet while the ICTY's application of *11bis* transfer requirements is distinct from the ICTR's application of the Rule to referrals to Rwanda, its approach is similar to the Rwanda Tribunal's application of the transfer rule to non-Rwandan venues. The next section describes the ICTR's similar concern with *11bis*' legal requirements, absent factual determinations, when considering transfer requests to non-Rwandan venues.

*b. The ICTR's Application of 11bis in Transferring Cases to Non-Rwandan Venues*

The ICTR has, on a few occasions, considered referral requests to non-Rwandan jurisdictions and has therefore had to conduct and apply an analysis of *11bis* requirements accordingly. The ICTR has thus far granted two referral requests to France<sup>222</sup> and one to the Netherlands,<sup>223</sup> though the latter request was revoked after a Dutch court ruled that the Netherlands does not exercise jurisdiction over certain international crimes.<sup>224</sup> While, in these cases, the ICTR Trial Chambers have been primarily concerned with ensuring that the French and Dutch courts have personal and subject matter jurisdiction over cases relating to the Rwandan genocide<sup>225</sup>—a concern not as relevant in referral requests to Rwanda due to its unquestioned jurisdiction under traditional notions of national jurisdiction<sup>226</sup>—the decisions also deal with some of the due process issues that have arisen in both the ICTY and Rwanda transfer cases.<sup>227</sup>

Similar to the Appeals Chamber's rulings in ICTY transfer cases, the ICTR Trial Chambers is primarily concerned with the adequacy of European law guaranteeing fair trial and monitoring provisions and the non-imposition of the death penalty and thus refrains from conducting a factual analysis of whether such laws are enforced.<sup>228</sup> For example, in evaluating whether the defendant will receive a fair trial in France, the Tribunal in *Prosecutor v. Bucyibaruta*<sup>229</sup> determined that France's ratification of the European Convention for the Protection of Human Rights and ICCPR as

222. See generally *Munyeshyaka*, Transfer Decision, *supra* note 119; *Bucyibaruta*, Transfer Decision, *supra* note 119.

223. See generally *Bagaragaza*, Trial Chamber's Transfer Decision, *supra* note 136.

224. See *Bagaragaza*, Referral Revocation Decision, *supra* note 120, ¶¶ 11–12 (granting the Prosecutor's request for revocation of the transfer order after finding that Dutch courts ruled that they do not have jurisdiction to hear cases relating to the genocide and war crimes).

225. See *Munyeshyaka*, Transfer Decision, *supra* note 119, ¶¶ 5–17; *Bucyibaruta*, Transfer Decision, *supra* note 119, ¶¶ 5–17; *Bagaragaza*, Trial Chamber's Transfer Decision, *supra* note 136, ¶¶ 8–30.

226. See *supra* note 61 and accompanying text.

227. See *Munyeshyaka*, Transfer Decision, *supra* note 119, ¶¶ 18–30; *Bucyibaruta*, Transfer Decision, *supra* note 119, ¶¶ 18–30; *Bagaragaza*, Trial Chamber's Transfer Decision, *supra* note 136, ¶¶ 31–39.

228. See *Munyeshyaka*, Transfer Decision, *supra* note 119, ¶¶ 18–30; *Bucyibaruta*, Transfer Decision, *supra* note 119, ¶¶ 18–30; *Bagaragaza*, Trial Chamber's Transfer Decision, *supra* note 136, ¶¶ 31–39.

229. Case No. ICTR-2005-85-I, Decision on Prosecutor's Request for Referral of Laurent Bucyibaruta's Indictment to France (Nov. 20, 2007).



well as its own domestic law suffice to guarantee such rights without conducting a factual analysis of its application.<sup>230</sup> Similarly, the Tribunal has held, without explaining its reasoning, that France's and the Netherlands' attestations that equal access to witnesses and trial monitoring is guaranteed under law and in practice are sufficient for the purposes of 11bis.<sup>231</sup> The Tribunal's willingness to accept Western European countries' due process guarantees may be explained by the international community's general acceptance of the existence of such protections in Western democracies.

Nevertheless, the Tribunal does not offer this general acceptance nor its familiarity with Western legal systems as reason for its disinclination from conducting a factual review.<sup>232</sup> Rather, much like the Appeals Chamber's ICTY 11bis rulings, the ICTR seems to view a factual analysis in these cases not only unnecessary but beyond its purview.<sup>233</sup> This solely law-oriented method is inapposite to the ICTR's treatment of 11bis determinations concerning transfers to Rwanda. As the next section illustrates, when determining whether to transfer a case to Rwanda, the ICTR is willing to investigate not only applicable (and possibly sufficient) Rwandan law but also context-specific situations inside the country and, based on those factual findings, deny transfer.

*c. The ICTR's Application of 11bis in Transferring Cases to Rwanda*

Compared to the ICTY's application of 11bis to transferring cases to Bosnia and Herzegovina and the ICTR's application of 11bis to France and the Netherlands, the Rwanda Tribunal treats the transfer question as a mixed question of law and fact when considering whether to transfer a case to Rwanda. Under this approach, the Tribunal applies a strict analysis of both Rwandan law and practice to evaluate whether Rwanda's judicial system meets Rule 11bis' strict requirements.<sup>234</sup> Though noting the progress of Rwanda's judicial system and the (general) sufficiency of its

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230. See *Bucyibaruta*, Transfer Decision, *supra* note 119, ¶¶ 21–24.

231. See *Munyeshyaka*, Transfer Decision, *supra* note 119, ¶¶ 18–30; *Bucyibaruta*, Transfer Decision, *supra* note 119, ¶¶ 18–30; *Bagaragaza*, Trial Chamber's Transfer Decision, *supra* note 136, ¶¶ 31–39.

232. See *Munyeshyaka*, Transfer Decision, *supra* note 119, ¶¶ 20–30 (conducting an analysis only of French law pertaining to fair trial, witness protection, and monitoring mechanisms without mentioning any factual application of such law); *Bucyibaruta*, Transfer Decision, *supra* note 119, ¶¶ 20–30 (same); *Bagaragaza*, Trial Chamber's Transfer Decision, *supra* note 136, ¶¶ 31–39 (conducting an analysis only of Dutch law pertaining to fair trial, witness protection, and monitoring mechanisms).

233. See *supra* note 232.

234. See, e.g., *Hategkimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 14–30 (discussing the conditions in Rwanda pertaining to witness availability and monitoring mechanisms despite laws providing for such protections); *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 35 (“[I]f the case were to be transferred to Rwanda, [the defendant] might face difficulties in obtaining witnesses residing within Rwanda because they would be afraid to testify . . . .”); *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 47 (holding that the Trial Chamber did not err in considering the conditions in Rwanda after considering the applicable Rwandan law).

laws, the Tribunal has denied transfer to Rwanda due to factual determinations of the situation within Rwanda itself.<sup>235</sup> Most recently, the Appeals Chamber held that, under *11bis*, transfer to Rwanda is unacceptable because of the ambiguity in the Transfer Law relating to life imprisonment<sup>236</sup> and the inability to guarantee defendants' access to witnesses residing both within and outside Rwanda.<sup>237</sup> Assuming Rwanda's amended Transfer Law meets the Tribunal's standards,<sup>238</sup> the remaining factor preventing transfer to Rwanda is the apparent lack of effective witness protection.

In order to evaluate the conditions within Rwanda, the ICTR has accepted amicus briefs from Human Rights Watch,<sup>239</sup> the Kigali Bar Association,<sup>240</sup> and the government of Rwanda,<sup>241</sup> among others. Drawing upon the Trial Chambers' findings from the reports, the Appeals Chamber considers whether the political and security situation in Rwanda creates the atmosphere intended by the *11bis* legal requirements.<sup>242</sup> In such a manner, the Appeals Chamber has repeatedly upheld the Trial Chambers' findings that although Rwandan law provides for witness protection,<sup>243</sup> the evidence suggests that witnesses living both within Rwanda and residing abroad may

235. See *infra* notes 239–46 and accompanying text.

236. See *supra* notes 173–89 and accompanying text.

237. See *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 39–40 (“[T]he Appeals Chamber has dismissed Ground 3 of the Appeal on the basis that it is unable to conclude that the penalty structure in Rwanda will be adequate . . . . [T]he Trial Chamber did not err in concluding that [the defendant’s] right to obtain the attendance of, and to examine, Defence witnesses . . . cannot be guaranteed at this time in Rwanda.”); *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 50 (The Appeals Chamber “has dismissed the remaining grounds of appeal, which relate to fundamental matters concerning whether [the defendant’s] right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as [the Prosecution’s] witnesses, can be guaranteed . . . and whether the penalty structure in Rwanda is adequate”).

238. See *supra* notes 173–89 and accompanying text.

239. See *generally* Prosecutor v. Munyakazi, Case No. ICTR-1997-36-I, Decision on the Request by Human Rights Watch for Leave to Appear as *Amicus Curiae* (Mar. 10, 2008); Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-I, Decision on Defence Request to Grant *Amicus Curiae* Status to Four Non-Governmental Organisations (Feb. 22, 2008) (granting status to Human Rights Watch while denying others).

240. See *generally* Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-I, Decision on *Amicus Curiae* Request by The Kigali Bar Association (Feb. 22, 2008); Prosecutor v. Munyakazi, Case No. ICTR-1997-36-I, Decision on the Application by the Kigali Bar Association for Leave to Appear as *Amicus Curiae* (Dec. 6, 2007).

241. See *generally* Prosecutor v. Hategekimana, Case No. ICTR-00-55B-I, Decision on Request by the Republic of Rwanda, The Kigali Bar Association, The ICDA, and ADAD for Leave to Appear and Make Submissions as *Amici Curiae* (Dec. 4, 2007) (granting status to Rwanda, reserving determination on others); Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-I, Decision on the Request of the Republic of Rwanda for Leave to Appear as *Amicus Curiae* (Nov. 9, 2007).

242. See, e.g., *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 21 (noting that the Trial Chamber had sufficient information from the amicus briefs to determine that defense witnesses experienced harassment in Rwanda).

243. See *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 23; *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 27; *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 38.

fear testifying in Rwanda.<sup>244</sup> Further, the Appeals Chamber has held that although monitoring and revocation mechanisms exist, and while Rwanda maintains video-link technology to set up distance testimony for witnesses reluctant to travel to Rwanda, such mechanisms are insufficient to guarantee the principle of equality of arms between the prosecution and defense.<sup>245</sup> In other words, even with such protective mechanisms, the totality of the circumstances does not remedy the lack of adequate witness protection.<sup>246</sup> Therefore, the Tribunal concludes, although the Rwandan legal system guarantees, in law and in effect, all other *11bis* due process requirements, its deficiencies in both penalty structure and witness protection preclude case transfer to Rwandan national courts.<sup>247</sup> In contrast with the ICTs' reluctance to make factual determinations regarding the implementation of domestic law when considering transfer to non-Rwandan venues, the ICTR has found the failure of adequate implementation of Rwandan law as reason to deny transfer to Rwanda.

The above part demonstrates the historical and political background of the formation and composition of the ICTR, as well as the legal requirements and hurdles required to transfer a case from the Tribunal to a court of national jurisdiction, in particular to Rwanda. With respect to legal structure, Rwanda has continuously revised its legal code in order to meet the demands of the Tribunal. Most significantly, Rwanda enacted the 2007 Transfer Law and 2008 amendment to the Death Penalty Abolition Law with the hopes of meeting the ICTR's Rule 11*bis* requirements. However, to date no cases have been referred to Rwanda, due largely to the ICTR's findings that Rwanda cannot in fact provide adequate witness protection, despite laws guaranteeing such protections. The following part outlines the arguments for and against such transfer to Rwanda in particular, with specific emphasis on respect for procedural due process on the one side and competing conceptions of retributive and rehabilitative justice on the other.

