

# Anti-Complementarity: Referral to National Jurisdictions by the UN International Criminal Tribunal for Rwanda

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## I. Introduction

Security Council Resolution 955 of 8 November 1994, which established the International Criminal Tribunal for Rwanda, “*Stress[ed]* also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects”.<sup>1</sup> In this respect, the context of establishment of the Tribunal was somewhat different than that of its companion, the International Criminal Tribunal for the former Yugoslavia, which had no equivalent clause in its preamble.

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<sup>1</sup> S/RES/955 (1994) of 8 November, preambular para. 9.

The Rwanda Tribunal was created at the request of the Government of Rwanda.<sup>2</sup> It was widely believed that its activities would be *complementary* to efforts of the national justice system, which was then in a state of total collapse.

The word “complementary” had only entered the taxonomy of international criminal law a few months earlier, in the final report of the International Law Commission on an International Criminal Court.<sup>3</sup> According to the Commission, the proposed Court was,

“intended to operate in cases where there is no prospect of [persons accused of crimes of significant international concern] being duly tried in national courts. The emphasis is thus on the court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements.”<sup>4</sup>

From a phrase in the preamble of the Commission’s 1994 draft, the concept of “complementarity” evolved into rather complex substantive provisions of the Rome Statute of the International Criminal Court whose scope is still being explored in the case law.<sup>5</sup> The Rome Statute requires that the state in question be “unwilling or unable genuinely to carry out the investigation or prosecution”.<sup>6</sup>

One of the important distinctions between the *ad hoc* tribunals and the International Criminal Court is that the former have *primacy* over national justice systems whereas the latter is *complementary* to them. But this may be oversimplifying the relationship. It is certainly true that in the case of the International Criminal Court, the burden lies upon

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<sup>2</sup> Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council, Doc. S/1994/1115.

<sup>3</sup> See, e.g., Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994), in: ILCYB 46 (1994), 1 et seq., Doc. A/CN.4/SER.A/1994/Add.I (Part 2), para. 81.

<sup>4</sup> Ibid., para. 91, p. 27.

<sup>5</sup> *Katanga et al.* (ICC-01/04-01/07), Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire (article 19 du Statut), 16 June 2009.

<sup>6</sup> Rome Statute of the International Criminal Court, 2002, 2187 UNTS 90, arts 17-20. See, e.g., M. El-Zeid, *The Principle of Complementarity in International Criminal Law, Origin, Development and Practice*, 2008.

the Prosecutor to establish that national justice systems are inadequate, whereas at the *ad hoc* tribunals jurisdiction may be assumed without any need to demonstrate that the relevant national courts are unwilling or unable to proceed.<sup>7</sup> Since 2005, as part of the so-called completion strategy, the *ad hoc* tribunals for the former Yugoslavia and Rwanda have been engaged in a process of transferring to national jurisdictions cases over which they have already assumed jurisdiction. Judges of the international tribunals must be satisfied that the national jurisdiction is in a position to deliver justice in a fair and adequate manner. In a sense, it is complementarity in reverse.

At the International Criminal Tribunal for the former Yugoslavia, the first transfers took place in 2005. Many accused persons have since been returned to the courts of the region for trial, most of them to Bosnia and Herzegovina where they have been or are being prosecuted before the War Crimes Chamber of Bosnia and Herzegovina. This new division of the Bosnian justice system was in large part created to provide a viable mechanism for the transfer cases. It has been generously supported by international donors. The institution's personnel includes many foreign judges, lawyers and experts.

Things have not gone so smoothly at the International Criminal Tribunal for Rwanda, where an international presence in the operation of the national justice system is far less significant. Over the second half of 2008, five applications by the Prosecutor for transfer were rejected by Trial Chambers of the Tribunal because of perceived inadequacies of the Rwandan courts.<sup>8</sup> Three of these decisions were at least partially affirmed on appeal submitted by the Prosecutor, although the grounds

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<sup>7</sup> *Prosecutor v. Tadić* (Case No. IT-94-1-D), Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Duško Tadić, 8 November 1994.

<sup>8</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 28 May 2008; *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11bis), Decision on Prosecutor's Request for Referral, Judgment, 6 June 2008; *Prosecutor v. Hategekimana* (Case No. ICTR-00-55B-R11bis), Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, 19 June 2008; *Prosecutor v. Gatete* (Case No. ICTR-2000-61-R11bis), Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 17 November 2008; *Prosecutor v. Kayishema* (Case No. ICTR-01-67-R11bis), Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 16 December 2008.

for refusal were narrowed considerably.<sup>9</sup> In effect, the judges of the International Tribunal were saying that Rwanda's justice system was "unable" to prosecute the cases properly.

Although there are some useful analogies, the principles identified by the Appeals Chamber of the International Criminal Tribunal for Rwanda are not directly applicable to admissibility determinations of the International Criminal Court. Nevertheless, they constitute an element in an emerging body of law defining the relationship between national courts and international criminal tribunals. They contribute to our understanding of the approach taken by international judges called upon to evaluate the validity and effectiveness of national justice systems.

## II. The Completion Strategy

When the *ad hoc* tribunals for the former Yugoslavia and Rwanda were established by the United Nations Security Council, in 1993 and 1994, probably very few people expected that they would still be fully operational some fifteen years later, each with an annual budget in the range of US\$100 million. Serious attention to the winding down of the institutions and the completion of their activity only began in the year 2000.<sup>10</sup> Following the analysis of the operations of the Tribunal by a five-member expert panel, the judges of the International Criminal Tribunal for the former Yugoslavia presented a report to the Secretary-General in which they projected that if the *status quo* were maintained, and there were no changes to penal policy and rules of procedure, "the

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<sup>9</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 8 October 2008; *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 30 October 2008; *Prosecutor v. Hategekimana* (Case No. ICTR-00-55B-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 4 December 2008.

<sup>10</sup> See: D.A. Mundis, "The Judicial Effects of the 'Completion Strategies' on the Ad Hoc International Criminal Tribunals", *AJIL* 99 (2005), 142 et seq.; L.D. Johnson, "Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity", *ibid.*, 158 et seq.; D. Raab, "Evaluating the ICTY and its Completion Strategy Efforts to Achieve Accountability for War Crimes and their Tribunals", *Journal of International Criminal Justice* 3 (2005), 82 et seq.

Tribunal will be unable to fulfil its mission before 2016".<sup>11</sup> The judges said that if a number of modifications were made, including the designation of *ad litem* judges, trials could be completed by 2007.<sup>12</sup> The Security Council reacted by authorising the appointment of *ad litem* judges. It also urged the Tribunal to expedite its activities.<sup>13</sup>

The International Criminal Tribunal for Rwanda moved somewhat more slowly. Only in August 2002 did the Security Council authorise *ad litem* judges. The Council noted that the measure was intended to enable the Tribunal to conclude its work at the earliest possible date.<sup>14</sup> The following year, the Tribunal developed a completion strategy that envisaged finishing the trials of detained persons in 2007, those not yet apprehended by 2009, and those not yet indicted by 2011.<sup>15</sup> Still later, it stated that its mandate could be completed by 2007 or 2008.<sup>16</sup> The first draft of the Tribunal's Completion Strategy was presented to United Nations headquarters in July 2003.<sup>17</sup>

Pressure on the tribunals to finish their work came from Washington, and did not sit well with everyone.<sup>18</sup> The President of the Parliamentary Assembly of the Council of Europe condemned the process in an official statement: "Pressure from the United States administration to close down the two International Criminal tribunals in The Hague and in Arusha is unacceptable. It represents political interference in a judicial process aimed at seeking justice for the hundreds of thousands of victims of the crimes committed in the former Yugoslavia and Rwanda."<sup>19</sup> Critics also complained that the measures being taken by

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<sup>11</sup> *Seventh Annual Report of the International Criminal Tribunal for the former Yugoslavia*, Doc. A/55/273-S/2000/777, Annex, para. 336.

<sup>12</sup> *Ibid.*, para. 342. See: D.A. Mundis, "Improving the Operation and Functioning of the International Criminal Tribunals", *AJIL* 94 (2000), 759 et seq.

