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”For these Reasons, the Chamber: Denies the Prosecutor’s Request for Referral”: The False Hope of Rule 11 BIS

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Abstract

This Note will examine decisions from two of the potential transfer cases, *Prosecutor v. Gaspard Kanyarukiga* and *Prosecutor v. Yussuf Munyakazi*, and discuss their implications for the ICTR." Part I addresses the early history of the ICTR, including the initial criticisms leveled against it and its rocky relationship with Rwanda. It also examines the introduction of 11 bis and the changes made by Rwanda to come into compliance with the Rule's requirements. Part II discusses the referral decisions themselves. Finally, Part III assesses the different approaches taken by the two chambers within their respective denials. Through an examination of the reasons given in each decision, this Note will highlight the apparent confusion within the ICTR as to the level of trust which should be afforded to Rwanda. It ultimately argues that the ICTR must give Rwanda greater leeway within its 11 bis decisions, both to underscore the Tribunal's own legitimacy and assist with Rwanda's growth as a nation. It nevertheless recognizes that Rwanda faces certain, potentially insurmountable, problems in guaranteeing a fair trial, problems to which the ICTR cannot afford to turn a blind eye. Although the chambers hold out the possibility of a future transfer if their concerns are addressed, there is a very real possibility that Rwanda cannot fix the highlighted problems. In the face of such an impasse, one is ultimately left questioning whether the ICTR is promising the impossible.

NOTES

“FOR THESE REASONS, THE CHAMBER: DENIES THE PROSECUTOR’S REQUEST FOR REFERRAL”: THE FALSE HOPE OF RULE 11 *BIS*

Amelia S. Canter*

INTRODUCTION

In December 2007, the Government of Rwanda (“GOR”) submitted an *amicus curiae* brief to the United Nations International Criminal Tribunal for Rwanda (“ICTR”), respectfully requesting that one of the Tribunal’s defendants, Yussuf Munyakazi, be transferred to Kigali for trial.¹ Prior to the 1994 Rwandan genocide, Munyakazi had been a prominent businessman and commercial farmer in Kigali.² When violence erupted,

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1. Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36-R11*bis*, *Amicus Curiae* Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11 *bis* (Dec. 21, 2007) [hereinafter “*Munyakazi Rwanda Brief*”], cited in Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda, ¶ 5 n.6 (May 28, 2008) [hereinafter “*Munyakazi Trial Decision*”] (requesting that Yussuf Munyakazi be transferred to Rwanda for trial pursuant to Rule 11 *bis*); see also Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36-R11*bis*, Prosecutor’s Request for the Referral of the case of Yussuf Munyakazi pursuant to Rule 11*bis* of the Tribunal’s Rules of Procedure and Evidence (Sept. 7, 2007) [hereinafter “*Munyakazi Referral Request*”], cited in *Munyakazi Trial Decision*, ¶ 1 n.1 (requesting that Yussuf Munyakazi be transferred to Rwanda for trial pursuant to Rule 11 *bis*); see also Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36-R11*bis*, *Amicus Curiae* Brief on Behalf of the Government of Rwanda, ¶ 1 (Jul. 28, 2008) [hereinafter “*Munyakazi Rwanda Appellate Brief*”] Within its appellate *amicus* brief, the Government of Rwanda (“GOR”) states that it:

[I]s prepared to receive the first transfer case. The structures and procedures are in place and in many respects have been tested. The GOR is unquestionably committed to fulfilling its international obligations to deliver justice fairly, mindful that the proceedings will be closely monitored. The GOR, thus, respectfully requests the Appeals Chamber to order the transfer of this case, together with any other orders it deems appropriate.

Id. ¶ 26.

2. *Munyakazi Trial Decision*, *supra* note 1, ¶ 12 (noting that “[t]he Accused is alleged to have been a wealthy businessman, a commercial farmer, and a leader of the Bugurama MRND militia (‘Bugurama *Interahamwe*’)).

however, he was accused of inciting hatred against Tutsis, attacking and killing Tutsis and delivering supplies to the *Interahamwe*, the extremist Hutu militia group.³ He was placed in the custody of the ICTR in 2004 and was “charged with genocide, or, alternatively, complicity in genocide, and extermination as a crime against humanity.”⁴

Rwanda’s submission to the ICTR was in accordance with Rule 11 *bis* (“Rule 11 *bis*” or “11 *bis*”), a recent addition to the Tribunal’s Rules of Procedure which allows for the transfer of ICTR defendants back to national courts.⁵ The provision had been introduced in 2003, as part of a larger United Nations’ effort to bring the work of the Tribunal to a close.⁶ Under 11 *bis*, a case can be referred to any state in which the crime was committed, the defendant was arrested or which has subject-matter jurisdiction and is willing and able to prosecute.⁷ Before authorizing

3. See *id.* (alleging that the accused “delivered weapons,” “incited hatred,” and “instigated the killing of Tutsis”).

4. *Id.*

5. See Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Rule 11 *bis* [hereinafter “Rule 11 *bis*” or “11 *bis*”] (providing guidelines for the transfer of cases from the International Criminal Tribunal for Rwanda (“ICTR”) to national jurisdictions). The Rules of Procedure and Evidence (“Rules”) were adopted on June 29, 1995 and have been periodically amended. The most recent version of the Rules can be found at <http://69.94.11.53/ENGLISH/rules/080314/080314.pdf>.

6. See Completion Strategy of the International Criminal Tribunal for Rwanda (“ICTR”), enclosure, in S.C. Res. 1503, U.N. Doc. S/Res/1503 (Aug. 28, 2003) [hereinafter “ICTR Completion Strategy”].

Within Security Council Resolution 1503, the U.N. urges:

[T]he ICTR to formalize a detailed strategy, modelled on the ICTY Completion Strategy, to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda, in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 . . . ,

Id. at 2.

7. See Rule 11 *bis*, *supra* note 5, (A).

Rule 11 *bis* (A) states that:

If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

- (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, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

Id.

a transfer, the referring bench must first 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.”⁸ The first successful referrals occurred in 2007, when the ICTR transferred two defendants, Wenceslas Munyeshyeka and Laurent Bucyibaruta, to French courts.⁹

Following the introduction of Rule 11 *bis*, Rwanda abolished the death penalty, established a new legal framework for referred cases, and provided for extensive fair trial guarantees for transferred defendants.¹⁰ Satisfied that the country now met the requirements for referral, the Prosecutor of the ICTR, Mr. Hassan Bubucar Jallow, made the first request for an 11 *bis* transfer to Rwanda in 2007.¹¹ As of June 2008, five defendants have been submitted for referral and the Tribunal has rendered decisions in three of the cases.¹² Thus far, the ICTR has denied all 11 *bis*

8. Rule 11 *bis*, *supra* note 5, (C).

9. See Prosecutor v. Wenceslas Munyeshyeka, Case No. ICTR-2005-87-I, Decision on Prosecutor's Request for Referral of Wenceslas Munyeshyeka's Indictment to France (Nov. 20, 2007) [hereinafter “*Munyeshyeka* Decision”] (authorizing 11 *bis* referral of Munyeshyeka to French courts); see also Prosecutor v. Laurent Bucyibaruta, Case No. ICTR-2005-85-I, *Décision Relative à la Requête du Procureur Aux Fins de Renvoi de L'Acte de L'Accusation Contre Laurent Bucyibaruta Aux Autorités Françaises* (Nov. 20, 2007) [hereinafter “*Bucyibaruta* Decision”], cited in William A. Schabas, *International Criminal Tribunals: A Review of 2007*, 6 NW. U. J. INT'L HUM. RTS. 382, 398 n.63 (authorizing 11 *bis* referral of Bucyibaruta to French courts). The ICTR has also tried to transfer defendant Michael Bagaragaza to Norway, but the referral was denied. See generally Prosecutor v. Michael Bagaragaza, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11 *bis* Appeal, ¶ 19 (Aug. 30, 2006) (denying 11 *bis* referral of Bagaragaza to Norway). Referral to the Netherlands was later approved for Bagaragaza, before the Netherlands withdrew its offer to host the defendant, citing a lack of jurisdiction. See Prosecutor v. Michael Bagaragaza, Case No. ICTR-2005-86-11*bis*, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, at 13 (Apr. 13, 2007) (authorizing 11 *bis* referral of Bagaragaza to Netherlands). For more information about the failed Bagaragaza referral, see generally Lisa Yarwood & Beat Dold, *Towards the End and Beyond: The “Almost” Referral of Bagaragaza in Light of the Completion Strategy of the International Criminal Tribunal for Rwanda*, 6 CHINESE J. INT'L L. 95 (2007).

10. See Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-R11*bis*, *Amicus Curiae* Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11 *bis*, ¶¶ 11-33 (Nov. 22, 2007) [hereinafter “*Kanyarukiga* Rwanda Brief”] (stating that Rwanda has established a new legal framework for transferred defendants, built additional prisons and abolished the death penalty). For more on fair trial guarantees within Rwanda, see discussion *infra* Part II.c.

11. See generally *Munyakazi* Referral Request, *supra* note 1.

12. The five defendants are Gaspard Kanyarukiga, Yussuf Munyakazi, Idelphonse Hategekimana, Jean-Baptiste Gatete and Fulgence Kayishema. Decisions have been rendered in the cases of Kanyarukiga, Munyakazi and Hategekimana. Kayishema remains at large. See, e.g., Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-R11*bis*,

requests for Rwanda, expressing concerns about the nation's penalty structure and ability to ensure a fair trial.¹³

This Note will examine decisions from two of the potential transfer cases, *Prosecutor v. Gaspard Kanyarukiga* and *Prosecutor v. Yussuf Munyakazi*, and discuss their implications for the ICTR.¹⁴ Part I addresses the early history of the ICTR, including the initial criticisms leveled against it and its rocky relationship with Rwanda. It also examines the introduction of 11 *bis* and the changes made by Rwanda to come into compliance with the Rule's requirements. Part II discusses the referral decisions themselves. Finally, Part III assesses the different approaches taken by the two chambers within their respective denials. Through an examination of the reasons given in each decision, this Note will highlight the apparent confusion within the ICTR as to the level of trust which should be afforded to Rwanda. It ultimately argues that the ICTR must give Rwanda greater leeway within its 11 *bis* decisions, both to underscore the Tribunal's own legitimacy and assist with Rwanda's growth as a nation. It nevertheless recognizes that Rwanda faces certain, potentially insurmountable, problems in guaranteeing a fair trial, problems to which the ICTR cannot afford to turn a blind eye. Although the chambers hold out the possibility of a future transfer if their concerns are addressed, there is a very real possibility that Rwanda cannot fix the highlighted problems. In the face of such an impasse, one is ultimately left questioning whether the ICTR is promising the impossible.

Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 2 n.3 (June 6, 2008) [hereinafter "*Kanyarukiga* Trial Decision"] (denying the Prosecutor's request for the referral of the case of Gaspard Kanyarukiga to Rwanda).

13. See, e.g., *Munyakazi* Trial Decision, *supra* note 1 (denying the Prosecutor's request for the referral of the case of Munyakazi to Rwanda); see also *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 104 (denying the Prosecutor's request for the referral of the case of Gaspard Kanyarukiga to Rwanda); *Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda (June 19, 2008) [hereinafter "*Hategekimana* Decision"] (denying the Prosecutor's request for the referral of the case of Ildephonse Hategekimana to Rwanda).

14. As of December 2008, 11 *bis* decisions have been rendered in three of the five possible cases: *Munyakazi*, *Kanyarukiga*, and *Hategekimana*. This Note will only address the decisions in *Munyakazi* and *Kanyarukiga*. The *Hategekimana* decision strongly resembles the *Kanyarukiga* decision and thus, will be covered under that discussion. See generally *Hategekimana* Decision, *supra* note 13.

I. FROM JURISDICTIONAL PRIMACY TO POTENTIAL PARTNER: THE EVOLUTION OF THE ICTR

A. "We are the victims, but we know nothing about what is happening there." *The Early History of Rwanda and the ICTR*¹⁵

By 1994, tensions between Rwanda's Hutu and Tutsi populations had reached a breaking point. When a plane carrying Rwanda's president was shot down outside of Kigali on April 6th 1994, the nation erupted in violence.¹⁶ Over the next hundred days, extremist Hutus led a systematic, nationwide effort to annihilate the country's Tutsis and moderate Hutus.¹⁷ By July 1994, up to one million Rwandans had been killed, including more than seventy-five percent of the Tutsi population.¹⁸ In the aftermath of the violence, Rwanda approached the United Nations for assistance with the prosecution of those responsible.¹⁹ The nation's judicial system had been decimated during the conflict and the Government requested an international tribunal, similar to the one created for Yugoslavia the year before.²⁰

15. Sharon Lafraniere, *Court Convicts 3 in 1994 Genocide Across Rwanda*, NEW YORK TIMES, Dec. 4, 2003, at A1 (quoting Bongani C. Majola, a deputy prosecutor at the ICTR).

16. See Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 ILSA J. INT'L & COMP. L. 1, 13 (2005) (stating that the president's plane crash "sparked the widespread and systematic murder of between 500,000 and 1,000,000 civilians"); see also SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA IN THE AGE OF GENOCIDE* 329-30 (2003) (noting that Rwanda's president Juvénal Habyarimana was killed in a plane crash on the evening of April 6, 1994 and that this event sparked widespread violence).

17. See Bostian, *supra* note 16, at 13 (stating that between 500,000 and 1,000,000 civilians were killed during the genocide); see generally PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* FRONTISPLATE 4 (1998) (noting that "at least eight hundred thousand people were killed in just a hundred days").

18. See Bostian, *supra* note 16, at 13 (stating that "more than seventy-five percent of Rwandan's ethnic Tutsi population had been slaughtered"); see also Inge Brinkman, *Review: We Wish to Inform you that Tomorrow We Will Be Killed with Our Families: Stories from Rwanda*, 47 AFRICA TODAY 141, 141 (2000) (stating that "Hutu Rwandans killed about 75 percent of Rwanda's Tutsi population").

19. See Bostian, *supra* note 16, at 18 (stating that the post genocide Rwandan government pressed the United Nations "for a war crimes tribunal similar to the ICTY"); see also 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, 175 (2000) (noting that "the Rwandan government requested the creation of an international tribunal").

20. See Bostian, *supra* note 16, at 18 (stating that the post genocide Rwandan gov-

Although Rwanda had come to the United Nations for help, it quickly found itself at odds with the Security Council over the proposed framework for the new court.²¹ During the preliminary negotiations, Rwanda voiced four main objections. First, it disagreed with the suggested temporal jurisdiction of the Tribunal.²² Under the proposed framework, the Office of the Prosecutor could only try defendants for crimes committed during the 1994 calendar year.²³ Rwanda objected to such a limited time frame, worried that it would prevent the court from effectively addressing the planning stages of the genocide.²⁴ Secondly, Rwanda complained about the resources that would be allocated to the Tribunal, fearing that it would be underfunded and understaffed.²⁵ Third, Rwanda objected to the proposed location

ernment pressed the United Nations "for a war crimes tribunal similar to the ICTY"); *see also* Carroll, *supra* note 19, at 172 (stating that the Rwandan judicial system "was in ruins after the 1994 conflict" and thus, "did not have the human, physical, or financial resources to deal with massive numbers of alleged perpetrators").

21. *See* Bostian, *supra* note 16, at 19 (noting that, while Rwanda had initially requested an international court, the nation "objected to a number of the provisions in the Tribunal's governing statute"); *see also* Carroll, *supra* note 19, at 175 (noting that "the Rwandan government expressed some misgivings" about the proposed structure of the Tribunal).

22. *See* Bostian, *supra* note 16, at 19 (stating that Rwanda first "objected because the ICTR would have jurisdiction only over crimes committed during the 1994 calendar year"); *see also* Carroll, *supra* note 19, at 175 (noting that the Rwandan delegation "did not consider that the temporal jurisdiction of the tribunal was adequate to hold the orchestrators of the genocide accountable for their actions").

23. *See* Bostian, *supra* note 16, at 19 (stating that Rwanda first "objected because the ICTR would have jurisdiction only over crimes committed during the 1994 calendar year"); *see also* Carroll, *supra* note 19, at 175 (noting Rwandan fears that the limited temporal jurisdiction would prevent the ICTR from "holding individuals responsible for planning the 1994 genocide and for carrying out trial projects of extermination in the early 1990s").

24. *See* Bostian, *supra* note 16, at 19 (noting that Rwanda was concerned that the proposed temporal jurisdiction "would prevent the ICTR from fully investigating the activities that led up to the genocide."); *see also* Carroll, *supra* note 19, at 175 (noting Rwandan fears that the limited temporal jurisdiction would prevent the ICTR from "holding individuals responsible for planning the 1994 genocide and for carrying out trial projects of extermination in the early 1990s").

25. *See* Carroll, *supra* note 19, at 177 (stating that "the Rwandan government also considered that the resources of the ICTR were ineffective to address such a massive problem"). Rwanda was particularly concerned about splitting resources with the United Nations International Criminal Tribunal for the Former Yugoslavia ("ICTY"), since the two Tribunals would share an appellate body and chief prosecutor. *See* Bostian, *supra* note 16, at 19 (stating that "Rwanda objected that the ICTR would be understaffed and underfunded, with only a handful of judges and with the appellate body and chief prosecutor to be split between the ICTR and the ICTY").

of the Tribunal in Arusha, Tanzania.²⁶ It argued that the court should, in fact, be situated in Kigali, so that the Rwandan people would have an opportunity to be actively involved in its proceedings.²⁷ Finally, Rwanda objected to the proposed prohibition on the death penalty.²⁸ At the time of the negotiations, the death penalty was legal in Rwanda and the nation worried about the potential for hypocrisy.²⁹ It complained that the different penalty structures would mean that those most responsible for the genocide would receive a lesser punishment than their subordinates, who would be tried in Rwanda.³⁰

The nation's objections were, ultimately, ignored and in November 1994, the Security Council voted to establish the ICTR.³¹ Rwanda was, in fact, the only member of the Security Council to vote against the Tribunal.³² Within Security Council Resolution 955, the ICTR was charged with the task of prosecuting "persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens

26. See Bostian, *supra* note 16, at 19 (noting that Rwanda objected to the proposed location of the ICTR); see also Carroll, *supra* note 19, at 176 (noting that Rwanda "was concerned about the location of the seat of the ICTR").

27. See Bostian, *supra* note 16, at 19 (noting that Rwanda was concerned the distance between Arusha and Kigali "would make it more difficult for the Rwandan people to follow the court's proceedings"); see also Carroll, *supra* note 19, at 176 (noting that Rwanda wanted the court in Kigali so that it could help promote "accountability and national reconciliation").

28. See Bostian, *supra* note 16, at 19 (noting that Rwanda objected to Tribunal's prohibition on the death penalty); see also Carroll, *supra* note 19, at 177 (noting that the "Rwandan government disagreed with the penalties in the ICTR statute").

29. See Bostian, *supra* note 16, at 19-20 (noting that, "[b]ecause the Rwandan Penal Code provides for the death penalty, '[t]hose most responsible for the killings' would not face the death penalty, while lower-level perpetrators tried in the Rwandan courts might be executed"); see also Carroll, *supra* note 19, at 177 ("Whereas Rwandan national laws would allow for the death penalty in cases of genocide, the ICTR statute provides for imprisonment but not for capital punishment.").

30. See Bostian, *supra* note 16, at 19-20 (noting that suspects at the ICTR could only receive life imprisonment, while lower level perpetrators in Rwanda could face the death penalty); see also Carroll, *supra* note 19, at 177 ("[T]he individuals who committed the most serious crimes could get less than life imprisonment in the ICTR while lower level perpetrators tried in Rwanda could receive the death penalty.").