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244. See *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 22, 26; *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 26, 31.

245. See *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 26–30; *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶¶ 33–39; *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶¶ 42–49. The Tribunal has acknowledged that the Prosecutor's suggested monitor—the African Commission on Human and People's Rights (African Commission)—is qualified to monitor domestic proceedings, but that monitoring nevertheless is insufficient to cure the witness protection deficiency. See *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 29; *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶¶ 37–38.

246. See *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 34; *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 43; *Gatete*, Transfer Decision, *supra* note 8, ¶ 64. The Tribunal has yet to reconsider the matter in light of the ICTR's recent witness protection training program and video-link services. See *supra* note 164.

247. See *supra* note 237 and accompanying text.

## II. TO TRANSFER OR NOT TO TRANSFER? DUE PROCESS PROTECTION V. JUSTICE AND RECONCILIATION

This part analyzes the legal and policy arguments for and against transferring cases from an international tribunal to national jurisdictions, specifically to courts of the country where the greatest nexus of the crimes committed occurred—in this case, Rwanda. Part II.A focuses on the position of those who advocate preventing the transfer of cases until certain specific due process guarantees are met in the transfer country. For the sake of brevity and due to their emphasis on the importance of guaranteeing the protection of certain due process requirements prior to granting transfer, this Note labels these opponents of transfer “Protectionists.”<sup>248</sup> While different “Protectionists” may emphasize different aspects of due process, they are united in the high degree of importance they attach to due process requirements and the need to buttress international legal standards. Part II.B focuses on the position of those who advocate the importance of transferring cases to the nexus country. These “Foundationalists,” united by the emphasis they place on the Tribunal’s goals as enumerated in its foundational documents, primarily argue that crimes of mass atrocity must be tried in the home country in order to effectuate the trials’ purposes of societal rehabilitation and retribution, and in so doing recognize the legitimacy of a non-Western method of carrying out justice.

### A. *Protectionists: Complete Fulfillment of Fair Trial Protection Guarantees Before Transfer*

Protectionists oppose the transfer of cases from the ICTR to Rwanda unless complete due process protection, as articulated by the Tribunal’s interpretation of Rule 11*bis*, can be guaranteed not only in law but in practice in Rwanda. The Tribunal itself shares this view and therefore ICTR transfer decisions help illustrate the position. Aside from sharing a concern for defendants’ rights, Protectionists also advocate keeping cases at the Tribunal in order to help establish a consistent set of international legal norms and incentivize domestic regimes to undertake meaningful legal reform. Part II.A.1 details the Protectionists’ concern for defendants’ rights in domestic courts while Part II.A.2 discusses their aspiration for creating a coherent body of international law and domestic legal reform.

#### 1. The Risk of Victor’s Justice and Concern for the Rights of the Defendant

In cases of mass atrocities and international crimes against humanity, there is a risk that the home populace will be overeager to convict and sentence the accused in order to satisfy the wronged-population’s thirst for revenge and desire to hold someone accountable for the crimes committed

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248. It is important to note that neither the opponents nor advocates of transfer comprise a monolithic school of legal thought. Rather, this Note synthesizes the many arguments for and against transfer in order to evaluate the arguments in their totality.

against them<sup>249</sup>—what some scholars identify as “victor’s justice.”<sup>250</sup> This is an acute concern for those who oppose transfer of cases from the ICTR to Rwanda.<sup>251</sup> To avoid such an outcome, then, due process protections must be guaranteed to their fullest and vigilantly guarded in the home country to ensure that the defendant will receive a fair trial.<sup>252</sup>

Protectionists—largely supported by the Tribunal’s own interpretation of 11bis—advocate that *all* due process protections must be met in a transfer country prior to referral.<sup>253</sup> Absent a single protection, transfer must be denied, both for the sake of the defendants’ rights<sup>254</sup> and the integrity of the legal system.<sup>255</sup> Opponents of transfer have argued that the language of 11bis empowers the Tribunal to look beyond relevant Rwandan law to actual practice in Rwanda to determine that transfer is not advisable.<sup>256</sup> International attorneys Alhagi Marong, Charles Cherner Jalloh, and David Kinnecome argue that the ICTR should only transfer cases to Rwanda once it receives a guarantee from the GOR that a host of due process provisions will be met,<sup>257</sup> despite the existence of domestic laws that already precisely provide those protections.<sup>258</sup> The concern is that the laws themselves are irrelevant if they are not fully applied.<sup>259</sup> To date, and in contrast with the Appeals Chamber’s position regarding ICTY transfer cases,<sup>260</sup> the Chamber has upheld its right to consider the facts on the ground in determining whether Rwandan courts will provide a fair trial as they define it.<sup>261</sup> In

249. See Carroll, *supra* note 1, at 172; Morris, *supra* note 27, at 371. Some delegates to the Security Council in 1994 were sensitive to the accusations that the Nuremberg and Tokyo Tribunals meted out “victor’s justice” and therefore wanted to ensure that such accusations could not be leveled against the new Rwanda Tribunal. See Popoff, *supra* note 97, at 374–75.

250. See, e.g., Carroll, *supra* note 1, at 172; Marong et al., *supra* note 24, at 186; Morris, *supra* note 27, at 371.

251. See Carroll, *supra* note 1, at 172 (“[T]he Commission of Experts . . . worried that emotionally, politically, and ethnically charged domestic prosecutions would lead to vengeance and ‘victor’s justice’ rather than fair trials.”); Morris, *supra* note 27, at 371 (“[D]efendants in national courts will have more reason than defendants tried before an international tribunal to fear bias, in the form of victor’s justice or of personal partiality.”).

252. See generally Marong et al., *supra* note 24, at 197–98, 201.

253. See *id.*

254. See *infra* notes 269–80 and accompanying text.

255. See *infra* Part II.A.2.

256. See Gatete, Transfer Decision, *supra* note 8, ¶ 31 (describing the Defense’s and Human Rights Watch’s assertions that “there is a gap between judicial theory and practice” in Rwanda); Hategekimana, Trial Chamber’s Transfer Decision, *supra* note 180, ¶ 33 (describing the Defense’s and amici curiae’s request “to look beyond the relevant Rwandan laws and consider Rwanda’s past practices”); Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, ¶ 31 (June 6, 2008) [hereinafter *Kanyarukiga*, Trial Chamber’s Transfer Decision].

257. See Marong et al., *supra* note 24, at 198 (“[T]he government must guarantee that all other fair trial standards will be met . . .”).

258. See *supra* Part I.B.2.

259. See Prosecutor v. Kayishema, Case No. ICTR-2001-67-I, Brief of Human Rights Watch as *Amicus Curiae* in Opposition to Rule 11bis Transfer, ¶¶ 12, 25–111 (Jan. 3, 2008) [hereinafter HRW Brief].

260. See *supra* Part I.B.3.a.

261. See *supra* Part I.B.3.c.

practice, the Tribunal has preferred a Protectionists' application of *11bis* by reading the Rule's fair trial provision to require a finding that the transfer country guarantees a full set of internationally-recognized due process protections, in law and in practice, for defendants prior to granting transfer.<sup>262</sup>

Protectionists urge the Tribunal to read extensive due process requirements into *11bis*, including conducting a factual analysis out of a serious concern for the rights of the defendant<sup>263</sup>—a concern that has dominated the Tribunal's analysis as well. In so doing, opponents stress that the alleged bias of the Rwandan judiciary and pressures from the government would constitute a form of victor's justice which should preclude transfer to Rwandan courts.<sup>264</sup> Specifically, the defense and human rights organizations such as Human Rights Watch argue that the Rwandan courts are dominated by ethnic Tutsis, are each comprised of only one judge, and are susceptible to biased government pressure.<sup>265</sup> While the Appeals Chamber eventually ruled that the Rwandan judiciary is sufficiently independent from executive influence and that the specific number of judges who hear a given case is irrelevant to determining whether the trial comports with due process standards,<sup>266</sup> the Chamber noted that there is indeed a concern of political sensitivity when dealing with genocide cases and the judiciary.<sup>267</sup> Similarly, the Trial Chambers have since ruled that although the individual allegations against the Rwandan judiciary are insufficient to prevent transfer on their own, some of the concerns are "well-founded,"<sup>268</sup> further validating the concerns that the opponents of transfer and the Tribunal have regarding transferring cases to Rwanda and the high standards domestic judiciaries must meet.

Similarly, Protectionists tend to evaluate whether Rwanda (or any other country) meets *11bis* requirements by going through the list of due process protections listed in the ICTR Statute one by one and, if finding any of the protections lacking, recommend against transfer.<sup>269</sup> In practice, the Trial Chamber adopts this methodology. The Chamber addresses the

262. See *supra* notes 140–46 and accompanying text.

263. See HRW Brief, *supra* note 259, ¶¶ 25–111.

264. See *Gatete*, Transfer Decision, *supra* note 8, ¶¶ 33–38; *Hategekimana*, Trial Chamber's Transfer Decision, *supra* note 180, ¶¶ 39, 42–43; *Kanyarukiga*, Trial Chamber's Transfer Decision, *supra* note 256, ¶¶ 36–39; see also Marong et al., *supra* note 24, at 186, 193, 197, 201.

265. See *Gatete*, Transfer Decision, *supra* note 8, ¶¶ 33–38; see also *Hategekimana*, Trial Chamber's Transfer Decision, *supra* note 180, ¶¶ 39, 42–43; *Kanyarukiga*, Trial Chamber's Transfer Decision, *supra* note 256, ¶¶ 36–39.

266. See *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶¶ 26–31 (overruling the Trial Chamber's holding that Rwandan courts did not meet standards of adequate judicial independence and fairness).

267. See *id.* ¶ 26.

268. See *Gatete*, Transfer Decision, *supra* note 8, ¶ 39; *Kanyarukiga*, Trial Chamber's Transfer Decision, *supra* note 256, ¶ 42; accord *Hategekimana*, Trial Chamber's Transfer Decision, *supra* note 180, ¶ 46.

269. See generally Marong et al., *supra* note 24, at 189–95 (analyzing Rwandan legal practice by evaluating whether it meets certain specific enumerated standards, such as equal treatment under the law, sufficient pre-trial prison conditions, and witness protection).

Defendant's allegations point by point,<sup>270</sup> arriving at the conclusion to deny transfer on the basis that one or two fair trial protections are not enforced, despite the fulfillment of other requirements.<sup>271</sup> While some protectionists—such as Human Rights Watch—have asserted that transfer should be denied on the basis that the GOR does not provide numerous due process protections in practice,<sup>272</sup> the Appeals Chamber has found that most protections are afforded by the GOR.<sup>273</sup> Rather, the Appeals Chamber has, on the three occasions it considered the matter, consistently held against transfer to Rwanda on the grounds of lack of adequate witness protection and uncertainty over the applicable punishment.<sup>274</sup> Now that the amendment to the Death Penalty Abolition Law has gone into effect, the ambiguity over Rwanda's penalty structure has most likely been resolved.<sup>275</sup> Given the Appeals Chamber's language in *Prosecutor v. Hategekimana*,<sup>276</sup> it is likely that the Tribunal would have held that lack of adequate witness protection itself, absent the ambiguity over the penalty structure or any other due process deficiency, would have been sufficient to deny transfer.<sup>277</sup> That is to say, in the Tribunal's Protectionist view, one

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270. See, e.g., *Gatete*, Transfer Decision, *supra* note 8, ¶¶ 33–87 (addressing each of the Defendant's allegations against the Rwandan judicial system: judicial independence, impartiality, and capacity; presumption of innocence; right to an effective defense; availability of counsel; legal aid; working conditions; availability and protection of witnesses both within and outside Rwanda; double jeopardy; arrest and conditions of detention; and life imprisonment with solitary confinement).