<sup>13</sup> S/RES/1329 (2000) of 5 December 2000, preamble.

<sup>14</sup> S/RES/1431 (2002) of 14 August 2002.

<sup>15</sup> Doc. A/58/269, para. 3.

<sup>16</sup> *Seventh Annual Report of the International Criminal Tribunal for Rwanda*, Doc. A/57/163-S/2002/733, Annex, paras 22, 23.

<sup>17</sup> *Eighth Annual Report of the International Criminal Tribunal for Rwanda*, Doc. A/58/140-S/2003/707, Annex, para. 2.

<sup>18</sup> S.D. Murphy, "Contemporary Practice of the United States Relating to International Law", *AJIL* 96 (2002), 461 et seq. (483).

<sup>19</sup> *Parliamentary Assembly: President's Statement on International Criminal Tribunals* of 1 March 2002.

the tribunals, such as referral of cases to national courts, and changes to evidentiary rules, were not authorised by the statutes.<sup>20</sup> Judge Hunt of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia expressed concern that pressure to complete the mandate had led to infringements on the rights of the accused, and he warned, “[T]his Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials”.<sup>21</sup>

In a Resolution adopted in August 2003, the Security Council called upon the two *ad hoc* tribunals to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010.<sup>22</sup> When a presentation by the two Presidents of the tribunals hinted that there might be difficulties in fully respecting the dates set out in the Completion Strategy, the Security Council adopted another resolution reaffirming their importance. The Security Council called upon the Prosecutors to determine cases that should be transferred to competent national jurisdictions. The Resolution insisted that the tribunals “in reviewing and confirming any new indictments” should “ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal”. The Council mandated the Presidents and Prosecutors to submit a twice-yearly report on progress in implementing the Completion Strategy, “including the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions”.<sup>23</sup>

In implementing the Completion Strategy, the judges of the International Criminal Tribunal for Rwanda amended the *Rules of Procedure and Evidence* in order to facilitate a reduction in case load by returning cases to national tribunals. Earlier case law of the Tribunal had held that

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<sup>20</sup> G.P. Lombardi, “Legitimacy and the Expanding Power of the ICTY”, *New England Law Review* 37 (2003), 887 et seq. (895-896).

<sup>21</sup> *Prosecutor v. Milošević* (IT-02-54-AR73.4), Dissenting Opinion of Judge Hunt, 30 September 2003, para. 22.

<sup>22</sup> S/RES/1503 (2003) of 28 August 2003, para. 7. The Council subsequently reaffirmed its view that trials at the International Criminal Tribunal for Rwanda should be completed by 2008, S/RES/1512 (2003) of 27 October 2003, preamble.

<sup>23</sup> S/RES/1534 (2004) of 26 March 2004, para. 6.

it had no authority to refer a prisoner to a national jurisdiction.<sup>24</sup> According to Rule 11*bis*, adopted by the Plenary of judges on 15 May 2004, if an indictment had already been confirmed, whether or not the accused was in the Tribunal's custody, a Trial Chamber acting on the request of the Prosecutor or *proprio motu* could order the transfer of the case to the authorities of a state where the crime was committed or where the accused was arrested. It could also refer the case to any state "having jurisdiction and being willing and adequately prepared to accept such a case", in effect acknowledging the legitimacy of universal jurisdiction. In making its determination, the Trial Chamber was to "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". The Prosecutor was authorised to send observers to monitor the trial. The Tribunal retained jurisdiction in that it could rescind its order and in effect revoke the transfer at any time prior to final judgment by the national courts.<sup>25</sup>

When the legality of the equivalent Rule of the International Criminal Tribunal for the former Yugoslavia was challenged, the Appeals Chamber held:

"It is true, as the Appellant points out, that the Statute of the Tribunal does not contain an explicit legal basis for Rule 11*bis*. But the explicit language of the Statute is neither an exclusive nor an exhaustive index of the Tribunal's powers. It is axiomatic under Article 9 of the Statute that it was never the intention of those who drafted the Statute that the Tribunal try all those accused of committing war crimes or crimes against humanity in the Region. The Tribunal was granted primary – but explicitly not exclusive – jurisdiction over such crimes. In this regard, it is clear that alternative national jurisdictions have consistently been contemplated for the 'transfer' of accused.

15. And even if the explicit authority to conduct such transfers from the Tribunal to national jurisdictions is not given to the Tribunal by the Statute itself, the interpretation of Article 9 of the Statute noted

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<sup>24</sup> *Prosecutor v. Ntuyahaga* (Case No. ICTR-98-40-T), Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999.

<sup>25</sup> M. El Zeidy, "From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 *bis* of the ad hoc Tribunals", *ICLQ* 57 (2008), 403 et seq.; M.H. Bohlander, "Referring an Indictment from the ICTY and ICTR to another Court – Rule 11*bis* and the Consequences for the Law of Extradition", *ICLQ* 55 (2006), 219 et seq.

previously giving implicit authority to do so has been backed by Security Council resolutions. The Appeals Chamber recalls that the Tribunal is bound by the resolutions concerning the Tribunal that the Council passes under its Chapter VII authority. Most significant among those documents are Resolution 1503 and Resolution 1534. Under Resolution 1503, the Security Council endorsed the Tribunal's proposed strategy of concentrating on the 'trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions ...' Furthermore, under Resolution 1534, the Security Council requested the Tribunal to keep it informed of the 'transfer of cases involving intermediate and lower rank accused to competent national jurisdictions.'

16. As these Resolutions make clear, the referral of cases is not just a notion that seemed prudent and sensible enough to the Tribunal judges to be worth incorporating into the Rules of Procedure and Evidence. On the contrary, the Tribunal judges amended Rule *11bis* to allow for the transfer of lower or mid-level accused to national jurisdictions pursuant to the Security Council's recognition that the Tribunal has implicit authority to do so under the Statute. The Security Council plainly contemplated the transfer of cases out of the Tribunal's jurisdiction and agreed with the Tribunal that referrals would advance its judicial functions. It is true that the Council did not amend the Statute accordingly, but that was not required. The Council accepted that the Tribunal was authorized to do so and thus confirmed the legal authority behind the Tribunal's referral process, but it left it up to the Tribunal to work out the logistics for doing so, such as through amendment of its Rules."<sup>26</sup>

But whereas the justice system in Bosnia and Herzegovina, with its substantial international involvement, was quickly deemed acceptable by judges of the International Criminal Tribunal for the former Yugoslavia, there was great resistance to transfer in Arusha.

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<sup>26</sup> *Prosecutor v. Stanković* (Case No.: IT-96-23/2-AR11bis.1), Decision on Rule *11bis* Referral, 1 September 2005.



### III. Transfer Applications by the Prosecutor

In 2005, the Prosecutor began to send files of unindicted suspects to the Rwandan justice system, in effect a form of cooperation and transfer, but one that did not require judicial authorisation.<sup>27</sup> In February 2006, the Prosecutor made his first application under Rule 11*bis*, requesting the referral of the case of Michel Bagaragaza to Norway. Although supported by the defence, the transfer was refused by the Trial Chamber.<sup>28</sup> It said Norway's legal framework was inadequate, because the country's criminal legislation did not provide specifically for the crime of genocide. Norway proposed to try Bagaragaza for murder, which was subject to a maximum sentence of 21 years' imprisonment. The Trial Chamber's determination that this was inadequate was upheld on appeal. The Appeals Chamber referred to article 8 of the Statute of the Tribunal, which speaks of "serious violations of international humanitarian law", holding that prosecution for the underlying crime of homicide was insufficient.<sup>29</sup> A subsequent request to transfer Bagaragaza to the Netherlands was withdrawn by the Prosecutor, for essentially the same reasons.<sup>30</sup> Bagaragaza negotiated a plea agreement with the Prosecutor,<sup>31</sup> but this was later withdrawn. A trial date was set in 2009<sup>32</sup> and then postponed, presumably because of further guilty plea negotiations.