31. See S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing an international tribunal to prosecute persons responsible for genocide and "other serious violations of international humanitarian law" committed during the Rwandan genocide).

32. See Bostian, *supra* note 16, at 19 (noting that "Rwanda was the only member of the Security Council to vote against the Resolution that created the Tribunal"); see also Yarwood & Dold, *supra* note 9, at 113 (noting that "Rwanda cast the only vote in opposition").

responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994”³³ It was established in Arusha, Tanzania, and given primacy over local Rwandan courts, thus providing it with the right to take cases from the national jurisdiction.³⁴

Although the GOR and the ICTR have developed a civil working relationship in the years following the Tribunal’s inception, many within the local population remain unconvinced as to the court’s worth and validity.³⁵ Some, for example, object to the overall cost of the ICTR. By the end of 2007, the United Nations spent more than US\$1 billion on the Tribunal.³⁶ When divided between the completed cases, this breaks down to approximately thirty million dollars per verdict.³⁷ In comparison, Rwanda’s GDP per capita is approximately US\$1500 and around sixty percent of the population lives below the poverty line.³⁸ Many, therefore, question whether the money could have been

33. S.C. Res. 955, *supra* note 31, art. 1.

34. See S.C. Res. 955, *supra* note 31, art. 8(2) (“The International Tribunal for Rwanda shall have primacy over the national courts of all States.”).

35. Rwanda and the ICTR have not, however, always maintained an amicable relationship. In fact, Rwanda cut relations with the ICTR in 1999 after the Appeals Chamber dismissed an indictment against Jean-Bosco Barayagwiza on procedural grounds. The Government barred the Tribunal Prosecutor, Carla del Ponte, from entering the country and prevented witnesses from traveling to Arusha. See generally *Kigali Protest Against UN Tribunal*, BBC News, Nov. 15, 1999, at <http://news.bbc.co.uk/2/hi/africa/521807.stm> (noting that “the Rwandan Government suspended cooperation with the International Criminal Tribunal in Arusha and refused to meet chief prosecutor Carla del Ponte” after Barayagwiza was released). In a later trial, del Ponte noted that “after [the] decision, there was no co-operation, no collaboration with the office of the Prosecutor. In other words, justice, as dispensed by this Tribunal was paralysed.” Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Decision: Prosecutor’s Request for Review or Reconsideration, ¶ 2 (Mar. 31, 2000) (Nieto-Navia, J., declaration).

36. See MARK A. DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* 131 (2007) (noting that “[b]y the end of 2007, the cost of the ICTR’s operations will have exceeded U.S. \$1 billion.”); see also Laura Blue, *Rwanda’s Most Wanted*, TIME, Sept. 26, 2007, available at <http://www.time.com/time/magazine/article/0,9171,1665648,00.html> (noting that “[i]n 13 years, the Tanzania-based international court has spent more than \$1 billion and completed just 33 cases”).

37. See DRUMBL, *supra* note 36, at 131 (noting that the Tribunal has spent “approximately U.S. \$30 million” per verdict; this is in contrast to amnesty applications in South Africa, which cost approximately “U.S. \$4,300 per case,” and demobilization and reintegration programs in post conflict Mozambique, which cost approximately “U.S. \$1,000 per combatant”); see also Blue, *supra* note 36 (noting that “[i]n 13 years, the Tanzania-based international court has spent more than \$1 billion and completed just 33 cases”).

38. See DRUMBL, *supra* note 36, at 131 (noting that “[t]his is a staggering sum of money in a country with a per capita economic output of about U.S. \$1,500”); Central Intelligence Agency, *The World Factbook- Rwanda* (Nov. 20, 2008), available at <https://>

better spent on national development or improving Rwanda's judicial framework.³⁹

A second common complaint relates to the inaction of foreign nations at the time of the violence. Many within the population "simply do not see how the international community, which idly sat by during the genocide, now has the moral legitimacy to punish individual Rwandans as perpetrators."⁴⁰ They, ultimately, question whether foreign countries, through the proxy of the ICTR, have any right to pass judgment on, or get involved in, Rwanda's affairs.⁴¹

International legal scholars and academics have also criticized the Tribunal. Some, for example, argue that the court favors "the interests of those only morally affected by the violence over those physically afflicted by it" and in the process, shift the focus away from Rwanda and its goals.⁴² Critics argue that "international lawyers . . . have largely referred to and replicated their own legal systems, rather than catered to and built on local realities and needs."⁴³ In his book, *Atrocity, Punishment and International Law*, Mark Drumbl argues that this tactic "leads to a para-

www.cia.gov/library/publications/the-world-factbook/print/rw.html (noting that sixty percent of the population lives below the poverty line).

39. See DRUMBL, *supra* note 36, at 131 (noting that "even just a part of these funds could have made a huge difference in terms of operationalizing restitutionary or reparative remedies for Rwandans"); see also Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 466 (1999) (arguing that "each dollar spent by the international community on the ICTR is one less dollar available for assistance to Rwandan courts").

40. DRUMBL, *supra* note 36, at 130.

41. See *id.* (noting that most Rwandans "simply do not see how the international community, which idly sat by during the genocide, now has the moral legitimacy to punish individual Rwandans as perpetrators"); see also Bostian, *supra* note 16, at 22 ("[G]iven the failure of the international community to prevent or stop the genocide, as well as the cooperation of some western states with the regime that perpetrated the genocide, Rwanda would be correct to greet any new offer of western help with skepticism.").

42. DRUMBL, *supra* note 36, at 132 (arguing that "the main beneficiary of the ICTR's work arguably has been the international community—whether in terms of assuaging guilt or developing international criminal law—and not Rwandans"); see also Allison Des Forges & Timothy Longman, *Legal Responses to genocide in Rwanda*, in MY NEIGHBOR, MY ENEMY 49, 56 (Eric Stover & Harvey M. Weinstein eds., 2004) (arguing that "the trials have been better vehicles for establishing international law than for contributing to the process of rebuilding Rwandan society").

43. DRUMBL, *supra* note 36, at 123 (quoting Dr. Rama Mani). When Rwanda voted against the ICTR in 1994, it recognized the potential for such externalization, expressing concern that the ICTR "would only appease the conscience of the international community rather than respond to the expectations of the Rwandan people and of the

dox: the society reeling from violence becomes disenfranchised from the redressing of that violence, which, instead, becomes a task suited to the technocratic savvy of international lawyers.”⁴⁴ While such an approach has allowed the work of the Tribunal to become “more intelligible for faraway audiences,” he suggests that this comes “at the price of intelligibility for those at home whose neighbors were killers or victims.”⁴⁵ Underlying these criticisms is the concern that such “externalization” promotes notions of western paternalism.⁴⁶ By taking charge of the situation, the international community is, in essence, declaring itself to be a better judge of Rwandan events than Rwandans themselves.⁴⁷

Whether as a result of the Tribunal’s location, its cost, or its possible paternalism, a clear distance has developed between the ICTR and the people of Rwanda. In a report on the Tribunal, researchers for Human Rights Watch concluded that “[m]any Rwandans felt that the work of the ICTR was far removed from their daily lives. Respondents complained that the trials were held far away from Rwanda and were organized using western-style judicial practices that place a heavy emphasis on procedure and have little concern for community interests.”⁴⁸ As a result, many Rwandans have become either ambivalent towards, or completely estranged from, the Tribunal.⁴⁹ For the most part, the trials in Arusha are inaccessible to those in Kigali and subse-

victims of genocide in particular.” Yarwood & Dold, *supra* note 9, at 113 (footnote omitted).

44. DRUMBL, *supra* note 36, at 135.

45. *Id.* at 128.

46. See GOUREVITCH, *supra* note 17, at 252-53 (arguing that “the very existence of the UN court implied that the Rwandan judiciary was incapable of reaching just verdicts, and seemed to dismiss in advance any trials that Rwanda might hold as beneath international standards”); see also Alvarez, *supra* note 39, at 402 (noting that jurisdictional primacy “rests on the presumed greater legitimacy of the international process over the local and the need to continually buttress this presumption”).

47. Bostian, *supra* note 16, at 22 (arguing that the structure of the court implies that “the international community is a better judge of Rwandan events than are Rwandans”); see also Alvarez, *supra* note 39, at 402 (noting that jurisdictional primacy “rests on the presumed greater legitimacy of the international process over the local and the need to continually buttress this presumption”).

48. Des Forges & Longman, *supra* note 42, at 56.

49. See DRUMBL, *supra* note 36, at 130 (“The Rwandan public remains largely ignorant of, ambivalent to, or at times estranged from the ICTR.”); see also Des Forges & Longman, *supra* note 42, at 56 (noting that the ICTR has had a limited impact in Rwanda because “most Rwandans have little knowledge of the tribunal’s work”).

quently, have minimal impact on the local population.⁵⁰ As an ICTR deputy prosecutor noted, “Rwandans say, ‘Listen, we are the victims, but we know nothing about what is happening there. We don’t see it on the papers, we don’t hear it on the TV, we don’t hear people in the bars talking about it. So to us, nothing is happening.’”⁵¹

B. “Clear guidelines around which to structure reform:” *The Introduction of Rule 11 bis*⁵²

1. Rule 11 *bis* at the ICTR

In 2003, the possibility emerged for the development of a new relationship between Rwanda and the ICTR. In an effort to bring the work of the Tribunal to a close, the Security Council introduced a “Completion Strategy” for the Court.⁵³ The plan established deadlines for all investigations and trials of first instance.⁵⁴ It also introduced Rule 11 *bis*, a mechanism which allows for the transfer of cases from the Tribunal to a domestic court.⁵⁵ The rule specifically authorizes the referral of a defendant to any state in which the crime was committed or the accused was arrested.⁵⁶ It also permits transfer to a nation that has

50. See DRUMBL, *supra* note 36, at 130 (arguing that “ICTR trials are by and large inaccessible and have minimal impact on victims’ lives”); see also Des Forges & Longman, *supra* note 42, at 56 (“In a survey [the authors] conducted in February 2002 in four Rwandan communities, 87.2 percent of respondents claimed that they were either not well informed or not at all informed about the tribunal.”).