271. See, e.g., *id.* ¶ 95. After considering many different factors under the due process rubric, the Trial Chamber held against transfer because there were questions regarding whether the Defendant would have sufficient access to witnesses in and outside Rwanda, as well as concern over the then-ambiguity concerning the applicable penalty. See *id.*

272. See HRW Brief, *supra* note 259, ¶¶ 14–16.

273. See *Munyakazi*, Appeals Chambers Transfer Decision, *supra* note 10, ¶ 50 (denying transfer on the basis of lack of adequate witness protection and penalty structure while overruling Trial Chamber's other finding of due process deficiencies).

274. See *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 39–40 (holding that although the Trial Chamber erred in finding that Rwandan law does not criminalize command responsibility, that Rwanda does not have mutual assistance agreements with other countries, and erred in failing to consider the availability of monitoring and revocation mechanisms, the lack of certain witness protection mechanisms and the possible ambiguity over Rwanda's penalty structure were sufficient to uphold the Trial Chamber's denial of transfer); *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶¶ 16, 27, 35 (affirming the Trial Chamber's denial of transfer based on ambiguous penalty structure and questions regarding witness protection); *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 50 (holding that despite the Trial Chamber's error in holding that the Rwandan judiciary was not independent and impartial, lack of adequate witness protection and ambiguity over Rwanda's penalty structure were sufficient to uphold the Trial Chamber's denial of transfer).

275. See *supra* notes 187–89 and accompanying text.

276. See *supra* notes 189–89 and accompanying text.

277. The Tribunal's methodology is to consider each ground of appeal separately. In *Prosecutor v. Hategekimana*, the Prosecution filed three grounds of appeal: 1) that the Trial Chamber erred in failing to recognize Rwanda's criminalization of command responsibility, 2) that the Trial Chamber erred in holding lack of availability and protection of witnesses, and 3) that the Trial Chamber erred in holding that the applicable penalty in Rwanda is ambiguous. See *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 6, 14, 31. The Appeals Chamber granted the Prosecution's first ground of appeal, but denied the other two. See *id.* ¶ 12–13, 30, 38. It therefore is likely that had the Appeals Chamber

significant due process deficiency is enough to outweigh other judicial considerations in determining whether to transfer a case from the ICTR to Rwanda.<sup>278</sup> In fact, a single due process deficiency—assuming allegations of witness harassment and intimidation are true<sup>279</sup>—may be enough to prejudice a trial.<sup>280</sup> Some Protectionists even suggest that the mere failure to complete the *11bis* requirements as a procedural checklist, regardless of which specific protection is lacking, is reason enough to deny transfer.<sup>281</sup>

The Tribunal is keen to look to the facts in Rwanda in addition to the law particularly in evaluating witness availability, contrary to its approach in ICTY cases. Protectionists are mostly concerned that the lack of a defendant's ability to access witnesses on his or her behalf to the same extent as the Prosecution's witnesses violates the principle of equality of arms and completely undermines the fairness of the trial.<sup>282</sup> The Trial and Appeals Chambers view access to witnesses as being so integral to due process that they have held that the mere possibility of the witnesses' fear to testify in Rwanda, "*regardless of whether their fears are well-founded,*" is enough to determine that defendants will not have sufficient access to witnesses and that therefore trials will be inherently unfair.<sup>283</sup> Aside from specific, isolated instances of harassment and intimidation—which the Tribunal notes as reason enough to absolve a witness from alleging specific instances of harassment pertaining to her case<sup>284</sup>—Protectionists point to the criminalization of "genocide ideology," under which one who expresses

granted two grounds of appeal and denied the one regarding witness protection, that singular due process deficiency would have still been sufficient to deny transfer to Rwanda.

278. This is in line with the Tribunal's language of recognizing the progress that the Rwanda judiciary has made over the years while maintaining that the witness protection deficiency casts doubt over the ability to conduct fair trials. *See, e.g., Gatete*, Transfer Decision, *supra* note 8, ¶ 95 ("The [Trial] Chamber concludes that the Republic of Rwanda has made notable progress in improving its judicial system. . . . However, the Chamber is not satisfied that [the Defendant] will receive a fair trial if transferred to Rwanda. First, it is concerned that he will not be able to call witnesses residing outside Rwanda to the extent and in a manner which will ensure a fair trial. Second, it accepts that the Defence will face problems in obtaining witnesses residing in Rwanda . . .").

279. *See* HRW Brief, *supra* note 259, ¶¶ 25–40; *see also* HUMAN RIGHTS WATCH, LAW AND REALITY: PROGRESS IN JUDICIAL REFORM IN RWANDA 73–78 (2008) [hereinafter, LAW AND REALITY], available at <http://www.hrw.org/sites/default/files/reports/rwanda07081.pdf>.

280. *Cf.* LAW AND REALITY, *supra* note 279, at 73 ("Most prosecutions of genocide, like many other court proceedings in Rwanda, depend on testimony from witnesses, both for the prosecution and the defense.").

281. *See* Marong et al., *supra* note 24, at 201 ("Given the more explicit requirements of *11bis*, referrals to Rwandan authorities would not be appropriate unless the Rwandan government addresses problems relating to fair trials . . .").

282. *See supra* notes 243–46 and accompanying text.

283. *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 22 (emphasis added); *accord Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶ 26; *Munyakazi*, Appeals Chamber Transfer Decision, *supra* note 10, ¶ 37. The Tribunal has held that instances of known witness intimidation, harassment, arrests, and even torture and killings create a general fear to testify without having to prove an individual fear. *See, e.g., Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 21–22. The Tribunal also notes that the criminalization of "genocide ideology" acts to make people fear that if they testify on behalf of one accused of genocide, they too will be charged. *See id.* ¶ 21.

284. *See Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 21.



extremist Hutu views may be incarcerated, as a sufficient deterrent to witness testimony to preclude the possibility of a fair trial.<sup>285</sup> Yet the criminalization of genocide ideology notwithstanding, the Transfer Law guarantees protection for defendants' witnesses, including immunity from prosecution for testifying.<sup>286</sup> Therefore, while the Tribunal's concern over the impairment of a fair trial due to lack of witness availability may be well-founded, this is a key instance where the ICTR looks beyond the law in evaluating 11bis requirements. This beyond-the-law approach is in stark contrast with the Tribunal's hesitancy to evaluate the facts concerning witness protection in Bosnia and Herzegovina.<sup>287</sup>

This section dealt with Protectionists' concern for defendants' due process guarantees, asserting that such guarantees are intrinsic to assuring a fair trial. Under this theory, transfer should be delayed until such protections are fully provided not only in law but in practice. The next section presents the Protectionists' belief that these trials should be conducted mainly in the international courts in order to buttress the international system and encourage domestic legal reform.

## 2. Toward Establishing a Consistent Set of International Legal Norms and Incentivizing Domestic Judicial Reform

Another argument opposing the transfer of cases from international tribunals to national jurisdictions is that such tribunals serve to establish international legal standards<sup>288</sup> as well as encourage domestic legal systems to adopt Western legal norms.<sup>289</sup> Regarding the former, by keeping cases in the ad hoc tribunal system, international legal theorists hope to create a substantive body of international criminal law with precedential value, which could act to deter (or at minimum, punish) acts of mass violence and genocide in the future.<sup>290</sup> There is widespread agreement that the existence of and lessons learned from the tribunals were a crucial step in the formation of international law and subsequent international courts.<sup>291</sup> In fact, the international community has noted that the formation of the Rwanda Tribunal has marked a major step forward in international jurisprudence in recognizing the applicability of international humanitarian

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285. See LAW AND REALITY, *supra* note 279, at 37–41; see also *Hategkimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 21–22.

286. See *supra* notes 163–66 and accompanying text.

287. See *supra* note 200 and accompanying text. International attorneys Alhagi Marong, Charles Chernor Jalloh, and David Kinnecome, in contrast with the ICTY, assert that the Yugoslav Tribunal should likewise look to evidence pertaining to whether due process protections provided for by law are in fact violated. See Marong et al., *supra* note 24, at 182, 185.

288. See, e.g., George, *supra* note 40, at 70; Harhoff, *supra* note 5, at 584–85.

289. See BOHLANDER, *supra* note 209, at 3–4 (describing the Western requirements for transferring ICTY cases to national jurisdictions, which are the same for the ICTR).

290. See Harhoff, *supra* note 5, at 584. Several State delegates (such as the U.K., Czech Republic, and Argentina) at the Security Council meeting considering Resolution 955 shared this view. See 955 Meeting, *supra* note 37, at 6–8.

291. See, e.g., GOLDSTONE & SMITH, *supra* note 13, at 110. See generally Morris, *supra* note 96.

law to mass atrocities occurring within the confines of a national border.<sup>292</sup> Aside from enabling international law to pierce the veil of domestic sovereignty, the Tribunal and ICTY decisions have led to the criminalization of specific acts—such as rape as a form of genocide and media incitement to genocide—under international law that had previously been beyond its scope.<sup>293</sup> Preferring the ICTR's right to hear cases over that of Rwanda enhances the authority and scope of international law in the present and the future.<sup>294</sup>

Another reason Protectionists support the ICTR's jurisdictional primacy speaks to the enormity of the crime committed and the shared responsibility of all humanity to respond to the atrocity. They stress both the international nature of the crimes committed and the corresponding duty the international community bears in administering justice.<sup>295</sup> Since the crimes committed were crimes against humanity, then it is the international community's responsibility—not the responsibility of Rwanda or any other nation—to try the perpetrators.<sup>296</sup> Further, as the ICTR was created to deal with “a threat to international peace and security,”<sup>297</sup> an international tribunal is the appropriate mechanism for dealing with related crimes.<sup>298</sup> Therefore, opponents of transfer assert, international crimes should be tried at the international level not only to buttress the international system but to hold the perpetrators of crimes against humanity accountable to all of humankind.<sup>299</sup>

Finally, maintaining the possibility of transferring cases from the ICTR to Rwanda, as long as strict *11bis* requirements are met, incentivizes Rwanda (and other interested domestic regimes) to reform its legal system

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292. See Magnarella, *supra* note 28, at 431 (noting that “the ICTR represents an important extension of international humanitarian law to internal conflicts”); 955 Meeting, *supra* note 37, at 6–7 (Czech Republic's delegate noting that “[t]he independent Commission of Experts concluded that even though the conflict in Rwanda was a domestic one its consequences affected the entire international community, inasmuch as fundamental principles of international humanitarian law were violated”).

293. See GOLDSTONE & SMITH, *supra* note 13, at 103.

294. Cf. 955 Meeting, *supra* note 37, at 7 (Czech Republic's delegate describing how the formation of the tribunal signifies a breakthrough in the codification process of international law). While most writings asserting the importance of the ICTR in establishing international law relate directly to the debate over the Tribunal's primacy, it logically applies to the transfer debate as well.

295. See Brown, *supra* note 5, at 395 (“[E]xtraordinary jurisdictional priority is justified by the compelling international humanitarian interests involved . . .”).

296. See generally *id.* Several State delegates (Russia, Spain, and Nigeria) to the Security Council meeting considering Resolution 955 shared this view. See 955 Meeting, *supra* note 37, at 2, 11–13.