At the time he presented his application in *Bagaragaza*, the Prosecutor felt compelled to explain that there could be no transfer to Rwanda itself because two of the conditions in Rule 11*bis*, the absence of the death penalty and the guarantee of a fair trial, could not be met at the present time.<sup>33</sup> At the end of 2006, the Prosecutor informed the Secu-

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<sup>27</sup> Doc. S/PV.5328, p. 15.

<sup>28</sup> *Prosecutor v. Bagaragaza* (Case No. ICTR-2005-86-R11*bis*), Decision on the Prosecution Motion for Referral to the Kingdom of Norway, 19 May 2006.

<sup>29</sup> *Prosecutor v. Bagaragaza* (Case No. ICTR-2005-86-AR11*bis*), Decision on Rule 11*bis* Appeal, 30 August 2006, para. 16.

<sup>30</sup> *Prosecutor v. Bagaragaza* (Case No. ICTR-2005-86-R11*bis*), Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral Order Pursuant to Rule 11*bis* (F) & (G), 17 August 2007.

<sup>31</sup> Hironelle News Agency, "ICTR/Bagaragaza – Ex-Rwandan Tea Authority Boss Signs Guilty Plea Agreement with ICTR", 25 June 2008.

<sup>32</sup> *Prosecutor v. Bagaragaza* (Case No. ICTR-2005-86-PT), Status Conference, 16 December 2008 and 9 March 2009.

<sup>33</sup> *Prosecutor v. Bagaragaza* (Case No. ICTR-2005-86-R11*bis*), see note 28, para. 7.

rity Council that he would be applying for transfer of several remaining cases, once Rwanda had abolished the death penalty.<sup>34</sup> In March 2007, Rwanda enacted legislation governing the transfer cases. The *Organic Law*, so-called because it is hierarchically superior to ordinary legislation although subordinate to the constitution, abolished capital punishment and made special provision for trials of transfer cases in order to accommodate the concerns of the International Tribunal.<sup>35</sup> The first of the applications was submitted by the Prosecutor in June 2007.<sup>36</sup>

The applications provoked a negative response from some international human rights non-governmental organisations. Two of them, Human Rights Watch and the International Criminal Defence Attorneys' Association, applied for and obtained leave to intervene in the proceedings as *amici curiae*. Supporting the applications were *amici* briefs from the Rwandan Bar and the Government of Rwanda.

#### IV. Rulings on the Transfer Applications

In the course of several months in 2008, all of the permanent judges of the International Criminal Tribunal for Rwanda ruled on one or another of the transfer applications. Unanimously, the requests were rejected, although the grounds varied from one Trial Chamber to another, and there were some notable distinctions. In the result, the Appeals Chamber upheld the refusal to transfer on only two grounds: the possibility that convicted persons could be sentenced to life imprisonment in solitary confinement, and problems in securing testimony of defence witnesses. Many other arguments that had been invoked by the defendants or by the human rights NGOs were rejected by the Trial Chambers or the Appeals Chamber. That the accused were intermediate and lower rank suspects whose cases were not important enough to be tried

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<sup>34</sup> Doc. S/PV.5594, p. 14.

<sup>35</sup> *Organic Law concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States*, Official Gazette of the Republic of Rwanda, Year 46, no. special of 19 March 2007.

<sup>36</sup> *Prosecutor v. Kayishema* (Case No. ICTR-2001-67-I), Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 11 June 2007.

by the International Tribunal seems to have been well accepted, and the matter was never even addressed in the various decisions.

## 1. The Death Penalty and Life Imprisonment

Rule 11*bis* requires that in the event of conviction, the death penalty may not be imposed or carried out by the national authorities. There was no doubt that Rwanda had complied with this condition in its legislation of March 2007.<sup>37</sup> Moreover, Rwanda took the issue a step further later in 2007 by abolishing the death penalty altogether.<sup>38</sup> This garnered the praise of such important personalities as Louise Arbour, then the United Nations High Commissioner for Human Rights.<sup>39</sup> In November 2007, in a debate in the United Nations General Assembly on a European Union-sponsored resolution calling for a moratorium on the death penalty, the Rwandan delegate joined in support of the resolution.<sup>40</sup> In effect, a very desirable by-product of the transfer process has been to promote the universal elimination of capital punishment in Rwanda. The move has probably had repercussions in the region as well; in 2009, neighbouring Burundi also abolished the death penalty.

The *Organic Law* of March 2007 effectively excluded the death penalty for all transfer and extradition cases (“Life imprisonment shall be the heaviest penalty imposed upon a convicted person in a case transferred to Rwanda from ICTR”<sup>41</sup>). Some defendants argued in proceedings before the International Tribunal that in light of detention conditions in Rwanda, a lengthy term of imprisonment was equivalent to a

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<sup>37</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11*bis*), Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda, 28 May 2008, para. 24; *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11*bis*), Decision on Request for Referral, 6 June 2008, para. 25.

<sup>38</sup> *Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty*, Official Gazette of the Republic of Rwanda, Year 46, no. special of 25 July 2007. See, J. Ddamulira Mujuzi, “Issues Surrounding Life Imprisonment after the Abolition of the Death Penalty in Rwanda”, *Human Rights Law Review* 9 (2009), 329 et seq.

<sup>39</sup> *High Commissioner for Human Rights Hails Abolition of Capital Punishment in Rwanda*, Press release of 27 July 2007.

<sup>40</sup> Doc. A/C.3/62/SR.46, para. 76.

<sup>41</sup> *Organic Law concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States*, see note 35, article 21.

death sentence. This submission was explicitly rejected by one of the Trial Chambers and did not attract any attention from the others.<sup>42</sup>

Ironically, had Rwanda not subsequently abolished the death penalty altogether, the March 2007 legislation would probably have been deemed satisfactory by the various Trial Chambers and the Appeals Chamber. It was the second *Organic Law* abolishing the death penalty generally in Rwanda, and not the earlier legislation eliminating capital punishment for cases transferred by the International Tribunal, that posed an obstacle. The July 2007 *Organic Law* said that the death penalty would be replaced either by life imprisonment or by “life imprisonment with special provisions”, the latter to include detention of the convict “in isolation”. The Prosecutor of the International Tribunal, as well as the Government of Rwanda, which intervened in the proceedings as *amicus curiae*, took the position that the July 2007 *Organic Law* on abolition of the death penalty, which is the source of the provision concerning detention in “isolation”, did not apply to the referral cases, which were governed by the earlier *Organic Law*.<sup>43</sup> Human Rights Watch, in its oral submissions, described the issue of which legislation took precedence as “a matter for debate”.<sup>44</sup> When Prosecutor General Martin Ngoga was questioned in court on this point, he replied that the applicable regime would be “[i]mprisonment under the conditions agreed upon by the ICTR registry on the management of the prison”,<sup>45</sup> as one of the Trial Chambers acknowledged.<sup>46</sup>

However, the judges at the International Criminal Tribunal were not convinced. The hypothesis of life imprisonment in solitary confinement was one of two reasons given by the Appeals Chamber in refusing to authorise transfer. The possibility of cruel, inhuman or degrading

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<sup>42</sup> *Prosecutor v. Hategekimana* (Case No. ICTR-00-55B-R11bis), see note 8, para. 29.

<sup>43</sup> *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11bis), Decision on Request for Referral, 6 June 2008, para. 94. See also, *Prosecutor v. Kayishema* (Case No. ICTR 01-67-I), Republic of Rwanda’s Submissions in Response to Amicus Curiae Brief filed by Human Rights Watch in Opposition to Rule 11bis Transfer of Fulgence Kayishema, 6 March 2008; *Prosecutor v. Munyakazi* (Case No. ICTR-97-36A-I), Transcript, 24 April 2008, pp. 66-67, 76-77.

<sup>44</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36A-I), see note 43, p. 63.

<sup>45</sup> *Ibid.*, p. 77.