51. Lafraniere, *supra* note 15, at 1 (quoting Bongani C. Majola).

52. 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, 323 (2008).

53. See ICTR Completion Strategy, *supra* note 6 (urging the Tribunal to develop a strategy to transfer cases “to competent national jurisdictions, as appropriate, including Rwanda,” in order to bring the work of the ICTR to a close).

54. See *id.* (noting the ICTR’s “objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010”).

55. See *id.* (noting the ICTR’s obligations “to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions”). A similar transfer provision, also known as Rule 11 *bis*, had already been introduced at the International Criminal Tribunal for the Former Yugoslavia (“ICTY”). See generally Sarah Williams, *ICTY Referrals to National Jurisdictions: A Fair Trial or a Fair Price?*, 17 CRIM. L.F. 177, 179 (2006); see also Burke-White, *supra* note 52, at 321-22.

56. See Rule 11 *bis*, *supra* note 5, (A).

Rule 11 *bis* (A) states that:

If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which

subject matter jurisdiction and is willing and able to prosecute.⁵⁷ Once jurisdiction is confirmed, Rule 11 *bis* requires that a referral bench satisfy itself that the accused will both obtain a fair trial within the receiving state and be free from the death penalty.⁵⁸ In contrast to the transfer provision at the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the ICTR rule does not require the referral bench to consider the gravity of the crimes charged or the level of responsibility of the accused.⁵⁹ Some ICTR chambers have, however, looked to ICTY precedent and considered the nature of the defendant and his alleged crimes within their referral decision.⁶⁰ Finally, the rule allows the ICTR to remain involved with the defendants, even after transfer.⁶¹ It authorizes the Prosecutor to send monitors and

shall determine whether the case should be referred to the authorities of 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,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

Id.

57. See Rule 11 *bis*, *supra* note 5, (A).

58. See Rule 11 *bis*, *supra* note 5, (C) ("In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall 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."). As noted by Sarah Williams within her article on ICTY referrals, "[i]t would be inconceivable for the tribunal to be transferring cases to a judicial system that did not respect international due process standards and international human rights law." Williams, *supra* note 55, at 189.

59. See Rule 11 *bis*, *supra* note 5, (C); see also *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 6 n.13. For a discussion of the ICTY provision, see Williams, *supra* note 55, at 186-91.

60. Within its decision, the *Munyakazi* Chamber makes a determination as to whether the defendant's level of responsibility permitted transfer. It notes that: According to prior jurisprudence on referrals, "intermediate" and "low-rank" accused include: a sub-commander of the military police and one of the main paramilitary leaders in Foëa; a prison administrator; a commander of a military police battalion including a formation known as "the jokers", four Bosnian Serb authorities involved in a joint criminal enterprise in two detention camps, a soldier; and a *préfet* in Rwanda.

Munyakazi Trial Decision, *supra* note 1, ¶ 10. It concludes that "the Accused had neither a rank of any military significance, nor had any official political role" and thus, was an appropriate level for transfer. See *id.* ¶¶ 13-14.

61. See Rule 11 *bis*, *supra* note 5, (D)(iv) (stating that "the Prosecutor may send observers to monitor the proceedings in the courts of the State concerned on his or her behalf"); see also Rule 11 *bis*, *supra* note 5, (F). Rule 11 *bis* (F) states that:

At any time after an order has been issued pursuant to this Rule and before

provides the Tribunal with the authority to revoke the case “[a]t any time after an order has been issued pursuant to this Rule”⁶²

2. “The acceptance of new sets of norms and values:” The Impact of Rule 11 *bis* on the Domestic Courts of Bosnia & Herzegovina and Rwanda⁶³

Within his article on referrals, William Burke-White explains the 11 *bis* transfer provision in terms of a “carrot-stick” dynamic.⁶⁴ Through the referral process, the international tribunal is offering the victim nation a “carrot,” the chance to try its own high profile defendants.⁶⁵ Before allowing the country to take control, however, the tribunal requires that it meet certain basic legal thresholds, relating to fair trial guarantees and the death penalty. If it fails to make the necessary changes, the tribunal can resort to the “stick:” a denial of transfer or even revocation to the international court.⁶⁶ The prospect of this “stick” provides the tribunal with a new leverage over the home state and by extension, the power to directly influence the nation’s institutions.⁶⁷ Through the various facets of the transfer

the accused is found guilty or acquitted by a court in the State concerned, the Trial Chamber may, at the request of the Prosecutor and upon having given to the authorities of the State concerned the opportunity to be heard, revoke the order and make a formal request for deferral

Id. Rule 11 *bis* (G) similarly states that:

Where an order issued pursuant to this Rule is revoked by the Trial Chamber, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal, and the State shall accede to such a request without delay in keeping with Article 28 of the Statute. The Trial Chamber or a Judge may also issue a warrant for the arrest of the accused.

Id.

62. Rule 11 *bis*, *supra* note 5, (D)(iv); *see also* Rule 11 *bis*, *supra* note 5, (F).

63. Burke-White, *supra* note 52, at 291.

64. *See id.* at 319-25. Burke does not use this exact terminology within his article, but does refer to “the ICTY’s ‘carrot’ of a case transfer.” *See id.* at 324.

65. Within his article, Burke-White discusses the ICTY, not the ICTR. His argument is, however, applicable to both. *See id.*

66. *See id.* at 300 (noting that where the domestic forum does not meet established fair trial and human rights standards, “the international forum can assume jurisdiction, thereby imposing a sanction on domestic authorities in the form of the sovereignty costs of international intervention”); *see also* Mohamed M. El Zeidy, *From Primacy To Complementarity And Backwards: (Re)-Visiting Rule 11 Bis Of The Ad Hoc Tribunals*, 57 INT’L & COMP. L.Q. 403, 405-06 (2008) (noting that the “decision of referral may be revoked by the Referral Bench if the State fails to conduct proper proceedings”).

67. *See* Burke-White, *supra* note 52, at 283-85, 295, 323-25 (stating that “the contes-

process, including “monitoring, sanctioning and socializing,” the international tribunals push “states toward greater compliance with the legal regime the tribunal enforces by making the costs of noncompliance greater than they would have been absent the tribunal or by acculturating states into the acceptance of new sets of norms and values.”⁶⁸

Within his article, Burke-White limits his discussion to the referral process of the ICTY.⁶⁹ Prior to the introduction of the ICTY’s 11 *bis* provision, Bosnia & Herzegovina (“BiH”) had little incentive to pursue genocide cases because the ICTY had jurisdictional primacy and thus, could take any defendant BiH tried to prosecute.⁷⁰ As a result, the nation saw no reason to evolve or improve its judicial framework and the domestic court system floundered.⁷¹

Rule 11 *bis*, however, changed the dynamic between the two parties. Previously, the ICTY could sweep in at any point and undercut the work of the domestic court.⁷² Now, the flow is reversed, with cases leaving The Hague for BiH. By promising that

tation over the appropriate locus of jurisdictional competence provided an international criminal tribunal, which would normally only be able to influence individual behavior, with direct leverage over state conduct and the operation of national institutions”); see also DRUMBL, *supra* note 36, at 103 (noting that “[t]he ICTY has exerted considerable influence on the legal systems of the states of the former Yugoslavia”).

68. Burke-White, *supra* note 52, at 291.

69. See *id.* at 309.

70. See *id.* at 311 (noting “the ICTY holds primary jurisdiction”); see also Graham T. Blewitt, *The International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in JUSTICE FOR CRIMES AGAINST HUMANITY 145, 150 (Mark Latimer & Philippe Sands eds., 2004) (stating that “[t]he ICTY enjoys jurisdictional primacy vis-à-vis national criminal jurisdiction systems”).

71. See Burke-White, *supra* note 52, at 314. He argues that:

[T]he subjugation of domestic institutions limited the payoff from investment in the judiciary for domestic officials. Since domestic courts could only prosecute when international approval was given, the domestic judiciary could not become an effective, independent institution of governance nor could it be relied upon to serve its fundamental purpose. In that context, it was far from an ideal candidate to receive attention or resources from domestic officials.

Id. at 314; see also Paul R. Williams & Patricia Taft, *The Role of Justice in the Former Yugoslavia: Antidote or Placebo for Coercive Appeasement?*, 35 CASE W. RES. J. INT’L L. 219, 253-54 (2003) (noting that the Tribunal narrowed “the opportunity for the development of additional mechanisms of justice, such as domestic prosecutions and truth commissions”).

72. See Burke-White, *supra* note 52, at 311 (noting that the ICTY Prosecutor may “seek a Request for Deferral from the trial chamber to prevent national proceedings from continuing”); see also Blewitt, *supra* note 70, at 150 (noting that the Tribunal can “take over cases from domestic courts at any stage of the procedure”).

BiH could try its own defendants, with little to no interference from the ICTY, 11 *bis* provided the nation with an incentive to change and clear guidelines around which to structure reform.⁷³ The transfer of cases has also had a “legitimizing effect” on the receiving nation.⁷⁴ As the President of the Bosnian Courts noted, “[t]hese cases are within our jurisdiction. It is not so much that we want them, but that we have a right to try them. And when the ICTY hands them back to us it validates our work in building [a new legal framework] and expands our credibility.”⁷⁵ In response to the introduction of Rule 11 *bis*, BiH has introduced a new War Crimes Chamber, provided for appellate review of transferred cases by the nation’s Constitutional Court, and strengthened fair trial guarantees for defendants.⁷⁶

Following the nation’s reforms, the ICTY began to transfer cases in 2005, starting with *Prosecutor v. Stankovic*.⁷⁷ Since then, it has referred another seven cases, involving twelve defendants, to

73. See Burke-White, *supra* note 52, at 323. He notes that:

[R]equirements for referral back provided domestic courts with clear guidelines and targets around which to structure reform efforts, including that the “accused answer in national courts for all the crimes specified in the indictments” and that “national trials are conducted in accordance with the international norms for the protection of human rights.”