297. S.C. Res. 955, *supra* note 35, at 1601.

298. See *id.*; see also Brown *supra* note 5, at 395 (“[E]xtraordinary jurisdictional priority is justified . . . by the Security Council's determination that the situation in the former Yugoslavia, as well as that in Rwanda, constituted a threat to international peace and security.”). Several State delegates (Russia, France, Pakistan) at the Security Council meeting considering Resolution 955 shared this view. See 955 Meeting, *supra* note 37, at 2–3, 10.

299. See, e.g., Brown *supra* note 5, at 395.

and sufficiently integrate Western due process standards.<sup>300</sup> New Zealand's delegate to the Security Council in 1994 said as much when he said that "in the domestic courts weight must be given to the Arusha human rights commitments" if genocide cases were to be dealt with by the Rwandan courts.<sup>301</sup> In fact, the policy of refusing to transfer cases from the ICTR to Rwanda has in reality had this effect.

For example, the Rwandan Transfer Law, Death Penalty Abolition Law, and amendment to the Death Penalty Abolition Law were all largely implemented in order to increase the possibility that the ICTR would begin to transfer cases to Rwanda for prosecution.<sup>302</sup> The perceived response of the Rwandan legislature regarding judicial reforms is noted both in the Tribunal's Reports to the United Nations and in the Tribunal's decisions itself. Prior to Rwanda's adoption of the Death Penalty Abolition Law, the ICTR President noted that "[a] welcome development since the previous Completion Strategy report is that Rwanda has promulgated a law which, among other things, excludes the application of the death penalty to cases referred from the ICTR or from States."<sup>303</sup> Six months later, the ICTR President responded in his report that, following the recent abolition of the death penalty, the Prosecutor filed the first three requests for transfer to Rwanda under 11*bis*.<sup>304</sup> These statements suggest that the ICTR President and Prosecutor view Rwanda's judicial reform as a response to the Tribunal's firm transfer requirements.

Similarly, the Tribunal's decisions regarding transfer requests reflect the expectation that Rwanda will reform its judiciary to comport with international standards.<sup>305</sup> The recent statement of the Chief Prosecutor of the ICTR at the United Nations Security Council reflects the position of those who believe that strict requirements for transfer of cases encourages necessary judicial reform in Rwanda.<sup>306</sup> Notably, the Prosecutor acknowledged that "[f]ollowing the Appeals Chamber decisions rejecting referral cases to Rwanda for trial under rule 11 *bis* . . . Rwanda is in the process of enacting . . . additional legislation to meet the remaining

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300. See, e.g., BOHLANDER, *supra* note 209, at 3 ("To 'relocate' these cases, the domestic judicial systems had to be based on democratic foundations and the national courts would have to be enabled to accomplish their work with independence and impartiality, and with due regard for the principles governing international humanitarian law and the protection of human rights."); Marong et al., *supra* note 24, at 161 ("[R]eferrals to Rwandan authorities will be inappropriate unless the Rwandan government officially addresses problems regarding fair trials and the death penalty.").

301. 955 Meeting, *supra* note 37, at 5.

302. See *supra* Part I.B.2.

303. The President of the ICTR, *Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶ 38, delivered to the Security Council, U.N. Doc. S/2007/323 (May 31, 2007) [hereinafter *ICTR Completion Strategy, May 2007*].

304. See *ICTR Completion Strategy, Nov. 2007*, *supra* note 174, ¶ 35.

305. See, e.g., *Hategkimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 40 ("The Appeals Chamber acknowledges the steps which Rwanda has recently taken to clarify the issue of the applicable penalty for transfer cases."); *Gatete*, Transfer Decision, *supra* note 8, ¶ 95 ("The Chamber concludes that the Republic of Rwanda has made notable progress in improving its judicial system.").

306. See Security Council Meeting 6134, *supra* note 10, at 12.

concerns of the Appeals Chamber.”<sup>307</sup> The Prosecutor also acknowledged that Rwanda “has also accomplished much in [legal reform]: the abolition of the death penalty; the incorporation of additional fair trial guarantees in law; the upgrading of facilities; and the training of personnel” and stressed that such capacity-building efforts should be encouraged.<sup>308</sup> It is clear, then, that the ICTR, at least to some measure, supports the Protectionists’ goal of calling for strict transfer requirements in order to encourage legal reform in domestic jurisdictions.

Professor Burke-White, while supporting the notion that the transfer mechanism incentivizes domestic judiciaries to undertake meaningful reform, argues that such incentive lies mostly in its ability to act as a “carrot” within reach.<sup>309</sup> Maintaining strict transfer requirements is only beneficial insofar as the domestic courts believe that they will be rewarded through the successful transfer of cases to their jurisdiction.<sup>310</sup> The desired reforms, in the Bosnian context, resulted from the state courts’ receipt of transfer cases and the expectation that they live up to international standards.<sup>311</sup> It is, in his view, the continued influence that the international court may exert over the domestic proceedings that effectuates true reform.<sup>312</sup> This then raises the question of the effectiveness of holding the carrot just beyond reach if the goal now is to create reform in practice, since the legal reforms have already been put in place.

As illustrated above, the Protectionists prefer adjudication of international criminal law at the international tribunal level for two primary reasons. First, they are concerned with the ability of the transfer country to conduct fair and impartial trials and value the due process guarantees that the ICTR is able to provide.<sup>313</sup> Second, they view the Tribunal as an opportunity to bolster both international criminal law and advocate for legal reform in transfer countries.<sup>314</sup> They do so by acknowledging, in their statements and in the Tribunal’s decisions, the progress the Rwandan legislature has made in response to their strict transfer requirements while continuing to deny referral requests, thus dangling the carrot of transfer just beyond Rwanda’s grasp in order to spur reform not just in law but in practice.<sup>315</sup> The Foundationalists, as this Note refers to those who give greater credence to the overarching goals of the ICTR as articulated in the Tribunal’s founding documents, present a starkly opposing position.

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307. *Id.* (referring to recent legislation dealing with witness protection and access to testimony).

308. *Id.*

309. *See* Burke-White, *supra* note 110, at 324.

310. *See id.*

311. *See id.* at 324–25.

312. *See id.* at 347.

313. *See supra* notes 253–86 and accompanying text.

314. *See supra* notes 288–93, 300–01 and accompanying text.

315. *See supra* notes 300–12 and accompanying text.

*B. Foundationalists: Compelling Countervailing Interests Require Transfers to Rwanda*<sup>316</sup>

Those who advocate trying all crimes relating to the Rwandan Genocide in Rwandan domestic courts, those who this Note refers to as “Foundationalists,” argue primarily that the paramount interest of justice requires that such cases be tried in Rwanda in order to satisfy the needs of the Rwandan people. For them, the focus is on Rwandan courts because that is where they perceive that justice can be effectively carried out.<sup>317</sup> While motivated by different judicial theories, this loose collection of scholars places prime importance on the unique ability of the national judicial process to carry out post-Genocide justice.<sup>318</sup> Among the many reasons given for the asserted deserved priority and effectiveness of Rwandan justice is that as the country where the crimes occurred and against whose people they were committed, Rwanda has the greatest interest in seeing justice done.<sup>319</sup> Moreover, trying top perpetrators in Rwanda would contribute toward national reconciliation and enhance the legitimacy and capacity of the Rwandan judiciary.<sup>320</sup>

1. The Founding Principles of the ICTR Point Toward Transfer to Rwanda

Many critics of the ICTR support trying cases in Rwandan courts because they perceive that the victors’ interests, as well as the interests of Rwandan society as a whole, are better served through domestic trials, even at the expense of defendants’ due process rights.<sup>321</sup> In general terms, “[i]f national prosecutions are conducted with impartiality” and a close approximation of due process, then international courts should defer to the domestic process.<sup>322</sup> Put another way, the international community must

316. Many of the arguments articulated in this subsection were first asserted by those who opposed the primacy and/or model of the ICTR in comparison with trying cases in Rwanda from the start. It therefore follows that many of the same arguments can be made for transferring cases from the Tribunal to the Rwandan courts.

317. *See, e.g.*, Drumbl, *supra* note 1, at 1259 (arguing that the geographic and psychological disconnect between the ICTR and the Rwandan people undermines any restorative effect the Tribunal’s trials may have on Rwandan society); Drumbl, *supra* note 27, at 624–26 (describing how, in the Rwandan case, an international tribunal may not be able to achieve the retributive, deterrent, protective, and rehabilitative goals of post-genocide trials without incorporating the national system); Howland & Calathes, *supra* note 35, at 163 (advocating an implementation of a hybrid Rwandan-international tribunal in Rwanda).

318. *See* Clark, *supra* note 25, at 772–74 (describing different models of justice and their applicability to different situations); Howland & Calathes, *supra* note 35, at 149–56 (describing different models of justice, such as the educative, rehabilitative, deterrent, retributive, incapacitative and restorative impact models).

319. *See* Marong et al., *supra* note 24, at 196–97.

320. *See id.* at 186.

321. *See, e.g.*, Drumbl, *supra* note 1, at 1284–85; *cf.* Tully, *supra* note 30, at 386–87 (noting that the international community should realize that in the pursuit of justice, developing countries such as Rwanda may have to sacrifice some political and civil rights).

322. Morris, *supra* note 96, at 358 (drawing upon lessons of the ICTR to outline when the ICC should defer to national jurisdictions); *see also* Harhoff, *supra* note 5, at 585 (advocating a synthesis of one view of the ICTR as an independent, isolated unit and another view of the Tribunal as a political body that must defer to certain pressures).

keep in mind the multifaceted purpose of the genocide and war crimes trials, which includes the larger societal goals of national reconciliation and judicial capacity building.<sup>323</sup> This view is reflected in Security Council Resolution 955, which includes a host of reasons and goals for forming the ICTR.<sup>324</sup> Paramount among those reasons, for the Foundationalists' purposes, is the statement that "the prosecution of persons responsible . . . would contribute to the process of national reconciliation and to the restoration and maintenance of peace" and the recognition of "the need for international cooperation to strengthen the courts and judicial system of Rwanda."<sup>325</sup> The founding principles tend to elevate national reconciliation and the rebuilding of the Rwandan judiciary over emphasizing the rights of the defendant precisely because the concern in 1994 was to hold the perpetrators of mass atrocity accountable and rebuild a severely fractured society.<sup>326</sup> Keeping in mind the founding principles of the ICTR and the conceptions of justice and reconciliation, Rwandan courts must be more involved—via transfer of cases or other means—in the ICTR's adjudication process.<sup>327</sup>

*a. Justice for Victors, Not Victor's Justice*

At the core of the position of those who advocate swift transfer to Rwanda is the contention that the interests of retributive justice—that is, holding accountable those guilty of instigating the genocide—are best served, and rest, in Rwanda. This argument draws heavily on early

323. See Drumbl, *supra* note 1, at 1232 ("[T]he purpose of legal intervention is to promote peace in local communities by repairing injury, encouraging atonement, promoting rehabilitation, and, eventually, facilitating reintegration."); Møse, *supra* note 8, at 678–79. Sharing this view, several States' delegates, among them Russia, New Zealand, Pakistan, Spain, Nigeria, and the United States, stated that the Tribunal's objective, in addition to restoring peace and security, should be to promote national reconciliation. See 955 Meeting, *supra* note 37, at 2, 6, 10, 12, 13, 18. Nigeria's delegate specifically noted that the ICTR "is designed not to replace, but to complement, the sovereignty of Rwanda," and that it will "enhance the prospects of national reconciliation." *Id.* at 13. This view, however, was not unanimous. See *id.* at 7 (the Czech delegate stating, "[t]he Tribunal might become a vehicle of justice, but it is hardly designed as a vehicle of reconciliation"). Delegates (from the United Kingdom, Nigeria, and the United States) at the Security Council meeting also underscored the importance of rebuilding Rwanda's broken judiciary. See *id.* at 6, 13, 18.