<sup>46</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda, 28 May 2008, para. 29, fn. 50.

treatment does not figure expressly in Rule 11*bis* of the *Rules of Procedure and Evidence*, which was, after all, adopted by the judges themselves. The applicable Rule only speaks of the death penalty as a criterion for referral. The judges are, of course, free to amend the *Rules of Procedure and Evidence* so as to impose further terms. Instead, the rulings themselves added as an additional condition that “the penalty structure within a State to which an indictment may be referred must provide an appropriate punishment for the offences with which the Accused is charged”.<sup>47</sup>

By December 2008, Rwanda had adopted a statute specifying that the legislation abolishing the death penalty generally did not apply to cases transferred from the International Criminal Tribunal.<sup>48</sup> However, when the Appeals Chamber rulings were issued these measures had not yet entered into force. Moreover, after the issue of solitary confinement had been raised in the first Trial Chamber decisions, a test case came before the Supreme Court of Rwanda on the legality of the maximum sentence proposed as a replacement for capital punishment. The Supreme Court held that imposition of periods of solitary confinement was not *per se* unlawful, but that it must be implemented in accordance with international standards and proper safeguards. The Supreme Court declined to declare the law invalid because legislation governing the implementation of the *Organic Law* provisions on life imprisonment and solitary confinement had not yet been announced or adopted.<sup>49</sup> In the result, the Appeals Chamber of the International Tribunal said it was “unable to conclude that the ambiguity as to the applicable punishment under Rwandan law for transfer cases has been resolved”.<sup>50</sup>

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<sup>47</sup> Ibid., para. 21. Also, *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11*bis*), Decision on Request for Referral, 6 June 2008, paras 8, 22.

<sup>48</sup> *Organic Law No.66/2008 of 21 November 2008 Modifying and Complementing Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty*, article 1. Note was taken of this legislation in a Trial Chamber decision of the International Criminal Tribunal for Rwanda: *Prosecutor v. Kalimanzira* (Case No. ICTR-05-88-T), Judgment, 22 June 2009, para. 744, fn. 773.

<sup>49</sup> *Tubarimo v. The Government*, Case No. RS/INCONST/Pén. 0002/08/CS, 29 August 2008, para. 36, cited in *Prosecutor v. Hategekimana* (Case No. ICTR-00-55B-R11*bis*), see note 9, para. 38, fn. 138.

<sup>50</sup> *Prosecutor v. Hategekimana* (Case No. ICTR-00-55B-R11*bis*), see note 9, para. 38. Also, *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11*bis*), Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11*bis*, 30 October 2008, para. 16; *Prosecutor v. Munyakazi*

## 2. Defence Witnesses

The second issue upon which the Tribunal based its refusal to authorise transfer concerned the protection of witnesses. The legal foundation was the right of the defendant, set out in article 20(3)e) of the Statute of the International Criminal Tribunal for Rwanda, “to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her”. Provisions of the *Organic Law* on transfers deal with the availability and protection of witnesses,<sup>51</sup> and there was no real disagreement that the situation was satisfactory on paper. According to the *Organic Law* on transfers, the High Court “shall provide appropriate protection for witnesses and shall have the power to order protective measures similar to those set forth in Rules 53, 69 and 75 of the ICTR Rules of Procedure and Evidence”. Rule 53 concerns non-disclosure of documents, and is rather more of interest to the prosecution than to the defence. Rules 69 and 75 make general provision for protective measures for victims and witnesses to be ordered. As a Trial Chamber of the International Tribunal observed, “the Republic of Rwanda has a legal framework for the protection of witnesses and has adopted provisions similar to those in the Tribunal’s Rules”.<sup>52</sup> Defendants and the *amici* argued that the picture painted by the legislation did not correspond to the reality. The Tribunal decisions distinguish between witnesses inside Rwanda and those outside Rwanda. Serious problems with respect to both categories were highlighted.

With respect to witnesses inside Rwanda, the Appeals Chamber upheld findings of the Trial Chambers of a danger of harassment of witnesses who were located in Rwanda. It also accepted that “witnesses who have given evidence before the Tribunal experienced threats, torture, arrests and detentions, and, in some instances, were killed”.<sup>53</sup>

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(Case No. ICTR-97-36-R11bis), Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, 8 October 2008, para. 20.

<sup>51</sup> *Organic Law concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States*, see note 35, article 14.

<sup>52</sup> *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11bis), Decision on Request for Referral, 6 June 2008, para. 65.

<sup>53</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, 8 October 2008, para. 37. Also, *Prosecutor v. Hategekimana* (Case No. ICTR-00-55B-R11bis), see note 9, para. 21.

There were concerns that witnesses would be afraid to testify because they might face prosecution for promoting “genocidal ideology”.<sup>54</sup> Reference was also made to the witness protection service in Rwanda, which was administered by the prosecution service. The Appeals Chamber said that the fact that the witness protection service was administered by the Prosecutor General and that threats of harassment were reported to the police did not render the system inadequate, but held that the Trial Chamber “did not err in finding that that witnesses would be afraid to avail themselves of its services for these reasons”.<sup>55</sup> The Appeals Chamber did not deem it significant that the defendants had not in fact identified witnesses within Rwanda whose testimony would be relevant.<sup>56</sup>

There are some difficulties with the holdings of the Appeals Chamber respecting witnesses inside Rwanda. First, there is the rather extraordinary reliance upon NGO reports as evidence. The NGOs did not present their evidence as expert witnesses, but simply made allegations that were filed as part of *amicus curiae* submissions. An expert would have been subject to cross-examination, and would no doubt have been closely scrutinised for impartiality. The human rights NGOs delivered what amounted to expert testimony, but without the inconvenient aspects that accompany such status. NGOs are advocacy organisations, and while they conduct investigations, this activist mission makes it difficult to regard them as impartial fact finders in a judicial sense. The International Criminal Defence Attorneys’ Association, for example, represents lawyers who earn their living before the international tribunals and who would be excluded from practising before the courts of Rwanda. Although defined as a “friend of the Court”, it was in reality at least in part acting in defence of the interests of its members before the Tribunal.

Human Rights Watch has a complex critique of the Rwandan regime, including serious complaints about prosecutorial priorities, which may distort its ability to properly assess the much narrower question of the suitability of the Rwandan courts to provide an adequate forum for the transfer cases. In their campaigns against transfer, both organisa-

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<sup>54</sup> *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11bis), Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, 30 October 2008, para. 26.

<sup>55</sup> *Ibid.*, para. 27.

<sup>56</sup> *Prosecutor v. Hategukimana* (Case No. ICTR-00-55B-R11bis), see note 9, para. 22.

tions submitted a litany of objections to the transfers; in fact, most of their arguments were either ignored or dismissed by the judges of the International Tribunal. Of course their views were properly before the Tribunal. But the judges might have been more scrupulous in relying upon the NGO briefs as sources of evidence and not just opinion.

It must be borne in mind that the International Criminal Tribunal for Rwanda has largely depended upon witnesses from inside Rwanda since it began holding trials more than a decade ago. Approximately half of the 2,500 witnesses who have testified before the Tribunal have come from Rwanda, and returned there after their testimony. The minutes of the Security Council provide evidence not only of Rwandan cooperation and assistance in facilitating testimony of witnesses within the country, but also of an absence of complaint about any difficulties in this area. Thus, in June 2008, President Byron told the Security Council that “Rwanda has continued to cooperate with the Tribunal by facilitating the flow of witnesses and by providing documents to the prosecution and the defence”.<sup>57</sup> His predecessor, President Møse, had regularly made statements to the same effect in his bi-annual reports to the Security Council. For example, in June 2005, he spoke of the “steady flow of witnesses from Kigali to Arusha”, adding that “[t]he Tribunal continues to appreciate the cooperation of the Rwandan authorities”.<sup>58</sup> In 2006, he said “Rwanda has continued to cooperate with the Tribunal by facilitating a steady flow of witnesses from Kigali to Arusha”.<sup>59</sup> He said essentially the same thing a year later.<sup>60</sup> Indeed, the Security Council must have been given the impression from these keen assessments by the Presidents of the Tribunal that there were no significant difficulties in obtaining testimony from witnesses within Rwanda. The decisions of the Appeals Chamber were based upon examples of harassment with respect to witnesses who had already appeared before the Tribunal. Were the judges stating that the trials before the International Tribunal were therefore unfair and unacceptable? Obviously not. But was it right for them to impose a higher standard on the Rwandan justice system than they applied to themselves?