Id. at 323; see also DRUMBL, *supra* note 36, at 103 (noting that Bosnia & Herzegovina (“BiH”) and Kosovo have aligned their “domestic structures to those of the ICTY,” shifting their systems to “an adversarial model from what had hitherto been an investigatory/inquisitorial model”).

74. Burke-White, *supra* note 52, at 324 (noting that “the Bosnian government has pushed strongly to take these cases back, in part because it has recognized this legitimizing effect”); see also DRUMBL, *supra* note 36, at 103 (arguing that a major reason for reform within “the former Yugoslavia is the reality that, by aligning domestic structures to those of the ICTY, those domestic structures become better positioned to receive cases from the ICTY, along with the international support, expertise, and resources”).

75. Burke-White, *supra* note 52, at 324; see also DRUMBL, *supra* note 36, at 103 (arguing that a major reason for reform within “the former Yugoslavia is the reality that, by aligning domestic structures to those of the ICTY, those domestic structures become better positioned to receive cases from the ICTY, along with the international support, expertise, and resources”).

76. See Burke-White, *supra* note 52, at 337-39 (noting the introduction of the War Crimes Chamber and that BiH has “embraced international norms and legal rules regarding the prosecution of war crimes”); see also DRUMBL, *supra* note 36, at 103 (noting that “[i]n the case of the former Yugoslavia, there is some evidence that these transplants are improving the quality of justice by dissipating ethnic bias and promoting transparency in the administration of justice”).

77. See *Prosecutor v. Radovan Stankovic*, Case No. IT-96-23/2-PT, Decision on Referral of Case under Rule 11 *bis* (May 17, 2005) (authorizing an 11 *bis* referral of Radovan Stankovic to BiH).

the domestic jurisdictions of BiH, Croatia and Serbia.⁷⁸ Within her article on ICTY referrals, Sarah Williams even goes so far as to suggest that “[t]he Referral Bench has effectively adopted a presumption of referral.”⁷⁹ It is important to note, however, that the situation was not perfect within BiH at the time of these initial transfers.⁸⁰ Federal detention centers, for example, were still in the process of being completed, causing significant concerns as to where to house transferred defendants.⁸¹ In addition, there remained questions as to the funding available for the defense and the skill and training of the domestic personnel involved.⁸² The ICTY, however, appears to have been convinced that sufficient guarantees were in place to ensure a fair trial and thus, authorized the transfers.⁸³

Although Burke-White does not address the ICTR within his article, further support for his theory can be found within Rwanda. While other nations have expressed a reluctance to accept transferred cases from the ICTR, the Tribunal’s Prosecutor,

78. See Press Release, Referral Bench, Milan Lukic and Sredoje Lukic to be Tried Jointly at the ICTY, MH/MOW/PR1176e (Jul. 20, 2007) (“The Tribunal has to date referred a total of 8 cases involving 13 persons to courts in the former Yugoslavia, mostly to Bosnia and Herzegovina.”). As of November 2008, ten defendants have been transferred to BiH, two to Croatia and one to Serbia. See Completion Strategy of the International Criminal Tribunal for the Former Yugoslavia, *enclosed in* Letter from the President 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, to the President of the Security Council (Nov. 21, 2008), UN Doc. S/2008/729 (2008) (“Ten Accused have been transferred to the War Crimes Section of the State Court of Bosnia and Herzegovina, two Accused have been transferred to the authorities of Croatia, and one Accused has been transferred to Serbia for trial before the domestic courts of these countries.”).

79. Williams, *supra* note 55, at 201.

80. See Burke-White, *supra* note 52, at 346 (noting that the new Bosnian court system “is certainly not without its own problems”); see also Daryl A. Mundis, *The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT’L. L. 142, 154 (2005) (noting deficiencies with BiH’s witness protection programs, its infrastructure and its detention facilities).

81. See Burke-White, *supra* note 52, at 346 (noting that “there are no federal level detention centers as yet” and “[u]ntil a federal level prison is operational, incarceration of convicts will remain a significant concern”); see also Mundis, *supra* note 80, at 154 (noting that the success of 11 *bis* will require the construction of “adequate detention facilities”).

82. See Burke-White, *supra* note 52, at 346 (“The skills and training of domestic personnel are questionable and further training is needed. . . . [And the] [e]quality of arms presents a serious concern and . . . it is uncertain whether an adequate defense can be offered.”); see also Mundis, *supra* note 80, at 154 (noting the need to develop “effective victim and witness protection programs” in BiH).

83. See generally Burke-White, *supra* note 52, at 326; Williams, *supra* note 55, at 179.

Hassan Bubucar Jallow, has noted that Rwanda “actually resents transfers to other jurisdictions and considers that its courts are the natural forum for genocide trials that the International Tribunal will not undertake.”⁸⁴ Following the introduction of Rule 11 *bis*, Rwanda initiated widespread institutional reforms in an effort to meet the requirements for referral.⁸⁵ First, Rwanda built two new prison facilities, in accordance with international standards, to handle any transferred defendants.⁸⁶ On March 16, 2007, Rwanda passed the “Organic Law concerning transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States” (“Transfer Law”).⁸⁷ As the title suggests, this legislation will govern all defendants transferred from the ICTR and establishes the legal framework through which the suspects would be tried.⁸⁸ It states that all cases will be heard before Rwanda’s High Court and establishes extensive fair trials rights for defendants, including presumption of innocence and the right to examine witnesses against them.⁸⁹ It provides for monitoring of both the trials and detention facilities by the ICTR and other international bodies.⁹⁰ Finally, it de-

84. Schabas, *supra* note 9, at 397. See generally Arthur Asimwe, *End of Genocide Tribunal Stirs Emotions in Rwanda*, REUTERS, Jan. 27, 2008, available at <http://www.reuters.com/article/latestCrisis/idUSL27658725> (quoting the leader of a genocide survivors’ group, who stated that “[t]he only viable solution they have is to send these fugitives back home”).

85. See generally *Kanyarukiga* Rwanda Brief, *supra* note 10, ¶¶ 11-33.

86. A special wing was added to a new prison in Mpanga to hold any transferred defendants convicted in Rwanda. It has seventy-three cells and has been “built to international standards” *Kanyarukiga* Rwanda Brief, *supra* note 10, ¶ 28. In addition, Rwanda has added a custom-built remand facility at the Kigali Central Prison to hold transferred defendants while they undergo trial. It contains twelve cells and has already been inspected by the Prosecutor of the ICTR. See *id.* ¶ 29.

87. Organic Law No. 11/2007 of Mar. 16, 2007, Concerning Transfer of Cases of the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States, Official Gazette of The Republic of Rwanda, Year 46, Special Issue of Mar. 19, 2007, p.22, at art. 1, available at <http://www.unhcr.org/refworld/docid/476644652.html> [hereinafter “Transfer Law”], (stating that the Transfer Law shall “regulate the transfer of cases and other related matters, from the International Criminal Tribunal for Rwanda and from other States to the Republic of Rwanda”).

88. See Transfer Law, *supra* note 87, art. 1.

89. See *id.*, art. 2 (“[T]he High Court of the Republic shall be the competent court to conduct on the first instance the trial of cases transferred to Rwanda as provided by this organic law.”); *id.*, art. 13 (outlining the rights of an accused person, which include: (1) a fair and public hearing, (2) presumption of innocence, (3) speedy trial, (4) legal representation, (5) the right to examine witnesses against him and (6) to obtain witnesses on his behalf).

90. See *id.*, art. 19 (“The ICTR Prosecutor shall have the right to designate individ-

clares that the maximum punishment for any transferred defendant convicted within Rwanda is life imprisonment.⁹¹ On July 25, 2007, the GOR passed a second piece of legislation abolishing the death penalty.⁹² As mentioned previously, the issue of punishment had been an early sticking point between Rwanda and the international community.⁹³ The prospect of an 11 *bis* referral, however, proved a sufficient incentive for the Government to reexamine its position and prohibit the use of the death penalty through the passage of Organic Law No. 31/2007.⁹⁴ As with BiH, the reforms instituted by Rwanda suggest that 11 *bis* has been a catalyst for change and, ultimately, brought the nation into greater compliance with international legal norms and human rights standards.⁹⁵

uals to observe the progress of cases transferred to Rwanda in accordance with article 11 *bis* D) iv) of the ICTR Rules of Procedure and Evidence.”); *id.*, art. 20 (“In the event that the ICTR revokes an Order of referral of cases it had transferred to Rwanda pursuant to Rule 11 *bis* of the ICTR Rules of Procedure and Evidence, the accused shall be promptly surrendered to the ICTR together with any files, documents, exhibits and all other additional materials as stipulated in the order.”).

91. See *id.*, art. 21 (“Life imprisonment shall be the heaviest penalty imposed upon a convicted person in a case transferred to Rwanda from ICTR.”).

92. Organic Law No. 31/2007 of July 3, 2007, Relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda, Year 46, Special Issue of July 25, 2007, at art. 3, available at <http://www.unhcr.org/refworld/docid/46bada1c2.html> [hereinafter “Death Penalty Law”] (“In all legislative texts in force before the commencement of this Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions as provided by this Organic Law.”).

93. See *supra* notes 28-30 and accompanying texts (discussing Rwanda’s objection to the ICTR’s prohibition on the death penalty).

94. See Death Penalty Law, *supra* note 92, art. 3 (“In all legislative texts in force before the commencement of this Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions as provided by this Organic Law.”).