324. See *supra* notes 36–37 and accompanying text.

325. S.C. Res. 955, *supra* note 35, preambular paras. Further, Security Council Resolutions 1503 and 1534 stress the goal of national reconciliation and the importance of judicial capacity building. See S.C. Res. 1503, *supra* note 14, ¶ 1 ("[The Security Council] [c]alls on the international community to assist national jurisdictions . . . in improving their capacity to prosecute cases transferred from the . . . ICTR . . .") (emphasis omitted); S.C. Res. 1534, *supra* note 15, ¶¶ preamble, 9 ("[The Security Council] [c]ommend[s] the important work of [the] Tribunal[] in contributing to . . . national reconciliation" and "[r]ecalls that the strengthening of competent national judicial systems is crucially important to the rule of law . . . and to the implementation of the . . . ICTR Completion Strateg[y] . . .").

326. See Howland & Calathes, *supra* note 35, at 142 ("Simply, its objective is to address and contribute to the improvement of the human rights situation in Rwanda. It should be the prism through which the many objectives articulated for the ICTR are viewed.").

327. See, e.g., Howland & Calathes, *supra* note 35, at 161–66.

criticism of the legality of the Tribunal in the first place,<sup>328</sup> and rests on the fact that Rwandan courts have the greatest claim to cases relating to the 1994 Genocide under traditional notions of national jurisdiction.<sup>329</sup> Rwanda has both unquestioned personal and territorial jurisdiction over cases arising from the 1994 Genocide, as the crimes were committed by Rwandans, against Rwandans, on Rwandan soil.<sup>330</sup> Read maximally, this claim undercuts the basis for the ICTR's delegated primacy, while at a minimum advances a reason for the ICTR to transfer cases to Rwanda's national courts.

However, ICTR critics assert, the Tribunal does not provide justice for the Rwandan victims of the genocide. Rather, the Tribunal "was reaping the wrath of the Rwandans each time it pursued a leader to be prosecuted."<sup>331</sup> These critics attribute such resentment toward the Tribunal to the disparities in sentencing and treatment between ICTR indictees, who by and large are the highest-level perpetrators, and those tried in local courts.<sup>332</sup> As Professor Madeline Morris points out, the combination of the local Rwandan plea system and the Westernized ICTR results in perpetuating the culture of impunity, in which those tried for lesser offenses in Rwanda receive vastly reduced sentences, while the architects and top perpetrators of the genocide, tried at the ICTR, receive better treatment and detention conditions.<sup>333</sup> This creates a perception where no one is held accountable and thus undermines the goals of retributive justice.<sup>334</sup> To counter this undesirable outcome and promote a sense of justice in Rwanda, at least some cases concerning top perpetrators should be transferred to Rwandan courts.<sup>335</sup> While this view advocates a retributive conception of justice—let Rwandans be accountable to Rwandans—the next section explores the Foundationalists' assertion that transferring cases to Rwandan courts will in fact facilitate social reconciliation.

*b. "[T]he prosecution of persons responsible . . . would contribute to the process of national reconciliation . . . ."*<sup>336</sup>

Advocates of transfer to Rwanda also assert that trials in Rwandan courts would best achieve Resolution 955's goal of supporting national

328. See 955 Meeting, *supra* note 37, at 9 (Brazil's delegate expressing concern for the manner in which the Tribunal was created and underscoring that "the assertion and exercise of criminal jurisdiction are essential attributes of national statehood"); Popoff, *supra* note 97, at 377–78.

329. See *supra* note 61 and accompanying text.

330. See Marong et al., *supra* note 24, at 187; Brown, *supra* note 5, at 391–92.

331. Morris, *supra* note 35, at 694.

332. See Harhoff, *supra* note 5, at 584; Morris, *supra* note 96, at 354–55.

333. See Morris, *supra* note 35, at 693–94; Morris, *supra* note 96, at 354–55. The local plea system, enacted in large part to reduce prison overcrowding and promote reconciliation, operates to reduce (or in some cases nullify) sentences in return for full confessions. See Morris, *supra* note 27, at 358–61; Raper, *supra* note 7, at 32–33.

334. See Morris, *supra* note 27, at 364 (describing the perception of the plea system as "a program of impunity").

335. See *id.*; Morris, *supra* note 96, at 357 (applying lessons of the ICTR to the ICC).

336. S.C. Res. 955, *supra* note 35, preambular para.

reconciliation. Proponents of using Rwandan courts to adjudicate genocide crimes stress the rehabilitative nature of both airing grievances and bringing those accountable to justice,<sup>337</sup> and emphasize the role the Tribunal should have in promoting human rights within Rwanda.<sup>338</sup> Reconciliation is a complex process that aims to rebuild fractured relationships between antagonists and involves more than punishing the perpetrators (and in some cases, no punishment).<sup>339</sup> Such a process can only be achieved when a certain confluence of factors are met, which allows for the public's widespread knowledge and internalization of the proceedings and results.<sup>340</sup>

According to Professors Mark A. Drumbl and Erika R. George, trials are only effective for the sake of reconciliation if the public is aware of the details of the proceedings and its outcome, and if the defendant recognizes his/her wrong as such.<sup>341</sup> This is a particularly acute problem when dealing with mass crimes of "radical evil," where, at the time the crimes were committed, the perpetrator did not view the crimes as deviant but rather as normal behavior.<sup>342</sup> In order for the aggrieved society to come to terms with the past and move forward, trials must be highly transparent and public.<sup>343</sup> This enables the public to hear a truthful accounting of the atrocities, become satisfied that perpetrators are being held accountable, and force the perpetrators to face their victims, thus eroding the perception of impunity.<sup>344</sup>

While the renowned post-Apartheid South African Truth and Reconciliation Committees were concerned chiefly with establishing an accounting in order to facilitate healing,<sup>345</sup> the Rwandan context requires emphasis on disseminating the knowledge that the perpetrators are being punished and ensuring that the perpetrators internalize the wrongs they have committed.<sup>346</sup> Professor Drumbl describes the Rwandan context as a "dualist postgenocidal" society in which the victims and perpetrators continue to live side-by-side and where, prior to and during the genocide, participation in the atrocities was not viewed as morally abhorrent.<sup>347</sup> Wide dissemination of the trials and perpetrators' internalization of shame for their crimes is necessary in order to signal that genocide ideology and ethnic hatred is no longer endorsed by the Rwandan people.<sup>348</sup> In these cases, trials are most effective when they are located near the populace, when they are conducted in a language accessible to all, when the

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337. See generally Clark, *supra* note 25; Drumbl, *supra* note 1.

338. See Howland & Calathes, *supra* note 35, at 142.

339. See Clark, *supra* note 7, at 770; Howland & Calathes, *supra* note 35, at 155–56.

340. See Drumbl, *supra* note 1, at 1253–63.

341. See *id.*; George, *supra* note 40, at 71.

342. See Drumbl, *supra* note 1, at 1253–55.

343. See Drumbl, *supra* note 1, at 1259; George, *supra* note 40, at 71.

344. See Drumbl, *supra* note 1, at 1232; Drumbl, *supra* note 27, at 567–68.

345. See George, *supra* note 40, at 68; see also Drumbl, *supra* note 1, at 1253–63 (distinguishing the South African approach from the Rwandan context).

346. See Drumbl, *supra* note 1, at 1256–63.

347. See *id.* at 1241–52.

348. See *id.* at 1232, 1253–63.



proceedings are disseminated through the mass media, and where reasonably efficient results may be reached.<sup>349</sup>

While the ICTR recognizes the importance of publicizing the proceedings,<sup>350</sup> critics do not view the Tribunal's efforts in this matter as sufficient to cure the public's exclusion from the process.<sup>351</sup> Particularly, the ICTR's emphasis on using technology to broadcast Tribunal proceedings overlooks the fact that the majority of the population lives without electricity and is unaware of any of the Tribunal's activities.<sup>352</sup>

Some Foundationalists, such as Professor Drumbl, recognize that fair trials are necessary in order to achieve the desired reconciliatory effect.<sup>353</sup> Therefore, they do not advocate trials without due process protections. Rather, they argue, given both the importance of national reconciliation and the reality that Rwanda is a developing country recovering from societal destruction, it is unrealistic to expect and require every due process protection before transferring cases to Rwanda.<sup>354</sup> In their view, it is sufficient that Rwandan courts provide a basic framework for defendants' rights.<sup>355</sup> Similarly, Foundationalists also recognize that the Rwandan judiciary continues to require assistance in its reform and rebuilding efforts. The next section details how they believe the transfer process may serve to assist in the reconstruction process.

*c. "[T]he need for international cooperation to strengthen the courts and judicial system of Rwanda"*<sup>356</sup> *Supports Transfer*

Advocates of transferring cases to Rwanda also stress that if the ICTR were to transfer cases to Rwanda and work closely with the domestic

349. *See id.* at 1259–60; George, *supra* note 40, at 71 (“[T]he fact that the ICTR was geographically and psychologically distant from those most affected . . . undercut the ICTR’s legitimacy in eyes of critical domestic audiences.”).

350. *See, e.g., ICTR Completion Strategy, May 2009, supra* note 16 ¶¶ 61–62 (describing the establishment of ten information centers throughout Rwanda, genocide education programs, and radio broadcasts of the proceedings).

351. *See* George, *supra* note 40, at 71; Howland & Calathes, *supra* note 35, at 155.

352. *See* Higonet, *supra* note 4, at 419–22.

353. *See* Drumbl, *supra* note 27, at 628 (noting that the right to a full answer and defense is “a sacrosanct pillar of the rule of law”).

354. *See id.* (noting that when a country experiences a genocide perpetrated by mass participatory violence, “it would be inappropriate to take offense at the fact that the presence of lawyers cannot be systematically ensured at all the trials” (quoting Daniel de Beer, Commentary: THE ORGANIC LAW OF 30 AUGUST 1996 ON THE ORGANIZATION OF THE PROSECUTION OF OFFENCES CONSTITUTING THE CRIME OF GENOCIDE OR CRIMES AGAINST HUMANITY 25 n.2 (1997)); Morris, *supra* note 96, at 358 (recommending, based on observations of the ICTR, that the ICC should try to “foster . . . national justice proceedings” as long as “national prosecutions are conducted with impartiality and something approaching adequate due process”).

355. *See* Howland & Calathes, *supra* note 35, at 166 (“Punishment responses and responses to human rights violations must also accept the deficiencies of orthodox western criminological objectives for a justice system.”); Sennett & Noone, *supra* note 25, at 447 (“The degree to which the Rwandan legal system should conform to systems in the West is subject to endless debate. It would be sufficient for the international community to be satisfied that the basic tenets of due process exist in handling the serious cases.”).