There was no specific evidence that relevant witnesses who might testify in the cases being considered were located in Rwanda. Surely the defence should have been required to provide an indication that diffi-

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<sup>57</sup> Doc. S/PV.5697, p. 10.

<sup>58</sup> Doc. S/PV.5199, p. 11.

<sup>59</sup> Doc. S/PV.5453, p. 9.

<sup>60</sup> *Ibid.*



culties with witnesses in Rwanda would concretely impact upon the trial. It is widely admitted that the vast majority of defence witnesses before the International Tribunal do not come from within Rwanda.<sup>61</sup> The witnesses inside Rwanda are in a very large majority those of the prosecution. It may very well be the case that there are no relevant witnesses inside Rwanda, and that the issue is therefore not only speculative but totally vacuous. One of the Trial Chambers seemed somewhat alive to this issue, noting that the defence had not yet filed a witness list, “which is not unusual at this stage of the proceedings before the Tribunal. Nonetheless, this makes the Defence assertions about its prospective witnesses difficult for the Chamber to assess.”<sup>62</sup>

The second witness related issue upon which the Appeals Chamber based its refusal to authorise transfer concerned those located outside Rwanda. In principle, such witnesses would be required to travel to Rwanda to testify. There were concerns that they might face prosecution for genocide-related crimes. The Rwandan legislation offered the possibility for witnesses to travel to Rwanda with a kind of safe conduct. They were to be guaranteed immunity from search, seizure, arrest or detention during their stay in Rwanda.<sup>63</sup> Alternatively, the possibility of testifying by video-link, a mechanism that has been employed frequently by the International Tribunals, was also proposed.

The Appeals Chamber found that these arrangements were not adequate. First, it noted that Rwanda’s grant of immunity to witnesses who travelled from abroad to testify would not resolve problems of fairness. The Chamber agreed that some witnesses would still be afraid to go to Rwanda, despite the guarantees, and also acknowledged concerns that travel to Rwanda might jeopardise refugee status in third countries.<sup>64</sup> As for the possibility of video-link depositions, the Appeals Chamber

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<sup>61</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, 8 October 2008, para. 40; *Prosecutor v. Hategekimana* (Case No. ICTR-00-55B-R11bis), see note 9, para. 24; *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11bis), Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, 30 October 2008, para. 31.

<sup>62</sup> *Prosecutor v. Hategekimana* (Case No. ICTR-00-55B-R11bis), see note 8, para. 63, fn. 66.

<sup>63</sup> *Organic Law concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States*, see note 35, article 14.

<sup>64</sup> *Prosecutor v. Hategekimana* (Case No. ICTR-00-55B-R11bis), see note 9, para. 24.

said this was not “a completely satisfactory solution with respect to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony, and that it would be a violation of the principle of equality of arms if the majority of Defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person”.<sup>65</sup>

Here, again, the judges were speculating. In the United Kingdom, where video-link evidence is not uncommon, judges issue a specific direction to jurors that they should give it the same weight as live evidence. Moreover, many trial lawyers report that in some respects they find video-link testimony to be preferable, in that their witnesses are more relaxed and focussed. It is a matter of common practice to have vulnerable witnesses, especially victims, testify outside of the courtroom by video – even if they are in the courtroom building – for their own protection and in order to *enhance* the reliability of their testimony. Virtually all of the national case law concerning video-link testimony involves prosecution witnesses. Typically, the defence objects to such testimony as unfair because it puts the witness in a privileged and protected position, sheltered from some of the rigours of cross examination.<sup>66</sup> In other words, video-link testimony may well put the prosecution, not the defence, at a disadvantage. The *European Union Convention on Mutual Assistance in Criminal Matters*, of 2000, provides for testimony by video-link.<sup>67</sup> Something similar is proposed as part of the Commonwealth Mutual Legal Assistance scheme, currently in draft form.

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<sup>65</sup> Ibid., para. 28. Also, *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, 8 October 2008, para. 42; *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11bis), Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, 30 October 2008, para. 33.

<sup>66</sup> *Maryland v. Craig*, 497 US 836 (1990); *R. v. Levogiannis*, [1993] 4 SCR 475 (Can.); *SN v. Sweden* (34209/96) Reports of Judgments and Decisions 2000-V; *R (on application of D) v. Camberwell Green Youth Court*, [2005] UKHL 4.

<sup>67</sup> Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 29 May 2000, *Official Journal* C 197, 12 July 2000, p. 3, article 10.

### 3. Independence and Impartiality of the Judiciary

Critics of the Rwandan justice system charge that it still lacks a sufficient degree of independence and impartiality, and that its courts cannot therefore be entrusted to deliver fair trials. Such complaints were an important part of the defence arguments, and they were developed in the *amicus curiae* briefs of Human Rights Watch and the International Criminal Defence Attorneys' Association. These arguments were, with one exception, rejected by the Trial Chambers of the International Criminal Tribunal for Rwanda. Only the *Munyakazi* Trial Chamber of the International Tribunal ruled against Rwanda on the independence and impartiality issue, and its finding was overturned by the Appeals Chamber;

“based on the record before it, no reasonable Trial Chamber would have concluded that there was sufficient risk of government interference with the Rwandan judiciary to warrant denying the Prosecution's request to transfer Munyakazi to Rwanda”.<sup>68</sup>

Under the *Organic Law*, trials were to be held before a single judge of the High Court of Rwanda. One of the Trial Chambers said it was “concerned that the trial of the Accused for genocide and other serious violations of international law in Rwanda by a single judge in the first instance may violate his right to be tried before an independent tribunal”.<sup>69</sup> Rwanda explained that it had adopted the one judge system following a study of procedure for trials elsewhere in Africa, where capital cases are heard before a single judge. The Trial Chamber took the view that “capital cases may be distinguished from cases involving serious violations of international law, including genocide. Consequently, equating the two is inappropriate.”<sup>70</sup> The Trial Chamber associated the single-judge issue with its concern that Rwandan political figures had shown “a tendency to pressure the judiciary, a pressure against which a judge sitting alone would be particularly susceptible”.<sup>71</sup> It conceded that in and of itself this did not necessarily reflect negatively upon the

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<sup>68</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 8 October 2008, para. 29.

<sup>69</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 28 May 2008, para. 39.

<sup>70</sup> *Ibid.*, para. 38.

<sup>71</sup> *Ibid.*, para. 40.

Rwandan judiciary, but said that three judges would be better able to resist such pressure than one.<sup>72</sup>

The decision in *Munyakazi* was the first of the referral rulings, but the other Trial Chambers did not adopt the same argumentation. The Appeals Chamber rejected the approach taken by the Trial Chamber in *Munyakazi*:

“While the Appeals Chamber shares the Trial Chamber’s concern about the fact that politically sensitive cases, such as genocide cases, will be tried by a single judge, it is nonetheless not persuaded that the composition of the High Court by a single judge is as such incompatible with Munyakazi’s right to a fair trial. The Appeals Chamber recalls that international legal instruments, including human rights conventions, do not require that a trial or appeal be heard by a specific number of judges to be fair and independent.”<sup>73</sup>

The Trial Chamber had referred to the views of the Consultative Council of European Judges to the effect that a single-judge bench should be avoided in serious cases.<sup>74</sup> The Appeals Chamber said this was “recommendatory only”, adding that there was “no evidence on the record in this case that single judge trials in Rwanda, which commenced with judicial reforms in 2004, have been more susceptible to outside interference or pressure, particularly from the Rwandan Government, than previous trials involving panels of judges”.<sup>75</sup>

The Appeals Chamber noted that the Trial Chamber had relied largely on Rwanda’s reaction to the famous *Barayagwiza* appeal,<sup>76</sup> a controversial ruling in November 1999 that provoked threats of non-cooperation with the International Tribunal. The Appeals Chamber observed that the *Barayagwiza* decision had been issued nine years ago. It said that “the Tribunal has since acquitted five persons, and that

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<sup>72</sup> Ibid., para. 46.

<sup>73</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, 8 October 2008, para. 26.

<sup>74</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda, 28 May 2008, para. 47.

<sup>75</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), see note 73, para. 26.