95. This claim is further underscored by Rwanda’s actions in the aftermath of the *Munyakazi*, *Kanyarukiga* and *Hategekimana* decisions. As will be addressed in Part II, the ICTR based its denials, in part, on concerns that defendants could face solitary confinement if convicted. In response to these decisions, Rwanda immediately passed a law banning the use of life imprisonment in solitary confinement for defendants transferred from the ICTR. See Press Release, Human Rights Watch, Letter to Rwanda Parliament Regarding the Penalty of Life Imprisonment in Solitary Confinement (Jan. 29, 2009), available at <http://www.hrw.org/en/news/2009/01/29/letter-rwanda-parliament-regarding-penalty-life-imprisonment-solitary-confinement> (stating that Rwanda “adopted legislation on December 1, 2008, barring application of the penalty of life imprisonment in solitary confinement to criminal cases transferred from the ICTR or from abroad”). For more on the chambers’ concerns regarding Rwanda’s penalty structure, see discussion *infra* Part II.b.

II. "FOR THESE REASONS, THE CHAMBER: DENIES THE PROSECUTOR'S REQUEST:" THE 11 *BIS* DECISIONS⁹⁶

In recognition of both Rwanda's reforms and the nation's interest in receiving transferred cases, the ICTR's Office of the Prosecutor made its first 11 *bis* referral requests for Rwanda in 2007. This section will examine decisions from two of the potential transfer cases, *Prosecutor v. Gaspard Kanyarukiga* and *Prosecutor v. Yussuf Munyakazi*.⁹⁷ There are two decisions in Munyakazi, one at the trial level and one at the appellate level.⁹⁸ There is only one decision in Kanyarukiga, reached at the trial level.⁹⁹

At the time of the genocide, Gaspard Kanyarukiga was a businessman in the Kigali and Kibuye prefectures and is accused of planning the massacre of over two thousand Tutsis at the Nyange Catholic Church in Kibuye.¹⁰⁰ He is charged with genocide, or alternatively complicity in genocide, conspiracy to commit genocide and extermination as a crime against humanity.¹⁰¹ As previously mentioned, Yussuf Munyakazi was a wealthy businessman, a commercial farmer and a leader of the Bugurama *Interahamwe* militia group during the genocide.¹⁰² He is accused of instigating killings of Tutsis and is charged with genocide, or complicity in genocide, and extermination as a crime against humanity.¹⁰³

Both chambers, ultimately, choose to deny the 11 *bis* re-

96. *Munyakazi* Trial Decision, *supra* note 1, at 26.

97. See *Kanyarukiga* Trial Decision, *supra* note 12; *Munyakazi* Trial Decision, *supra* note 1; *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11 *bis*, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11 *bis*, ¶¶ 8-20 (Oct. 8, 2008) [hereinafter "*Munyakazi* Appeals Decision"] (denying Prosecutor's 11 *bis* appeal for Yussuf Munyakazi).

98. See *Munyakazi* Appeals Decision, *supra* note 97; *Munyakazi* Trial Decision, *supra* note 1.

99. See *Kanyarukiga* Trial Decision, *supra* note 12.

100. See *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 3 ("The focus of the Indictment is an attack against Nyange church on 15 April 1994, where about 2,000 Tutsi refugees were allegedly killed.").

101. See *id.* ¶ 3 (noting that the Indictment "charges Kanyarukiga with genocide, or in the alternative complicity in genocide, and extermination as a crime against humanity").

102. See *Munyakazi* Trial Decision, *supra* note 1, ¶ 12 ("The Accused is alleged to have been a wealthy businessman, a commercial farmer, and a leader of the Bugurama MRND militia ('Bugurama *Interahamwe*').").

103. See *id.* ¶ 12. The Trial Chamber notes that:

It is alleged that the Accused:

(i) delivered weapons, uniforms and boots to the *Interahamwe*;

quests. Each decision, however, adopts a vastly different tone within its denial. The *Munyakazi* Bench maintains a distrustful attitude of Rwanda, while the *Kanyarukiga* Chamber appears willing, in most instances, to give the nation the benefit of the doubt. Despite the differences in tone, the decisions base their respective denials on similar concerns. This section will now address the three primary considerations of each bench: Rwanda's legal framework, the nation's penalty structure and its ability to guarantee a fair trial.

A. Rwanda's Legal Framework

Before addressing the merits of an argument for referral, both chambers must first satisfy themselves that the requesting state is a "competent national jurisdiction."¹⁰⁴ Under Rule 11 *bis* (A), a case may be referred 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."¹⁰⁵ Clearly, Rwanda satisfies the requirement under Rule 11 *bis* (A) (i) and thus, has personal jurisdiction over the two defendants.¹⁰⁶ Within the *Kanyarukiga* decision, however, Human Rights Watch also questioned Rwanda's subject matter jurisdiction, arguing that the nation's legal framework did not appropriately criminalize the defendant's actions.¹⁰⁷ While the Chamber would not comment on the specific

(ii) incited hatred against Tutsis at the Hotel Ituze in Kamembe, Cyangugu *préfecture*;

(iii) instigated the killing of Tutsis at Kabusunzu in Bugarama;

(iv) at Leonard Bamenyayundi's house in Gisuma Commune, Cyangugu *préfecture*, planned to kill all the displaced Tutsis gathered at Nyarushishi Refugee Camp, and was present at Nyarushishi to execute the plan the following day;

(v) with the Bugurama *Interahamwe*, attacked Tutsi civilians who had sought refuge at Cyangugu Cathedral; and

(vi) attacked and killed Tutsi civilians who sought refuge at three parishes in Cyangugu *préfecture*, and in Bisesero in Kibuye *préfecture*.

Id.

104. *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 6.

105. Rule 11 *bis*, *supra* note 5, (A).

106. See *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 9 (finding that "Kanyarukiga's alleged crimes were committed in Rwanda" and thus, that "Rwandan courts have personal jurisdiction over him"); *Munyakazi* Trial Decision, *supra* note 1, ¶ 16 (noting that Rwanda "has jurisdiction as the State in whose territory the crimes were committed pursuant to Rule 11*bis* (A) (i)").

107. *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 10 ("According to Human Rights

law that would apply to Kanyarukiga, it was convinced that, between Rwanda's domestic law and international obligations, there existed a sufficient legal framework to try the defendant for genocide and crimes against humanity.¹⁰⁸

B. *Rwanda's Penalty Structure*

Once jurisdiction has been established, the chambers must then satisfy themselves, in accordance with Rule 11 *bis* (C), "that the death penalty shall not be imposed or carried out."¹⁰⁹ In 2007, Rwanda passed the "Death Penalty Law," which states that, "[i]n all legislative texts in force before the commencement of this Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions"¹¹⁰ Through reference to this legislation, the *Munyakazi* Chamber concludes that the death penalty will not be imposed if the defendant is transferred.¹¹¹ It does, however, express concern about the alternative punishments available. Article 4 of the Death Penalty law states that if a defendant is given "life imprisonment with special provisions," "a convicted person is kept in isolation."¹¹² The Chamber, therefore, fears that Munyakazi could be kept in solitary confinement, a punishment which it argues is in violation of international human rights standards.¹¹³

Watch, transfer may not be possible due to a potential lack of subject matter jurisdiction."). A similar argument was made in the *Munyakazi* trial. The Chamber did not, however, address the claim within its decision. *See generally* *Munyakazi* Trial decision, *supra* note 1; *see also* Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36-R11bis, Brief of Human Rights Watch as *Amicus Curiae* in Opposition to Rule 11 *bis* Transfer, ¶¶ 21-24 (Mar. 17, 2008) [hereinafter "*Munyakazi* HRW Brief"] (noting that Rwanda's laws "may be insufficient to confer *ratione materiae*, or subject matter, jurisdiction on Rwanda for the acts alleged in the *Munyakazi* Indictment").

108. It specifically looked at Rwanda's Transfer Law and Genocide Law. It also noted that the Genocide Convention and Geneva Conventions were all binding on Rwanda. *See Kanyarukiga* Trial Decision, *supra* note 12, ¶¶ 10-19. Within its decision, the Chamber also addressed questions as to whether Rwanda was capable of trying "modes of participation," such as aiding and abetting. It, ultimately, concluded that Rwandan law provides for the prosecution of alternative forms of responsibility. *See id.* ¶ 21.

109. *Munyakazi* Trial Decision, *supra* note 1, ¶ 16 n.30.

110. Death Penalty Law, *supra* note 91, art. 3.

111. *See Munyakazi* Trial Decision, *supra* note 1, ¶ 24 ("[T]he Chamber is satisfied that, in line with Rule 11*bis* (C), the death penalty will not be imposed in Rwanda.").

112. Death Penalty Law, *supra* note 91, art. 4.

113. *See Munyakazi* Trial Decision, *supra* note 1, ¶¶ 21-22 nn.39, 40 & 41. Within its discussion, it looks to various sources of international law, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights,

While both the Office of the Prosecutor and the GOR assure the Bench that the highest possible penalty is life imprisonment, the Chamber finds that neither party “satisfactorily responded to the Defense submission that this means life imprisonment in isolation.”¹¹⁴ The Chamber, ultimately, concludes that Rwanda’s penalty structure, by allowing for solitary confinement, does not conform to international standards and thus, is a bar to referral.¹¹⁵

This issue is addressed again in the *Munyakazi* Appeals decision.¹¹⁶ Following the confusion within the Trial Chamber regarding “life imprisonment with special provisions,” the GOR attempted to clarify the applicable law through an *amicus curiae* brief.¹¹⁷ Within its brief, it stated that the Transfer Law trumped the Death Penalty Law and subsequently, the highest possible penalty for referred defendants was life imprisonment, not life imprisonment with special provisions.¹¹⁸ In addition, the Government attached an official statement to its brief, confirming that no person transferred from the ICTR could be subject to solitary confinement.¹¹⁹ It argued that such a declaration could be relied upon by Rwanda’s High Court, should any confusion

the African Charter on Human and People’s Rights, the Convention Against Torture and statements by the Human Rights Committee. *See id.* ¶¶ 21-22 nn.39, 40 & 41. The Chamber argues that solitary confinement could be permissible if certain safeguards were in place, like a right to review and limits on time in confinement. It concludes, however, that these safeguards are not in place in Rwanda. *See id.* ¶¶ 30-31.