356. S.C. Res. 955, *supra* note 35, at 1601.

courts, rather than operate as a completely separate institution, the Tribunal will be more likely to fulfill its mandate of strengthening the Rwandan judiciary.<sup>357</sup> One of the primary reasons Rwanda requested that the Security Council convene an international tribunal was that the Rwandan judiciary was completely destroyed in 1994.<sup>358</sup> In so doing, the nascent Rwandan government was hoping to create a hybrid system in which international and Rwandan judges would work in tandem.<sup>359</sup> While that was not the outcome, transferring cases to Rwanda and maintaining a close working relationship between the domestic courts and the Tribunal can, with the support of the international community, work toward strengthening Rwanda's justice sector.<sup>360</sup>

As discussed in Part I.B.3.a., the monitoring and revocation mechanism not only allows the Tribunal to continue to influence the proceedings but may incentivize the domestic judiciary to comport with international standards, in effect training them to perform according to such principles.<sup>361</sup> While the recent ICTR Completion Strategies have placed a renewed focus on strengthening the Rwandan judiciary,<sup>362</sup> critics maintain that the Tribunal's recent efforts do little to overcome years of neglect.<sup>363</sup> The ICTR Prosecutor has recently acknowledged the necessity of continuing to strengthen the Rwandan judiciary in order to better handle transfer cases and its own domestic caseload.<sup>364</sup> Similarly, Security Council Member States link capacity building to transfer cases, stressing that the ICTR *must* strengthen the administration of justice in national jurisdictions with the express purpose of transferring cases.<sup>365</sup>

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357. See Drumbl, *supra* note 27, at 625 (noting that had the U.N. spent more resources on building institutions to adjudicate genocide crimes in Rwanda, the goal of recreating the justice system would have been facilitated); Howland & Calathes, *supra* note 35, at 162–63.

358. See *supra* notes 25–35 and accompanying text.

359. See Howland & Calathes, *supra* note 35, at 162–63.

360. See *id.* (noting that the international community should revisit the hybridity concept); George, *supra* note 40, at 77 (contrasting the author's critique of the ICTR with the Special Court for Sierra Leone); Tully, *supra* note 30, at 412 (noting that continued international assistance is “the best means of ensuring that the judges can live up to [the] enormous task”).

361. See *supra* notes 212–14, 309–11 and accompanying text.

362. See, e.g., *ICTR Completion Strategy, May 2009*, *supra* note 16, ¶¶ 64–65 (describing ICTR-sponsored judicial training activities, such as training sessions in relevant law and online legal research); Møse, *supra* note 8, at 678–79.

363. See George, *supra* note 40, at 71 (“[U]ntil the recent focus on the ICTR's completion strategy, the ICTR had done very little to help strengthen the ability of local courts . . .”).

364. See Security Council Meeting 6134, *supra* note 10, at 12 (urging Member States to “redouble their efforts in support of capacity-building for the Rwandan legal system” considering Rwanda's “burden of dealing with the cases transferred not only from the Tribunal but also . . . from other national jurisdictions, as well as many other domestic cases”).

365. See, e.g., *id.* at 25 (“One of the key actions for dealing with the caseload of the Tribunals and contributing to the development of capacities for the administration of justice in the States concerned is the referral of new cases to national jurisdictions.”). The United States delegate also appreciated the efforts of the ICTR Prosecutor in requesting transfers to Rwanda and commended “the work done by Rwanda and other countries to build up the capacity the Rwandan legal system needs to make such transfers possible.” *Id.* at 27.

However, some, as stated above, advocate transfer *in order* to build Rwandan judicial capacity; rather than initiating new training programs, the ICTR should transfer cases to Rwanda, accompanied by monitors to ensure that the judiciary adheres to international standards.<sup>366</sup> The ICTR Prosecutor, when requesting transfer under Rule 11*bis*, has repeatedly requested monitors with the transfer to ensure that the judiciary fulfills its function adequately.<sup>367</sup> The Prosecutor has stressed that, according to the ICTR Statute, the proposed monitors, as independent observers, would “have access to court proceedings, documents and records relating to . . . case[s], as well as access to all places of detention.”<sup>368</sup> In fact, the Prosecutor has refrained from compelling the transfer of four RPF members from Rwanda to the ICTR for trial, on the basis that that the ICTR monitors confirmed that the Rwandan courts observed fair trial standards.<sup>369</sup> Given the ICTR Prosecutor’s own admissions, the monitors accompanying the transferred cases would have the ability to be involved in all stages of the proceedings and would ensure a fair trial in Rwanda.

This section so far has addressed the Foundationalists’ assertions that transfer will serve judicial objectives—that is, it will facilitate justice for the Rwandan people, contribute toward national reconciliation, and strengthen the Rwandan judiciary. The next section discusses a deeper underlying criticism of requiring certain standards to be met before permitting transfer. Here, they argue that imposing such conditions adopts an imperialist attitude by assuming the superiority of Western, largely Anglo-American legal systems over any other tradition of jurisprudence.

## 2. Requiring Transfer Countries To Meet Western Legal Standards Approaches Legal Imperialism

A serious ideological critique of requiring transfer countries to meet certain legal standards, as represented by the 11*bis* requirements, is that imposing such legal norms on non-Western countries is a form of neo-imperialism.<sup>370</sup> Conceptions of fair trial, comprised of specific due process provisions such as the right to legal counsel or the guilty plea, are Western legal constructs foreign to many countries, including Rwanda.<sup>371</sup> Professor Michael Bohlander points out that some of the required procedures are in fact unique to the Anglo-American common law tradition and even foreign to Continental civil law systems.<sup>372</sup> Critics accuse the international

366. See Tully, *supra* note 30, at 412.

367. See *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶¶ 27–28; *Kanyarukiga*, Appeals Chamber Transfer Decision, *supra* note 135, ¶¶ 36–37; *Gatete*, Transfer Decision, *supra* note 8, ¶¶ 90–92.

368. *Gatete*, Transfer Decision, *supra* note 8, ¶ 92.

369. See Security Council Meeting 6134, *supra* note 10, at 33.

370. See Drumbl, *supra* note 1, at 1313–14; George, *supra* note 40, at 64–65; Howland & Calathes, *supra* note 35, at 147–48, 166. See generally BOHLANDER, *supra* note 209.

371. See BOHLANDER, *supra* note 209, at 24–25.

372. See *id.* at 30 (noting that the required criminalization of command responsibility is in fact contrary to German law, which recognizes “*Schuldprinzip*,” the principle of individual guilt).

community of adopting due process provisions wholesale and applying them to non-Western countries, regardless of the cultures, legal norms, and traditions of the transfer country.<sup>373</sup> Even when domestic systems have adopted Western procedure, the ICTR's lack of consideration for and misunderstanding of domestic procedure and legal norms has on occasion led the ICTR to misinterpret Rwandan domestic law, particularly when evaluating transfer cases.<sup>374</sup> For example, in *Hategekimana*, decided on December 4, 2008, the Appeals Chamber refused to look beyond what the litigants presented, holding that it lacked the information to determine whether the amendment to the Death Penalty Abolition Law entered into force and that therefore, the Law was still ambiguous, even though in actuality the amendment entered into force on December 1, 2008.<sup>375</sup> This perceived ignorance of domestic law, the argument goes, in effect runs the risk of "undermin[ing] the local population's trust in the idea of the rule of law as propagated by the international community."<sup>376</sup>

In this view, then, it is unrealistic and patronizing to require the transfer country to meet the *11bis* transfer requirements in order to qualify as a transfer state. The advocated solution to this perceived colonization of the legal systems of these former colonies<sup>377</sup> is to discard a strict adherence to these requirements and instead recommend transfer so long as certain basic provisions are met.<sup>378</sup> Others suggest that Rwanda adopt, and the international community support, a hybrid system that integrates aspects of

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373. See *id.* at 25 ("[T]he international community has no real intention in observing—and above all respecting—the legal traditions of the countries where the conflicts occurred . . ."); Drumbl, *supra* note 1, at 1231 ("[In forming the ICTR,] the international legal community responded to atrocity in Rwanda simply by using as boilerplate the Statute of the ICTY."); Howland & Calathes, *supra* note 35, at 154 (asserting that the adoption of Western criminal justice objectives ignores the context of mass human rights violations).

374. See Morris, *supra* note 96, at 352–53. Further, the ICTR is hesitant to look beyond what the prosecution and defense provides them with concerning Rwandan law. See, e.g., *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 38 ("[T]here is no information before the Appeals Chamber to indicate that this law has entered into force.").

375. Compare *Hategekimana*, Appeals Chamber Transfer Decision, *supra* note 19, ¶ 38 ("[T]here is no information before the Appeals Chambers to indicate that [the Death Penalty Abolition] law has entered force."), with Law No. 66/2008 of Nov. 21, 2008, Official Gazette of the Republic of Rwanda, Dec. 1, 2008, p. 99 ("[L]ife imprisonment with special provisions . . . shall not be pronounced in respect of cases transferred to Rwanda from the [ICTR] and from other States . . . concerning the transfer of cases to the Republic of Rwanda from the [ICTR] and from other States.").

376. BOHLANDER, *supra* note 209, at 27; see also Drumbl, *supra* note 1, at 1231 ("[Implementing a Western prosecutorial model] may create a disconnect between the pursuit of trials and the consequences these trials have on local communities, national reconciliation, and international peace."); George, *supra* note 40, at 64 ("[T]he 'structural simplicity' pursued by the dominant model of prosecution and punishment may discount the complexity of justice and reconciliation.").

377. See BOHLANDER, *supra* note 209, at 31 ("Wholesale replacement of legal traditions because of impatience based on lack of planning or foresight, ignorance or unwillingness to understand them, is a violation of the historical identity of a people.").

378. See *supra* notes 354–54 and accompanying text.

both Western judicial systems and traditional judicial methods,<sup>379</sup> such as those subsequently adopted by East Timor, Cambodia, and Sierra Leone.<sup>380</sup> While the international community has responded to these criticisms in forming subsequent international (or, “internationalized”) courts, including the ICC, the ICTR has not integrated such criticisms into its evaluation of transfer requests.

While critics of the ICTR's transfer policy have been primarily concerned with according sufficient weight to countervailing judicial interests—such as national reconciliation and judicial capacity building—and international legal imperialism,<sup>381</sup> they have not directly addressed the Protectionists' concerns regarding due process protections and the risk of victor's justice.<sup>382</sup> Similarly, while Protectionists have devoted much energy to advocating defendants' due process rights and the role the ICTR plays in establishing international law and domestic legal reform,<sup>383</sup> they have seldom addressed Foundationalists' larger concerns of using prosecution to facilitate widespread justice, reconciliation, and judicial capacity building in Rwanda.<sup>384</sup> Part III of this Note attempts to address the deficits in the debate and put forth a workable solution to the ICTR's transfer dilemma, which can serve as a useful paradigm for resolving future international and domestic jurisdictional disputes. Specifically, Part III argues that the ICTR, when evaluating transfer requests, should adopt a comprehensive balancing approach, wherein it weighs due process concerns against the Foundationalists' countervailing interests in order to make a particularized determination on the transfer question. Part III also argues that, in light of the differing tests the ICTR and ICTY use in evaluating transfer requests, the Tribunal should adopt a unified approach and place a renewed confidence in its monitoring system in order to cure itself of the appearances of dealing in double standards.

### III. ABANDON THE STRICT APPLICATION OF 11BIS WHILE ACCOUNTING FOR ADEQUATE DUE PROCESS PROTECTIONS: A COMPREHENSIVE BALANCING APPROACH

Part II of this Note analyzed the controversy surrounding the recent ICTR decisions not to transfer cases to Rwanda. Opponents of transfer—the Protectionists—argue that the guarantee of due process protections, ensured through a strict application of 11bis, is necessary to outweigh the risk of a victor's justice outcome in Rwanda.<sup>385</sup> The Protectionists further argue that keeping high profile transfer cases in the international system is necessary

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379. See BOHLANDER, *supra* note 209, at 6 (describing the proposed hybrid composition of the international humanitarian law court in Bosnia and Herzegovina); George, *supra* note 40, at 77–78. See generally Clark, *supra* note 25.