<sup>76</sup> *Prosecutor v. Barayagwiza* (Case No. ICTR-97-19-AR72), Decision, 3 November 1999. See, e.g., C. del Ponte, *La caccia. Io e i criminali di guerra*, 2008, 195. Also F. Hartmann, *Paix et châtement*, 2007.

Rwanda has not suspended its cooperation with the Tribunal as a result of these acquittals". It also faulted the Trial Chamber for not taking into account the continued cooperation of the Rwandan government with the Tribunal.<sup>77</sup>

The *Munyakazi* Trial Chamber had also supported its conclusions on independence and impartiality by referring to recent situations in which Rwandan officials have reacted negatively to efforts by judicial authorities in Spain and France to proceed with charges against its own officials.<sup>78</sup> It placed these under the heading "Rwandan Government's Condemnation of Foreign Judges". The Trial Chamber said "the Rwandan Government has also condemned foreign judges for adverse decisions".<sup>79</sup> Rwanda indeed reacted angrily when French investigating magistrate Jean-Louis Bruguière attributed responsibility to Rwandan leaders, including President Kagame, for shooting down the airplane of President Habyarimana on 6 April 1994. The Trial Chamber said that the Rwandan government "appeared to equate Bruguière with the French Government".<sup>80</sup> The other case concerned Spanish magistrate Fernando Andreu, who has issued an indictment against forty high-ranking Rwandan military officers.<sup>81</sup> The Appeals Chamber explained that "the reaction of the Rwandan government to foreign indictments does not necessarily indicate how Rwanda would react to rulings by its own courts, and thus does not constitute a sufficient reason to find that there is a significant risk of interference by the government in transfer cases before the Rwandan High Court and Supreme Court".<sup>82</sup>

One of the recurring themes in the critiques of the Rwandan justice system is that it is ethnically imbalanced. This complaint did not find any support in the Trial Chambers of the International Criminal Tribunal. It is well known the Hutu make up a large majority of the Rwandan population, but it is also widely accepted that the Tutsi have been dominant within government institutions since the overthrow of the previous regime in 1994. The *amicus curiae* brief of the International

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<sup>77</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), see note 73, para. 28.

<sup>78</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), see note 74, paras 42-46.

<sup>79</sup> *Ibid.*, para. 42.

<sup>80</sup> *Ibid.*, para. 43.

<sup>81</sup> *Ibid.*, para. 44.

<sup>82</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), see note 73, para. 28.

Criminal Defence Attorneys' Association said that in terms of assessing Rwanda's ability to deliver a fair trial, it is "critical" to note that 90 per cent of judges and 90 per cent of prosecutors are Tutsi.<sup>83</sup> Noting this claim, one Trial Chamber said it could not verify the figure, "but even if true does not consider that such a figure would, of itself, show a lack of independence or impartiality".<sup>84</sup>

It was also argued that the Rwandan justice system is not impartial because it has not undertaken prosecution of the atrocities perpetrated by the Rwandese Patriotic Forces who took power in July 1994. Amnesty International has said:

"This failure raises serious concerns about the ability of the national justice system to address all crimes committed in the conflict justly, fairly and impartially. The ICTR and other states should not transfer persons to Rwanda for trial, until the national justice system has demonstrated its impartiality by investigating and prosecuting crimes committed by individuals associated with all parties, regardless of which group suspects are a member."<sup>85</sup>

Similar submissions were made by the defence in the transfer proceedings.<sup>86</sup> The argument was not taken up seriously in the judgments of the Appeals Chamber or the Trial Chambers.

#### 4. Torture and Conditions of Detention

Charges that there would be a risk of torture of prisoners took on some importance in the submissions of the international NGOs and of the

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<sup>83</sup> *Prosecutor v. Kayishema* (Case No. ICTR-2001-67-I), Brief of *Amicus Curiae*, International Criminal Defence Attorneys Association (ICDAA), Concerning the Request for Referral of the Accused to Rwanda Pursuant to Rule 11*bis* of the Rules of Procedure and Evidence, 3 January 2007, para. 22.

<sup>84</sup> *Prosecutor v. Hategukimana* (Case No. ICTR-00-55B-R11*bis*), see note 8, para. 40, fn. 52. Also, *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11*bis*), Decision on Request for Referral, 6 June 2008, para. 38.

<sup>85</sup> Amnesty International, *Rwanda: Suspects must not be transferred to Rwandan courts for trial until it is demonstrated that trials will comply with international standards of justice*, AI Index: AFR 47/013/2007, November 2007, p. 2.

<sup>86</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36A-I), Transcript, 24 April 2008, p. 16.

defence.<sup>87</sup> For example, Amnesty International said it was “concerned that torture takes place in Rwanda”.<sup>88</sup> It referred to reports of secret detention centres, although noting this was denied by the Rwandan authorities and admitting that there was no real proof. Amnesty International also argued that there was a “lack of commitment” by Rwanda to the eradication of torture, manifested by its failure to ratify the Convention Against Torture.<sup>89</sup> The International Criminal Defence Attorneys’ Association, devoted considerable attention to the issue of torture in its *amicus curiae* brief.<sup>90</sup>

The submissions cited a decision of the District Court for the District of Columbia in the *Karake* case,<sup>91</sup> which excluded evidence because it had been obtained by Rwandan law enforcement authorities through the use of torture.<sup>92</sup> The decision was issued on 17 August 2006, and at first glance seems to indicate a very harsh contemporary critique of Rwandan law enforcement at the present time. The proceedings involved the murder of United States nationals, and there was considerable involvement of American law enforcement authorities in this extradition case. The accused persons were apprehended in Rwanda, where their confessions were obtained during interrogation by both Rwandan agents and FBI officers. Although the tale of abuse is appalling, and was accepted as accurate by a judge in Washington, the events took place in 2002.

Prison conditions in Rwanda were lamentable, even before the 1994 genocide, and the situation became aggravated afterwards largely because of terrible overcrowding. Establishment of a special regime for transferred prisoners, developed in cooperation with the Office of the

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<sup>87</sup> *Prosecutor v. Kayishema* (Case No. ICTR-2001-67-I), Brief of Human Rights Watch as *Amicus Curiae* in Opposition to Rule 11bis Transfer, 3 January 2008, paras 93, 94.

<sup>88</sup> Amnesty International, see note 85, p. 7.

<sup>89</sup> *Ibid.* In January 2008, the Rwandan Parliament enacted legislation authorising ratification of the Convention: *Law authorising the Ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments, adopted in New York on 10 December 1984, No. 002/2008 of 14/01/2008*, Official Gazette of the Republic of Rwanda, Year 47, no. 7 of 1 April 2008, pp. 12-14.

<sup>90</sup> *Prosecutor v. Kayishema* (Case No. ICTR-2001-67-I), see note 83, paras 121-127.

<sup>91</sup> *United States v. Karake et al.* (Criminal Action No. 02-0256(ESH)), 17 August 2006.

<sup>92</sup> Amnesty International, see note 85, p. 7, fn. 8.

Prosecutor, was an important dimension of Rwanda's preparations for the transfer applications. A special wing of the modern, new facility built in Mpanga, with the support of the Dutch government, was set aside for the transferred prisoners, if they were to be convicted. A new wing of the Kigali Central Prison was constructed to hold them during trial.

Opponents of the transfers said it was "unclear whether the detention conditions before, during and, in case of conviction, after trial will comply with the [International Covenant on Civil and Political Rights] and other internationally recognised standards".<sup>93</sup> Although Amnesty International welcomed the construction of the new Mpanga prison, it said this was an exception that did not form part of a broader comprehensive nationwide strategy to improve prison conditions. It said "it would be undesirable for states and international organizations to condone the establishment of a two-tier system of detention in Rwanda by transferring persons on the basis they will be housed in special facilities, while the rest of the prison population suffers appalling conditions".<sup>94</sup>

The *Rules of Procedure and Evidence* of the International Criminal Tribunal for Rwanda do not expressly impose the requirement, but Trial Chambers have held that for transfer to be authorised, "conditions of detention [in the receiving State], a matter which touches upon the fairness of a jurisdiction's criminal justice system, must accord with internationally recognised standards".<sup>95</sup> Noting the construction of the new Mpanga prison, as well as a special facility for remand prisoners in Kigali, one of the Trial Chambers said it was "not persuaded by the concerns regarding the physical conditions of the detention facilities".<sup>96</sup>

## 5. Rights of the Defence

The availability of defence counsel funded by the Rwandan legal aid system was also an important theme in all of the proceedings. At the time of the 1994 genocide, Rwanda did not even have a defence bar.