114. *Id.* ¶ 25 n.48.

115. *See id.* ¶ 32 (finding that the current penalty structure is “not adequate, as required by the jurisprudence of the ICTY and the Tribunal, thus precluding referral to Rwanda”).

116. *See Munyakazi Appeals Decision, supra* note 97, ¶¶ 8-20.

117. *See Munyakazi Rwanda Appellate Brief, supra* note 1, ¶¶ 9-13 (noting that Article 25 of the Transfer Law trumps the solitary confinement provision of the Death Penalty Law).

118. *See id.* ¶ 10 (stating that under the Transfer Law, “[t]he ‘heaviest penalty’ that can be imposed is ‘life imprisonment’ and no more; not life imprisonment with any heavier conditions, such as solitary confinement”).

119. *See id.* (stating that under the Transfer Law, “[t]he ‘heaviest penalty’ that can be imposed is ‘life imprisonment’ and no more; not life imprisonment with any heavier conditions, such as solitary confinement”); *see also id.*, Annex Three (“Statement of the Government of Rwanda in respect of sentence for transfer cases”) (noting that “[t]he Government of Rwanda categorically states that the Death Penalty Law does not and was never intended to amend or to govern the Transfer Law in any respect” and that “[u]nder the Transfer Law the maximum sentence that can be imposed for such persons is one of life imprisonment and not life imprisonment with any special provisions including solitary confinement”).

arise over an appropriate punishment.¹²⁰ Finally, Rwanda offered to obtain an official interpretation of the law from its Parliament.¹²¹ This declaration would reaffirm that life imprisonment is the highest possible punishment and be binding on Rwandan courts.¹²²

Within its decision, the Appeals Chamber dismisses these offers. It notes that the official statement is not, in fact, binding on Rwandan courts and as a result, they would "be free to adopt an alternative interpretation of these laws."¹²³ It also refuses to consider the promised Parliamentary statement, since it has not yet been obtained.¹²⁴ Instead, the Chamber focuses on the confusion between the Death Penalty and Transfer Laws, finding that a "genuine ambiguity" exists as to the punishment provision which would be applied.¹²⁵ It argues that a court could rely upon the Transfer Law, which would mean that the maximum punishment is life imprisonment.¹²⁶ At the same time, the Death Penalty Law states that "[a]ll legal provisions contrary to this Organic Law are hereby repealed."¹²⁷ Since the Death Penalty Law was passed more recently than the Transfer Law, the Chamber argues that it is possible to view it as *lex posterior*¹²⁸ and thus, find that "life imprisonment with special provisions" could apply.¹²⁹ As with the Trial Bench, the Appeals Chamber, ultimately, concludes that the possibility for solitary confinement

120. See *id.* ¶ 11 (noting that the prepared statement can "be relied upon by any Accused and due account will be taken of it by the Rwandan courts").

121. See *id.* ¶ 13 (stating that "an authentic interpretation of the Transfer Law can be obtained from Parliament stating that solitary confinement . . . is not a sentence that can be imposed in transfer cases").

122. See *id.* ¶ 13 (stating that "[s]uch an interpretation is binding on the courts").

123. *Munyakazi Appeals Decision*, *supra* note 97, ¶ 18 (arguing that, "[w]hile Rwandan courts may take note of this statement, it is not binding on them").

124. *Id.* ¶ 18 (arguing that "as such an interpretation has not yet been obtained, the Appeals Chamber cannot take this into consideration").

125. *Id.* ¶ 20 (noting that "there is genuine ambiguity about which punishment provision would apply to transfer cases").

126. *Id.* ¶ 16 (arguing that "[i]t would be plausible to construe the Transfer Law, which states in Article 25 that its provisions shall prevail in the event of inconsistencies with any other relevant legislation, as the *lex specialis* for transfer cases, and thus as prevailing over the more general Abolition of Death Penalty Law").

127. *Munyakazi Trial Decision*, *supra* note 1, ¶ 27.

128. *Lex posterior derogat priori* means that "a later law prevails over an earlier one." BLACK'S LAW DICTIONARY 931 (8th ed. 2004).

129. See *Munyakazi Appeals Decision*, *supra* note 97, ¶ 17.

forms a bar to referral.¹³⁰

Like the *Munyakazi* Chambers, the *Kanyarukiga* Bench finds that the death penalty has been abolished within Rwanda but again, faces a question regarding “life imprisonment with special provision.”¹³¹ While it notes that the Transfer Law provides for a maximum of life imprisonment and is the *lex specialis*¹³² in the field of referrals, it acknowledges the potential conflict with the tenets of the Death Penalty Law.¹³³ Although the Chamber is aware that the legislation could be interpreted such that “life imprisonment with special provisions” would not apply, it worries about the possibility for confusion.¹³⁴ As a result, “the Chamber finds that there is a risk that Kanyarukiga, if transferred and convicted, may be subject to isolation and is therefore not satisfied that he will be protected against isolation.”¹³⁵

In contrast to the *Munyakazi* Bench, the *Kanyarukiga* Chamber addresses this issue in relation to the monitoring system and the potential for revocation.¹³⁶ As previously discussed, 11 bis (D) (iv) states that the Prosecutor may send monitors on his be-

130. See *id.* ¶ 20 (finding that the Trial Chamber did not err in its conclusion barring referral because “the possibility exists that Rwandan courts might hold that a penalty of life imprisonment in isolation would apply to such cases, pursuant to the Abolition of Death Penalty Law”).

131. See *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 94. The *Kanyarukiga* Chamber was also asked to address the issues of arbitrary arrest and the potential conditions within the detention facilities. First, it finds that there is an adequate legal framework in place to prevent arbitrary arrests. See *id.* ¶¶ 87-88. In addition, it concludes that the conditions of detention appear satisfactory. It notes that new prisons have been built and that Rwanda has allowed for monitoring by international bodies, like the International Committee for the Red Cross. See *id.* ¶¶ 91-93. Should any problems arise with arbitrary arrest or problematic conditions of detention, the Chamber finds that such issues would come under the purview of the established monitoring system. See *id.* ¶¶ 88, 92-93.

132. *Lex specialis* refers to the maxim in international law that specific law trumps general law. For a discussion of the doctrine see Report of the International Law Commission on its Fifty-eighth Session, May 1-June 9, 2006, July 3-Aug. 11 2006, U.N. GAOR, 61st Sess., Supp. No. 10, at 408-10, U.N. Doc. A/61/10, available at <http://un.org/ga/61/documentation/list.shtml>.

133. See *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 96 (noting that, while “these two laws may be interpreted to the effect that ‘life imprisonment with special provision’ does not apply within the field of application of the Transfer Law, the legal situation is nevertheless unclear”).

134. *Id.* (“[T]he legal situation is nevertheless unclear.”).

135. *Id.*

136. See *id.* ¶ 103 (“The Chamber considers the suggested monitoring system satisfactory and has taken this into account in its deliberations.”).

half to oversee the national proceedings.¹³⁷ Within its decision, the *Kanyarukiga* Chamber notes that the Prosecutor has requested assistance with monitoring from the African Commission on Human and People's Rights and establishes that it "has no reason to doubt that the Commission has the necessary qualifications to monitor trials."¹³⁸ In addition, it acknowledges Rwanda's past cooperation with outside bodies, like the International Committee for the Red Cross, and its promise to facilitate the future work of the monitoring body.¹³⁹

While the *Munyakazi* Chamber pays little to no attention to monitoring and revocation, the *Kanyarukiga* Bench includes it as a key factor within its decision.¹⁴⁰ The safety net provided by monitoring, in fact, allows the Chamber to dismiss some of the defense's arguments—like concerns about the future funding of legal aid—and side in favor of Rwanda.¹⁴¹ On the issue of punishment, however, the Chamber finds that the prospect of monitoring cannot "eliminate the risk of solitary confinement in case of life imprisonment."¹⁴² As with *Munyakazi*, the *Kanyarukiga* Chamber, ultimately, finds that the penalty structure in place forms a bar to referral.¹⁴³

C. Fair Trial Guarantees

The second component of Rule 11 *bis* (C) requires that a chamber "satisfy itself that that the accused will receive a fair trial in the courts of the State concerned"¹⁴⁴ While *amicus* parties, like Human Rights Watch ("HRW"), worry that the defend-

137. See *supra* note 61 and accompanying text (discussing the monitoring provision of Rule 11 *bis*).

138. *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 100.

139. See *id.* ¶¶ 91-93, 101 (noting that Article 23(2) of the Transfer Law "provides for inspection by the International Red Cross Committee (ICRC) or an observer appointed by the ICTR President").

140. See *id.* ¶ 103 (noting that the Chamber has considered the monitoring system within its deliberations).

141. See *id.* ¶ 103 (noting that the Chamber's view of the monitoring system "has led to the rejection of some of the objections against transfer").

142. *Id.* ¶ 103.

143. See *id.* ¶ 104 (concluding "there is a risk that Kanyarukiga, if convicted to life imprisonment there, may risk solitary confinement due to unclear legal provisions in Rwanda"). Since these decisions, Rwanda has passed a law specifically prohibiting the use of solitary confinement for transferred suspects. See Human Rights Watch, *supra* note 95, ¶ 2.