380. See *supra* note 105 and accompanying text.

381. See *supra* Part II.B.

382. See *supra* Part II.A.

383. See *supra* Part II.A.

384. See *supra* Part II.B.

385. See *supra* Part II.A.1.

in order to create a coherent body of international law, as well as to encourage the liberalization of domestic judiciaries.<sup>386</sup>

Conversely, advocates of transfer—the Foundationalists—argue that a compelling countervailing interest of justice requires that such cases be transferred; that the trials of top perpetrators in Rwanda would contribute toward achieving justice for the victims of the genocide,<sup>387</sup> promote reconciliation for Rwandan society,<sup>388</sup> and would serve to strengthen the domestic judiciary.<sup>389</sup> Additionally, they argue that a strict application of *11bis*, and the due process protections guaranteed thereby, implies the inherent superiority of Western legal jurisprudence and runs the risk of legal imperialism.<sup>390</sup>

This part argues that while procedural protections are necessary to guarantee the rights of the accused, such an approach runs the risk of ignoring the Tribunal's Security Council mandated mission. Yet denouncing the very primacy of the ICTR and its procedural protections is not conducive to remedying the impasse. Such a position offers no useful remedy other than the abolition of the Tribunal as it stands and drastically overlooks the importance of defendants' rights within the judicial process. After analyzing these critiques of both positions, this part suggests that the question of transfer remains a mixed question of law and fact for the Tribunal, one in which it should adopt a comprehensive balancing approach wherein the judges consider not only the factors comprising a due process analysis under *11bis*, but balance such interests against how such a transfer will effectuate the Tribunal's overarching mandate of providing justice, restoring peace, promoting reconciliation, and enhancing the Rwandan judiciary.

#### A. *A Critique of a Strict Application of Due Process Requirements*

This section identifies the deficiencies in maintaining the strict application of due process requirements in evaluating transfer requests. Specifically, this section asserts that a structuralist reading of the Tribunal's founding documents together with Rule *11bis* strongly suggests that the Tribunal has thus far read too many compulsory requirements into *11bis* at the expense of fulfilling its Security Council delegated mandate. While Security Council Resolution 955 lists specific motivating factors for the Tribunal's formation,<sup>391</sup> reinforced by Resolutions 1503 and 1534,<sup>392</sup> Rule *11bis* contains only the general requirement that the Trial Chamber be satisfied that the accused will receive a fair trial,<sup>393</sup> along with the caveat

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386. *See supra* Part II.A.2.

387. *See supra* Part II.B.1.a.

388. *See supra* Part II.B.1.b.

389. *See supra* Part II.B.1.c.

390. *See supra* Part II.B.2.

391. *See supra* notes 36–37 and accompanying text.

392. *See supra* note 325 and accompanying text.

393. *See supra* note 133 and accompanying text.

that the death penalty may not be enforced.<sup>394</sup> The specific due process protections enumerated in the ICTR Statute only enter the *11bis* analysis through the judicial interpretation that the rights set out in Article 20 of the ICTR Statute comprise *11bis* fair trial standards.<sup>395</sup> Thus, it follows that the Security Council placed the aforementioned objectives of the Tribunal over the specific procedural mechanisms through which they were to be achieved.<sup>396</sup>

Security Council Resolutions 955, 1503, and 1534 strongly suggest that the purpose of the ICTR includes, *inter alia*, using the prosecutions to facilitate national reconciliation, restore peace, and strengthen the Rwandan courts and that these considerations are to be preserved in the transfer process.<sup>397</sup> These same goals are listed in Resolutions 1503 and 1534,<sup>398</sup> which were passed for the express purpose of formulating a completion strategy for the ICTR.<sup>399</sup> The resolutions explicitly provide that such a completion strategy, with those purposes in mind, include the transfer of cases to national jurisdictions, including Rwanda.<sup>400</sup> These three Security Council resolutions, when read together, strongly suggest the Council's interest in using the ICTR to contribute to national reconciliation and judicial capacity building—which is undoubtedly best achieved through working within Rwanda<sup>401</sup>—and includes the use of transfers as part of the Tribunal's completion strategy.

Conversely, neither Resolution 955 nor the Statute of the ICTR requires due process guarantees for the accused if transferred to a national jurisdiction. The Resolution is silent on the matter, while Articles 20 and 21 of the ICTR Statute guarantee rights of the accused insofar as the case is heard by the Tribunal.<sup>402</sup> Rule *11bis* of the ICTR Rules of Procedure, written by the Tribunal pursuant to Article 14 of the Statute,<sup>403</sup> provides that the Tribunal must find that the transfer country will guarantee a "fair trial,"<sup>404</sup> but does not explicitly state that all rights of the accused in Articles 20 and 21 must be provided for with no exception. Rather, in the first transfer cases ten years later, the judges extended the general fair trial provision to encompass all of the rights of the accused listed in Articles 20 and 21.<sup>405</sup> Additionally, Article 14 of the ICTR Statute recognizes that the unique circumstances of the Rwandan genocide may require that procedure deviate from the prior established norm, as it states that the judges shall adopt the rules of the ICTY "*with such changes as they deem necessary.*"<sup>406</sup>

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394. *See supra* note 133 and accompanying text.

395. *See supra* notes 140–45 and accompanying text.

396. *See supra* note 326 and accompanying text.

397. *See supra* note 37 and accompanying text.

398. *See supra* note 325 and accompanying text.

399. *See supra* notes 114–15 and accompanying text.

400. *See supra* notes 114–15 and accompanying text.

401. *See supra* Part II.B.1.

402. *See supra* notes 142–45 and accompanying text.

403. *See supra* note 122 and accompanying text.

404. *See supra* note 133 and accompanying text.

405. *See supra* notes 135–45 and accompanying text.

406. ICTR Statute, *supra* note 55, art. 14 (emphasis added).

Therefore, read together with the stated goals of the Tribunal enumerated in Security Council Resolutions 955, 1503, and 1534, the language of the ICTR Statute and Rule 11*bis*, on their face, strongly suggest that there is no strict textual basis for requiring the transfer state to provide full due process protections for the accused at the expense of other countervailing interests.<sup>407</sup>

Though, as the Protectionists put forth, a benefit of applying a strict due process requirement for transfer cases is the effect of encouraging judicial reform in the transfer country,<sup>408</sup> the Tribunal must be careful not to quell Rwanda's hope that such reform will be rewarded. While judicial reform is certainly important, the international community must be careful to avoid the appearances of legal imperialism and cultural superiority.<sup>409</sup> Such appearances are only exacerbated when the Rwandan judiciary and legislature constantly revise the law and improve adjudication to conform to the ICTR's requirements, only for the Tribunal to find additional reasons for denying transfer.<sup>410</sup> Furthermore, requiring an in-depth analysis into the application of the law of the domestic country by the Tribunal's judges, who are not experts in the transfer country's law, opens up room for error and misapplication of the rule.<sup>411</sup> This in turn encourages a Tribunal-Rwanda game of cat-and-mouse, which over time runs the risk of further eroding the public's confidence in the ICTR's sincerity in working with national jurisdictions.<sup>412</sup>

In order to maintain the public's confidence, the Tribunal must ensure that it applies the same legal standards for all transfer cases, regardless of the proposed transfer location or the timing of the request within the judicial proceedings. Rwanda's seemingly Sisyphean task is highlighted by the ICTR's and ICTY's application of a much lesser scrutiny for transferring cases within Europe,<sup>413</sup> including to Bosnia and Herzegovina.<sup>414</sup> Further, the ICTR itself applies differing standards when deciding whether to transfer a case to Rwanda; the Prosecutor has found Rwanda offers sufficient judicial safeguards to merit the transfer of fifty-five non-indicted cases to Rwanda's national jurisdiction.<sup>415</sup> The Prosecutor also has enough confidence in the Rwandan judiciary to trust it to try four members of the RPF and withhold seeking transfer of those cases to the Tribunal.<sup>416</sup> Yet the ICTR judges continually find those same

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407. Read together, the language of the Security Council resolutions, ICTR Statute, and 11*bis* adds statutory support to the Foundationalists' argument that the Tribunal should facilitate transfer so long as the national government provides some measure of basic due process protections. *See supra* notes 353–54 and accompanying text.

408. *See supra* notes 300–08 and accompanying text.

409. *See supra* Part II.B.2.

410. *See supra* Part I.B.2.

411. *See supra* note 374 and accompanying text.

412. *See supra* note 376 and accompanying text.

413. *See supra* Part I.B.3.b.

414. *See supra* Part I.B.3.a.

415. *See supra* notes 117–19 and accompanying text.

416. *See supra* note 369 and accompanying text.



safeguards insufficient to allow transfer of indicted cases.<sup>417</sup> The protections and rights accorded to a defendant should not hinge on the stage of her indictment or on the official who determines transfer.<sup>418</sup> As a developing country's "respect for the alleged superiority of the rule of law . . . will to a very large extent depend on their perception that the same rules apply to all,"<sup>419</sup> the Tribunal must be wary not to appear to be applying one standard to Rwanda and another to the rest of the international community, even if the Tribunal has valid reasons for doing so.

*B. A Warning for the Foundationalists: Legal Cultural Relativism Can Lead to Victor's Justice and Serious Violations of Non-Derogable Rights*

In their efforts to critique the structure of the ICTR, Foundationalists run the risk of falling into the morass and empty rhetoric of cultural relativism and discounting the positive effects of requiring a due process analysis in evaluating whether to transfer a case to a national jurisdiction. While the ICTR, and ad hoc tribunal systems in general, may ignore domestic legal traditions and impose Western legal standards,<sup>420</sup> that in itself is not a basis to assume due process protections are without merit. After all, there have been instances in the past of Rwandan courts meting out victor's justice without due regard for defendants' rights or adequate protections for the parties involved, despite the existence of law providing for Western due process protections.<sup>421</sup> Moreover, while the Tribunal should be careful of not dealing in double standards<sup>422</sup> or adopting previous tribunal models wholesale,<sup>423</sup> the Tribunal should nevertheless look outside the letter of the domestic law and conduct a factual analysis to determine whether protections are met in actuality.<sup>424</sup> Conducting a thorough legal analysis of whether domestic law meets ICTR requirements without a concern for whether the law is applied as such is a waste of resources and makes the Tribunal a mockery of its own processes. Therefore, despite concerns of legal imperialism, the Tribunal should continue to conduct a due process analysis as a mixed question of law and fact.<sup>425</sup>

Additionally, one should not discount the positive effect that a strict application of an enhanced 11bis has had on Rwandan domestic law. Not only has Rwanda reformed its legal code to conform with ICTR requirements,<sup>426</sup> the Rwandan legislature has, *ceteris paribus*, at times

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417. See Part I.B.3.c.

418. See Marong et al., *supra* note 24, at 197–98 (describing the Prosecutor's independent application of 11bis factors prior to granting transfer to non-indicted defendants despite the Tribunal's continual refusals to transfer indicted defendants).

419. See BOHLANDER, *supra* note 209, at 31.

420. See *supra* Part II.B.2.

421. See *supra* notes 249–82 and accompanying text.

422. See *supra* notes 413–18 and accompanying text.

423. See *supra* note 373 and accompanying text.

424. See *supra* Part I.B.3.c.

425. By analyzing Rwandan law and practice, the Tribunal already treats the 11bis analysis as a mixed question of law and fact. See *supra* Part I.B.3.c.

426. See *supra* Part I.B.2.

exceeded the ICTR's requirements for transferring cases. For example, while the 2007 Transfer Law guarantees that the death penalty will not be imposed for transfer cases<sup>427</sup>—thus meeting the *11bis* prohibition against the use of the death penalty<sup>428</sup>—the subsequent Death Penalty Abolition Law completely abolished the death penalty for any crime.<sup>429</sup> While such liberalization and reformation of the Rwandan judiciary is not judicial capacity building as envisioned by the Security Council resolutions *per se*,<sup>430</sup> such progressive reforms should nevertheless be encouraged as part of Rwanda's civic, political, and social restoration.