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<sup>93</sup> *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11bis), Decision on Request for Referral, 6 June 2008, para. 89.

<sup>94</sup> Amnesty International, see note 85, p. 8.

<sup>95</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 28 May 2008, para. 21.

<sup>96</sup> *Ibid.*, para. 92.



There were only a handful of trained lawyers in the country, and most of them said they would refuse to defend “*génocidaires*”. Nevertheless, over the years, with the assistance of human rights NGOs like *Avocats sans frontières* and the Danish Institute of Human Rights, defendants have received competent representation in many of the serious trials relating to genocide. It is now estimated that more than 200 lawyers are qualified to practice. The Kigali Bar Association intervened in the proceedings at the International Tribunal to insist that its members were capable of assuring the defence of persons who might be transferred to Rwanda for trial before the High Court.<sup>97</sup> The *Organic Law* explicitly provides for the right of accused persons to counsel of their choice as well as the right to free legal assistance for indigent defendants.<sup>98</sup> Foreign counsel are allowed to act on behalf of defendants charged under the *Organic Law*. According to article 15 of the *Organic Law*, “Without prejudice to the provisions of other laws of Rwanda, Defence Counsel and their support staff shall have the right to enter into Rwanda and move freely within Rwanda to perform their duties”. They benefit from various forms of immunities, and are entitled to security and protection.

The International Criminal Defence Attorneys’ Association conceded that Rwandan law is adequate “on paper” in this respect, but that “to the extent that the statutory legal assistance is itself not adequate (as described above) the financial support for such assistance also cannot be adequate”.<sup>99</sup> But the Trial Chambers seemed satisfied, and were not prepared to reject transfer based on shortcomings in the legal aid system.<sup>100</sup> Complaints about the ability of defence counsel to work without impediment were also raised. One Trial Chamber concluded that “though troubling, the examples are discrete; they do not show widespread abuses”.<sup>101</sup> Another referred to difficulties in meeting detainees saying “such incidents are not in themselves sufficient to prevent transfer”, but

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<sup>97</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-1997-36-1), *Amicus Curiae* Brief of the Kigali Bar Association in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11*bis*, 27 December 2007.

<sup>98</sup> *Organic Law concerning transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States*, see note 35, p. 22, article 13(6).

<sup>99</sup> *Prosecutor v. Kayishema* (Case No. ICTR-2001-67-I), see note 83, para. 34.

<sup>100</sup> *Prosecutor v. Hategekimana* (Case No. ICTR-00-55B-R11*bis*), see note 8, para. 55; *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11*bis*), Decision on Request for Referral, 6 June 2008, para. 58.

<sup>101</sup> *Ibid.*, para. 58.

that taken with other factors they might “have a bearing on the fairness of the trial”.<sup>102</sup>

Article 13 of the *Organic Law* enumerates “guarantees of rights of an accused person”, including the presumption of innocence. The Human Rights Watch *amicus* brief placed considerable emphasis on the issue of the presumption of innocence, which it argued was violated by Rwanda.<sup>103</sup> Human Rights Watch raised a number of arguments in this respect: prisoners on remand awaiting trial were not allowed to vote in Rwanda;<sup>104</sup> mixing of remand prisoners with convicts, where they were subject to various forms of harsh treatment;<sup>105</sup> examples of collective punishments carried out by officials in some communities;<sup>106</sup> public discussion of the 1994 genocide that suggested all Hutu bore responsibility.<sup>107</sup> Human Rights Watch said that “Rwandan officials often speak and act in blatant disregard of the right of the accused to be presumed innocent”.<sup>108</sup> A Trial Chamber said “the present situation, which involves transfer of a former military adversary of some members of the current Rwandan government, calls for awareness of the risk of victor’s justice, and thus careful scrutiny”,<sup>109</sup> but said it did not consider that “the submissions and examples of the Defence and HRW show that Mr. Hategekimana will not be presumed innocent”.<sup>110</sup> Similarly, another Trial Chamber noted that “the examples referred to by Human Rights Watch do not include activities before Rwandan courts”.<sup>111</sup> It said the complaint about voting rights of persons in pre-trial detention might indicate “a possible problem with electoral legislation”, but said it did

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<sup>102</sup> *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11bis), Decision on Request for Referral, 6 June 2008, para. 62.

<sup>103</sup> *Prosecutor v. Kayishema* (Case No. ICTR-2001-67-I), Brief of Human Rights Watch as *Amicus Curiae* in Opposition to Rule 11bis Transfer, 3 January 2008, paras 41-48.

<sup>104</sup> *Ibid.*, para. 43.

<sup>105</sup> *Ibid.*, para. 44.

<sup>106</sup> *Ibid.*, para. 45.

<sup>107</sup> *Ibid.*, paras 46-48.

<sup>108</sup> *Ibid.*, para. 42.

<sup>109</sup> *Prosecutor v. Hategekimana* (Case No. ICTR-00-55B-R11bis), see note 8, para. 49.

<sup>110</sup> *Ibid.*, para. 52.

<sup>111</sup> *Prosecutor v. Kanyarukiga* (Case No. ICTR-2002-78-R11bis), see note 102, para. 44.

not “demonstrate that judges in a trial will disregard the presumption of innocence”.<sup>112</sup>

## V. The Aftermath

Rejection of the transfer applications by the Prosecutor has the potential for rather dire consequences in terms of the completion strategy of the Tribunal. Several additional trials may be required and the life-span of the Tribunal extended for another year or more. The cost to the United Nations is enormous. Following dismissal of his appeals, the Prosecutor elected to proceed with one of the cases that he had hoped to send to Rwanda. The *Munyakazi* trial began in April 2009. There is general agreement that this is not the sort of case that needs to be tried by the International Criminal Tribunal. But as long as the transfer to Rwanda is forbidden and there are no other offers from third states there can be no other alternative if the accused is to stand trial.

In May 2009, Rwanda enacted legislation that attempted to address the concerns of the Appeals Chamber. With respect to the competent tribunal, while maintaining the single-judge bench of the High Court as a general rule, the new legislation added that “the President of the Court may at his/her absolute discretion designate a quorum of three (3) or more judges assisted by a Court Registrar depending on his/her assessment of the complexity and importance of the case”.<sup>113</sup> The provision dealing with the rights of the accused was supplemented with a guarantee that no person could be criminally liable for anything said or done in the course of a trial, subject to relevant laws on contempt of court and perjury.<sup>114</sup> This was a response to concerns that witnesses (and even counsel) might be prosecuted for spreading “genocidal ideology”. Finally, the new enactment provided for testimony to be delivered outside of Rwanda by video-link or in person before a foreign judge or a commissioner designated by the Rwandan courts.<sup>115</sup> Rwanda

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<sup>112</sup> Ibid.

<sup>113</sup> *Organic Law modifying and complementing the Organic Law n° 11/2007 of 16/03/2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States*, Official Gazette of the Republic of Rwanda, Year 48, no. special of 26 May 2009, article 1.

<sup>114</sup> Ibid., article 2.

<sup>115</sup> Ibid., article 3.

also undertook various reforms to its witness protection programme, separating the mechanism from the prosecution authorities and beefing up the available resources.

In June 2009 the Prosecutor informed the United Nations Security Council that,

“the Government of Rwanda is in the process of enacting — indeed, I am advised that it has enacted — additional legislation to meet the remaining concerns of the Appeals Chamber in relation to the protection of witnesses and the recording of testimony of witnesses who may be reluctant to travel to Rwanda to testify. Once the law comes into force and the capacity is established for witness protection and video link facilities, my Office will again consider making further applications before the Trial Chambers in the course of this year for the referral of cases of ICTR indictees to Rwanda for trial. As the concerns of the Trial and Appeals Chambers relate to legal as well as capacity issues, I would urge the Council to call upon Member States to redouble their efforts in support of capacity-building for the Rwandan legal system. Rwanda has had the onerous burden of dealing with the cases transferred not only from the Tribunal but also possibly from other national jurisdictions, as well as many other domestic cases of genocide, war crimes and crimes against humanity.”<sup>116</sup>

At conferences in The Hague in June 2009 and Geneva in July 2009 the Prosecutor indicated his intent to proceed with new applications by the end of the year. The only remaining issue, he said, was the effectiveness of the new witness protection measures.

Judicial reforms within Rwanda associated with preparation for the transfers by the International Tribunal had the very positive by-product of encouraging other governments to contemplate extradition to Rwanda. The decisions of the Tribunal had the very negative by-product of discouraging the process. The result, in most cases has been impunity, because many of the states concerned are themselves unwilling or unable to proceed. There is evidence of at least one extradition to Rwanda, from India, in 1996,<sup>117</sup> but none from countries in Europe or North America where it appears that most of the genocide suspects

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<sup>116</sup> Doc. S/PV.6134, p. 12.

<sup>117</sup> Froduauld Karamira was extradited from India to Rwanda in July 1996. See, *Ministère Public v. Karamira*, 1 Recueil de jurisprudence contentieux du génocide et des massacres au Rwanda (1st inst., Kigali, 14 February 1997), 75.

fled. As long as they did not attract the attention of the International Tribunal, they could be fairly certain they would escape justice.

In 2006, after four suspects were arrested in Britain, the government decided to proceed with extradition on the basis of a memorandum of understanding with Rwanda. The extradition was initially authorised by a British judge following a lengthy hearing at which many of the same issues that concerned the International Tribunal in the transfer proceedings were aired.<sup>118</sup> The rulings of the International Tribunal were issued after the ruling had been appealed. They strongly influenced the British court, and the decision to allow extradition was overturned.<sup>119</sup> Similarly, French courts authorised extradition, and then denied it in light of rulings of the International Tribunal.<sup>120</sup> Other European governments that had been contemplating extradition to Rwanda decided against this. In the case of Finland, extradition was substituted with an effort at prosecution by national courts.<sup>121</sup>

Sweden has been the only European government to persist with extradition, ordering that Sylvère Ahorugeze be returned to Rwanda to stand trial for genocide. Its courts and its minister of justice considered the rulings of the International Criminal Tribunal for Rwanda as well as those of the British courts, but decided these did not constitute an obstacle to extradition. Transfer of Ahorugeze to Rwanda has been suspended pending a challenge before the European Court of Human Rights.<sup>122</sup> In *Soering v. United Kingdom and Germany*, the European Court said it could not “exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country”.<sup>123</sup> But it has yet to declare that an extradition would violate the European Convention on Human Rights for this reason. The non-*refoulement* case law of the European Court has, to

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<sup>118</sup> *Government of the Republic of Rwanda v. Bajinya et al.*, Judgment, 6 June 2008.

<sup>119</sup> *Brown et al. v. Government of Rwanda*, [2009] EWHC 770 (Admin) (8 April 2009).

<sup>120</sup> “French court overturns extradition of Rwandan genocide suspect”, AFP, 10 July 2008.

<sup>121</sup> “Rwanda Working with Finland on Genocide Trial”, Voice of America, 2 September 2009.

<sup>122</sup> “Sweden stops extradition of Rwanda genocide suspect”, AFP, 16 July 2009.

<sup>123</sup> *Soering v. United Kingdom and Germany*, Series A, No. 161, para. 113.

date, always concerned the threat of torture.<sup>124</sup> Whether the Court would conclude that the findings of the International Criminal Tribunal on witness protection are enough to constitute a “flagrant denial of a fair trial” would seem to lie at the heart of the case. Of course, the unlikely scenario of the European Court of Human Rights disagreeing with the Appeals Chamber of the International Criminal Tribunal for Rwanda in its assessment of the fair trial issues cannot be excluded. This could open a new chapter in the fragmentation of international law debate.

## VI. Conclusion

The transfer proceedings demonstrate the potential for synergy that exists between international and national criminal justice systems. There can be no doubt that in terms of justice within Rwanda, the whole process has been extremely salutary. The death penalty has been abolished, and not only for transfer cases but for the country as a whole. The applications for transfer have provided an important stimulus to Rwanda to make improvements in a range of areas, including prison conditions and training of judicial personnel. They have heightened the awareness within the country of the importance of a truly independent and impartial judiciary. This may have further benefits along the line, because courageous and activist judges will stimulate other reforms, and provide a foundation for greater democracy, as they have done in many developed countries.

In this context, it is a pity that the efforts have thus far gone largely unrewarded, and that the applications before the International Tribunal were dismissed as a result of standards that may have been set too high. One of the Trial Chambers, in the somewhat patronising concluding paragraph of its decision denying the transfer application, said that it “would like to emphasise that it has taken notice of the positive steps taken by Rwanda to facilitate referral. The Chamber is of the view that if Rwanda continues along this path, the Tribunal will hopefully be able to refer future cases to Rwandan courts”.<sup>125</sup> The decisions were humili-

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<sup>124</sup> *Chahal v. United Kingdom*, Reports 1996-V; *Saadi v. Italy* (Application no. 37201/06), 28 February 2008.

<sup>125</sup> *Prosecutor v. Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda, 28 May 2008, para. 67.

ating for Rwanda, which has made great strides in order to modernise its justice system, inspired by international standards. There may be lessons here of more general application to the field of transitional or post-conflict justice. A tension obviously exists between national and international prosecutions. This is manifested in a variety of forms, including the debate about complementarity at the International Criminal Court.

The decisions of the International Criminal Tribunal for Rwanda have gone beyond what the *Rules of Procedure and Evidence* require. Thus, in addition to verifying the non-imposition of the death penalty, the judges have considered the terms of detention and the prison conditions. Within the context of examining the fairness of proceedings, they have set the bar very high indeed, requiring of Rwanda mechanisms for the protection of defence witnesses that do not exist in the justice systems of most developed countries. Although Rwanda did not have any problems with the substantive law, because since 1994 it has adopted adequate legislation dealing with the crime of genocide, the transfer decisions concerning Norway showed that a very precise implementation of international criminal law is also required. One of the Trial Chambers refused transfer to Rwanda because it considered there was no legislation permitting prosecution on the basis of command responsibility.<sup>126</sup> The Chamber was simply mistaken – it had not even taken the trouble to verify the applicable law – and its finding on this point was overturned on appeal.<sup>127</sup> But Rwanda is very much the exception, and most countries in the world would not have anything resembling command responsibility in their own national criminal codes.

The lesson here is that if judges at the International Criminal Court are as demanding in assessing the issue of complementarity as the judges at the International Criminal Tribunal for Rwanda have been in examining the very similar issues that arise within the transfer process, they will almost inexorably be drawn to the conclusion that the national justice system is either “unwilling or unable genuinely” to prosecute suspects. This will be especially true when developing countries are concerned. Exercise of jurisdiction by the International Criminal Court will be the rule, not the exception. States contemplating ratification of

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<sup>126</sup> *Prosecutor v. Hategkimana* (Case No. ICTR-00-55B-R11bis), see note 8, para. 19.

<sup>127</sup> *Prosecutor v. Hategkimana* (Case No. ICTR-00-55B-R11bis), see note 9, para. 13.

the *Rome Statute* but concerned about the effectiveness of the complementarity regime will hardly be reassured.

The consequences in terms of the International Criminal Tribunal for Rwanda are not disastrous, because to the extent the Chambers refuse transfer, they retain jurisdiction and will conduct the trials themselves. For some judges, this means many more months of hardship, living away from home and far from their families. For others, it provides a welcome additional period of time as a senior United Nations official. As for the international campaign to confront impunity, the results are more dramatic and unacceptable. This is because the transfer decisions had a direct impact upon the willingness of states to cooperate in extradition towards Rwanda. A significant number of genocide suspects remain at large, sheltered from prosecution, as an indirect and certainly unintended consequence of the decisions by the International Criminal Tribunal.