Similarly, one should not ignore the role that the ICTR (and other ad hoc tribunals) plays in creating a body of coherent international law and its positive effects in establishing precedent in trying international crimes against humanity.<sup>431</sup> While establishing international legal precedents is not the paramount purpose of the ICTR, and should not be preferred to the pursuit of overall justice, it nevertheless may be a benefit worth pursuing.<sup>432</sup> It behooves Foundationalists to recognize that a policy that at times results in withholding from national courts may nonetheless produce beneficial results.

Parts III.A and III.B focused on both the Protectionists' and Foundationalists' failure to offer satisfying solutions to the transfer dilemma. While each position may have valid reasons for asserting either the importance of the strict due process requirement or the societal benefits of trying cases in the domestic courts, neither suggest an innovative method to both ensure the sufficiency of the Rwandan judicial process and offer a way to transfer ICTR cases to Rwanda. The next section suggests a modified, particularized approach which the Tribunal should utilize in evaluating transfer cases, wherein the judges should consider the arguments of both the Protectionists and Foundationalists.

*C. A Consistently Applied Comprehensive Balancing Approach  
Encapsulates the Protectionists' Fears and the Foundationalists'  
Aspirations*

1. A Comprehensive Balancing Approach

In order to resolve both the Protectionists' and Foundationalists' concerns, judges should apply a comprehensive balancing approach to evaluate whether to transfer a case from the ICTR to a national jurisdiction. Like in many domestic common law jurisdictions, the Tribunal's judges must consider a variety of factors when determining this mixed question of law and fact. To date, the Tribunal has claimed to apply a totality of the

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427. *See supra* note 175 and accompanying text.

428. *See supra* note 133 and accompanying text.

429. *See supra* notes 173–74 and accompanying text.

430. *See supra* Part II.B.1.c.

431. *See supra* notes 295–98 and accompanying text.

432. *See supra* notes 293–93 and accompanying text (noting developments in international law as a result of prosecution at the ad hoc tribunals).

circumstances test;<sup>433</sup> in reality, this is not the case. Rather, the Tribunal has applied a totality of the circumstances test to determine whether due process requirements have been met under Rule 11*bis*, considering each ICTR Statute Article 20 and 21 due process factor independently.<sup>434</sup> Further, the Tribunal has used such a test to determine whether the facts on the ground in their totality comport with specific due process requirements, such as access to witnesses.<sup>435</sup> This is a much more limited—and ineffective—test than the comprehensive balancing approach which this Note advocates.

The Tribunal should widen the scope of its test to consider the multiplicity of objectives that the Security Council has mandated.<sup>436</sup> The ultimate inquiry of the Tribunal should consist of a balancing act between the goals of national reconciliation and restoration<sup>437</sup> on one end and concern for the rights of the defendant, including full due process protections,<sup>438</sup> on the other. Each factor to be considered, then, is each stated purpose of the ICTR and the specific fair trial concerns. Of course these factors are in reality interrelated—encouraging respect for due process protections within Rwanda helps to reinforce legal norms and popular conceptions of rule of law within the Rwandan judiciary.<sup>439</sup> The Tribunal's inquiry is thus reoriented toward its mandated goals by shifting the focus of its analysis from the question of whether the totality of present due process factors meets 11*bis* fair trial requirements to whether the totality of the various interests, weighed against the interest of a fair trial, merit transferring the case to a national jurisdiction.

While the judicial application of such a broad test may be difficult to effectuate, it need not be impossible. The Tribunal already conducts a limited totality of the circumstances test with respect to due process requirements, in which it considers a multiplicity of factors together.<sup>440</sup> Here, the judicial challenge is teasing out a workable set of sub-factors to evaluate the overarching countervailing interests of retributive justice, national reconciliation, and judicial capacity building.<sup>441</sup> The Tribunal may look at the substance of the case—in particular, the gravity of the crime committed or the number of people the defendant is alleged to have harmed (directly or indirectly)—in order to gauge what impact a trial in the domestic courts may have on national reconciliation.<sup>442</sup> If the case involves a question of law new to the Rwandan courts, or the sheer scale of the case

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433. *See supra* notes 239–46 and accompanying text.

434. *See supra* notes 140–49 and accompanying text.

435. *See supra* notes 239–46 and accompanying text.

436. *See supra* notes 36–37 and accompanying text.

437. *See supra* Part II.B.1.

438. *See supra* Part II.A.1.

439. *See supra* notes 300–08 and accompanying text.

440. *See supra* Part I.B.1.

441. *See supra* Part II.B.1.

442. Although the ICTR judges have limited their analysis to evaluating whether the transfer country's due process protections meet 11*bis*' requirements, the Prosecutor has already weighed other factors when considering whether to transfer non-indicted defendants. *See Marong et al., supra* note 24, at 197.

would involve additional Rwandan legal practitioners, perhaps the interests of judicial capacity building would become salient.<sup>443</sup> Whatever the factors the Tribunal would consider, the goal is not to delineate a clear answer but to reintroduce such concerns into the judicial equation.

In so doing, the Tribunal would recognize the many valid concerns on both sides. It would preserve the Protectionists' concern for due process rights<sup>444</sup> by leaving room to rule that a singular omission—such as the lack of adequate witness protection—is enough to outweigh countervailing judicial interests. Similarly, it reinforces the importance of due process and adequate defense in the criminal trial process, which plays toward the Protectionists' interest in establishing international legal norms and precedent.<sup>445</sup> It also alleviates some of the Foundationalists' concern for protecting the domestic national interest in the proceedings<sup>446</sup> by reintroducing the consideration of national reconciliation and restoration into the judicial equation. Also, by addressing Rwandan national concerns in their opinions, judges may be able to dispel the sentiment that the Tribunal is not concerned with Rwandan justice<sup>447</sup> and deals in legal imperialism.<sup>448</sup> Such expression of judicial goodwill may prevent debacles like the *Barayagwiza* decision in the future, or at minimum quell the uproar that such an opinion can generate.<sup>449</sup> Also, now that the ambiguity over Rwanda's penalty structure is most likely resolved,<sup>450</sup> this approach also opens up the possibility that the absence of one factor—complete witness protection<sup>451</sup>—is by itself insufficient to outweigh the other due process protections and countervailing interests together, thus allowing the Tribunal to permit transfer to Rwanda.<sup>452</sup>

## 2. Uniform Application for All Transfer Cases

The standards the Tribunal uses to evaluate transfer cases, regardless of the requested transfer country, must be consistent in order to avoid appearances of legal imperialism and dealing in double standards. The ICTY Appeals Chamber's rulings that the court need not consider the actual application of Bosnia's law regarding witness protection,<sup>453</sup> together with

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443. The Prosecutor has already considered the capacity of the Rwandan courts to prosecute genocide cases in his determination of whether to transfer cases. *See id.* It follows that the ICTR may then consider the ability of a case to help the judicial system when evaluating whether to transfer a defendant to the domestic courts.

444. *See supra* Part II.A.1.

445. *See supra* Part II.A.2.

446. *See supra* notes 321–26 and accompanying text.

447. *See supra* notes 43–44 and accompanying text.

448. *See supra* Part II.B.2.

449. *See supra* notes 1–4 and accompanying text.

450. *See supra* notes 173–89 and accompanying text.

451. *See supra* notes 238–46 and accompanying text.

452. This is not to say that the finding of lack of adequate witness protection is insignificant. The Tribunal may still find that the lack of adequate protections is so egregious and detrimental to a fair trial that transfer must be denied. This approach merely opens up the possibility of a different outcome.

453. *See supra* notes 198–207 and accompanying text.

the ICTR's similar rulings regarding the transfer of cases to Europe,<sup>454</sup> does not comport well with the ICTR's willingness to look beyond Rwandan law and in fact rule against transfer based on the factual, and not legal, findings.<sup>455</sup> If the Tribunals are sincere in their efforts to establish international legal norms, such consistency is of paramount importance.

Likewise, the treatment of the 11*bis* monitoring mechanism should be accorded the same weight between the ICTY and ICTR, and within the ICTR, between the Prosecutor and the judges. Both the ICTY and the ICTR Prosecutor have considered the monitoring mechanism sufficient to remedy deficiencies in the domestic judicial proceedings.<sup>456</sup> It is particularly glaring that the ICTR Prosecutor has deemed such safeguards as sufficient<sup>457</sup> while the Tribunal has held otherwise.<sup>458</sup> This Note advocates that the ICTR accord greater support and weight toward the use of monitors to ensure fair trials in transfer countries, in line with the positions of the Prosecutor and the ICTY. This may be greatly facilitated by the Tribunal's recognition of an official monitoring body, or the use of a body that the Tribunal has already approved, such as the African Commission.<sup>459</sup> Further, if, after transfer, monitors cannot guarantee a fair trial, the Tribunal may still order the case remanded to Arusha<sup>460</sup> and Rwanda must comply.<sup>461</sup> Not only can these mechanisms cure deficiencies in the domestic proceedings if they arise, the domestic judges' knowledge that a case may be compelled back to the Tribunal once transferred to Rwanda may incentivize them to comport with international standards.<sup>462</sup> At any rate, the Rule 11*bis*(D)(iv) monitoring mechanism should be used to its maximum potential in facilitating the transfer of cases to national jurisdictions, in particular Rwanda, where the Prosecutor has already deemed such mechanism successful.

#### CONCLUSION

The question of whether to transfer cases from an international tribunal to a domestic court of a post-conflict country in which the crimes originated necessitates the consideration of many competing interests. Concerns over due process protections for the accused and the risk of victor's justice must be balanced against the broader goals of national reconciliation, restoration, and justice for the victims. The repeated refusal of the International Criminal Tribunal for Rwanda to transfer cases to Rwandan courts offers a

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454. *See supra* notes 228–30 and accompanying text.

455. *See supra* Part I.B.3.c.

456. *See supra* notes 203, 367–68 and accompanying text.

457. *See supra* notes 367–68 and accompanying text. This is even more significant given the fact that the Prosecutor deems monitors sufficient to cure the deficiencies in trials of RPF officials, where logically concerns of impartiality and government pressure would be greatest. *See supra* notes 10, 361 and accompanying text.

458. *See supra* notes 243–45 and accompanying text.

459. *See supra* note 245 and accompanying text.

460. *See supra* notes 148–48 and accompanying text.

461. *See supra* notes 75–81 and accompanying text.

462. *See supra* notes 210–14 and accompanying text.

perfect microcosm for analysis of this issue. To date, the Tribunal has weighed heavily in favor of ensuring all due process protections in the transfer state, to the exclusion of considering the other founding principles of the ICTR. However, the Tribunal should instead adopt a comprehensive balancing approach in which it weighs all pressing judicial interests together in making its evaluation. This, together with a renewed confidence in monitoring mechanisms, may alter how the Tribunal and other international institutions approach this issue.

This is a crucial time for the ICTR to reevaluate its standards for transfer. As the Tribunal has just once again pushed back its completion strategy deadline, the transfer of cases to Rwanda becomes even more important. Since Rwanda has removed all ambiguity from its laws pertaining to the applicable punishment in transfer cases, the only remaining obstacle is adequate witness protection. Utilizing a multifaceted balancing approach combined with a renewed confidence in trial monitoring, the Tribunal may be able to reconsider its position regarding transferring cases to Rwanda. More generally, although the era of the ad hoc system is drawing to a close, other international courts will most likely continue to supplement and operate in tandem with the ICC. Questions of how to deal with competing national and international jurisdictional claims are unlikely to disappear from the international legal discourse.