144. See *Munyakazi* Trial Decision, *supra* note 1, ¶ 16 n.30.

ants will fail to receive a wide variety of fair trial protections, the chambers focus primarily on two important guarantees: the right to a free and independent judiciary and the right to call witnesses in one's defense.¹⁴⁵

1. Judicial Independence

In the *Munyakazi* decision, the Chamber questions the independence of the judiciary within Rwanda.¹⁴⁶ While it acknowledges that the right to an independent tribunal is guaranteed in theory, it questions whether sufficient safeguards exist to ensure this right in practice.¹⁴⁷ Much of their suspicion is based on the past behavior of Rwanda in relation to the genocide trials. The Chamber, for example, points to the Government's previous condemnation of foreign judges, who attempted to indict or prosecute former members of the Rwandan Patriotic Forces ("RPF").¹⁴⁸ In addition, it recalls Rwanda's decision to bar the ICTR Prosecutor in 2000, following the successful appeal of Jean-Bosco Barayagwiza.¹⁴⁹ Given the Government's past willing-

145. See *Kanyarukiga* Trial Decision, *supra* note 12, ¶¶ 34-42 (discussing judicial independence), ¶¶ 63-81 (addressing the availability and protection of witnesses); *Munyakazi* Trial Decision, *supra* note 1, ¶¶ 33-49 (discussing judicial independence), ¶¶ 50-66 (addressing the availability and protection of witnesses). The *Kanyarukiga* decision, in fact, considers a large number of fair trial issues including presumption of innocence, *Kanyarukiga* Trial Decision, *supra* note 12, ¶¶ 43-45; availability of counsel, *id.* ¶¶ 54-55; right to an effective defense, *id.* ¶¶ 52-53; legal aid, *id.* ¶¶ 56-58; working conditions for lawyers, *id.* ¶¶ 59-62; and double jeopardy, *id.* ¶¶ 82-83.

146. See *Munyakazi* Trial Decision, *supra* note 1, ¶ 40 (arguing that "while Rwandan legislation enshrines the principle of judicial independence, which by definition includes guarantees against outside pressures, the practice has been somewhat troubling").

147. See *id.* ¶ 40 (arguing that "while Rwandan legislation enshrines the principle of judicial independence . . . the practice has been somewhat troubling").

148. The Rwandan Patriotic Force ("RPF") is a political organization formed by Tutsi refugees during their exile in Uganda. Its armed wing invaded Rwanda during the genocide and ultimately, defeated the Hutu extremists. It is now the ruling party in Rwanda and its former military commander, Paul Kagame, is the country's current president. See generally POWER, *supra* note 16, at 336, 380, 485. In 2006, a French judge issued a report urging the national prosecutor to issue international arrest warrants against former RPF members. The Government of Rwanda responded by criticizing the French government, the judge and his conclusions, declaring that "this criminal attempt to distort history should be dismissed with the contempt it deserves." *Munyakazi* Trial Decision, *supra* note 1, ¶ 44. The decision also recalls an attempt by the Rwandan parliament to prosecute a Spanish judge for "negationism of genocide," after the judge issued an indictment against 40 high ranking RPF officers. *Id.* ¶ 45.

149. See *id.* ¶ 41. Jean-Bosco Barayagwiza was convicted by the ICTR and sentenced to life imprisonment. His conviction was, however, overturned on appeal, after

ness to question or attack unpopular decisions, the Chamber fears that the domestic judicial branch will face outside interference when it receives referred cases.¹⁵⁰

In addition, the Chamber expresses concerns about the structure of the court itself.¹⁵¹ After a careful examination of the judicial systems throughout Eastern, Central and Southern Africa, Rwanda created a high court with a single judge.¹⁵² Within its decision, the Chamber questions this structure, concerned that a single individual will be more susceptible to outside pressure from the Government. It argues, however, that "this danger would be substantially reduced if the trial were conducted by a panel of three or more judges."¹⁵³ In light of these concerns, the Chamber bars referral, concluding that Rwanda cannot guarantee judicial independence.¹⁵⁴

In contrast, both the *Munyakazi* Appeals decision and the *Kanyarukiga* decision find that Rwanda possesses sufficient judicial independence to permit transfer.¹⁵⁵ Within its decision, the *Kanyarukiga* Chamber emphasizes the extent of the fair trial guarantees found within the Rwandan Constitution and the Code of Criminal Procedure.¹⁵⁶ While it acknowledges that the

the Appeals Chamber found that his fair trials rights had been violated. *See generally* Prosecutor v. Barayagwiza, Case No. ICTR-97-19, Decision, ¶¶ 112-13 (Nov. 3, 1999) (finding that the Appellant was tried on charges for which he was belatedly indicted and ordering for his immediate release).

150. *See Munyakazi* Trial Decision, *supra* note 1, ¶ 40 ("The Chamber is concerned that these actions by the Rwandan Government . . . show a tendency to pressure the judiciary, a pressure against which a judge sitting alone would be particularly susceptible.").

151. *See id.* ¶ 39 (noting concern 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").

152. *See id.* ¶ 35. It also noted that capital cases in the High Courts of Kenya, Tanzania, Uganda, South Africa, Botswana and Zambia were presided over by a single judge. *See id.*

153. *Id.* ¶ 49.

154. *Id.* ¶ 49 ("[T]he composition of the High Court does not accord with the right to be tried by an independent tribunal, and the right to a fair trial, thus precluding referral of this case of Rwanda.").

155. *See Munyakazi* Appeals Decision, *supra* note 97, ¶ 29 (concluding that, "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" a denial); *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 42 (concluding that concerns about judicial independence do not "constitute a sufficient basis to deny transfer to the judicial bodies under the Transfer Law").

156. *See Kanyarukiga* Trial Decision, *supra* note 12, ¶ 35. The Chamber discusses the following articles in the Constitution: 140 (establishing judicial independence and

"concept of judicial independence is relatively new in Rwanda," it finds that the examples of interference provided by the defense do not focus specifically on the High and Supreme Courts, nor show that the alleged interference was successful.¹⁵⁷

The Chamber also dismisses defense claims relating to the appointment and composition of the judiciary.¹⁵⁸ It is not, for example, persuaded by the defense argument that executive involvement in judicial appointments in Rwanda is prejudicial, noting that this is common practice in many countries and does not, by itself, suggest that the courts lack independence.¹⁵⁹ The defense also claims that the judiciary is comprised primarily of Tutsis and thus, biased against Hutus.¹⁶⁰ The Court again rejects this argument, stating that it has not been provided with statistical information to support the claim.¹⁶¹ It also points to the considerable acquittal rate for genocide cases in Rwanda, noting that "[m]any accused of Hutu origin have been acquitted by the ordinary courts"¹⁶²

Finally, the Bench addresses Rwanda's single judge system. Unlike the *Munyakazi* Trial Chamber, the *Kanyarukiga* Bench accepts the structure in place, noting that "international legal instruments, including human rights conventions, do not require that a trial or an appeal has to be heard by a specific number of judges in order to be fair and independent."¹⁶³ It further states

financial and administrative autonomy); 142 (judges hold office for life); 157 and 158 (Superior Council of the Judiciary is responsible for the appointment, discipline and removal of judges). *See id.* ¶ 35. It also discusses Article 1 of the Code of Criminal Procedure, which provides for trials by a competent, independent and impartial tribunal. *See id.* ¶ 35.

157. *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 38 ("[A]lthough some of the illustrations provided by the *amici* appear well-founded, they are mostly of a general nature and do not focus specifically on the High Court or Supreme Court which will adjudicate cases within the framework of the Transfer Law.").

158. *See Kanyarukiga* Trial Decision, *supra* note 12, ¶¶ 36-37.

159. *See id.* ¶ 36 ("[E]xecutive involvement in connection with judicial appointments exists in many countries. This does not in itself mean that the courts lack independence.").

160. *See id.* ¶ 37 ("[T]hat there has been a tendency to fill higher positions, also in the judiciary, with Tutsis and exclude Hutus" and that "[t]he implication is that the courts may be biased, or that judicial proceedings cannot take place in a sufficiently calm and dispassionate climate.").

161. *See id.* ("The Chamber has not been provided with any statistical information, neither generally nor in relation to the ethnicity of judges appointed to the High Court and the Supreme Court.").

162. *Id.*

163. *Id.* ¶ 40.

that “Rwanda has had single judge trials in genocide cases since 2004, and there is no information available that the acquittal rate has been lower in such trials.”¹⁶⁴

Similar arguments are made by the *Munyakazi* Appeals Chamber, which, ultimately, overturns the lower court’s finding regarding judicial independence.¹⁶⁵ Within its decision, the Appeals Bench openly questions the conclusions of the Trial Chamber, noting that the earlier decision fails to cite concrete examples of domestic interference.¹⁶⁶ While it acknowledges the potential danger inherent in allowing a single judge to hear politically sensitive cases, it questions the Trial Chamber’s recommendation for a panel of judges, noting that “there is 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.”¹⁶⁷

The Appeals Chamber also criticizes the lower court’s focus on Rwanda’s past behavior toward foreign judges and the ICTR.¹⁶⁸ It questions whether Rwanda’s response to foreign indictments is an appropriate indicator of how the Government would react to unfavorable domestic decisions.¹⁶⁹ It also chastises the Trial Chamber for failing to adequately consider

164. *Id.* Within its discussion, the Chamber also rejects arguments that the Rwandan judges lack the necessary competence to try such cases, noting their previous experience in adjudicating genocide trials. *See id.* ¶ 41.

165. *See Munyakazi Appeals Decision, supra* note 97, ¶¶ 29, 31 (finding that “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”).

166. *See id.* ¶¶ 26, 29 (while the Appeals Chamber acknowledges that the Trial Bench examined a United States State Department Report on Human Rights Practices in Rwanda, it concludes that this report provides insufficient support for the Chamber’s findings because it “states only in very general terms that there are constraints on judicial independence”).

167. *Id.* ¶ 26.

168. *See id.* ¶ 28 (noting that the ICTR has acquitted five people since the *Barayagwiza* Decision and “that Rwanda has not suspended its cooperation with the Tribunal as a result of these acquittals”). In addition, the Appeals Chamber argued that the “Trial Chamber did not take into account the continued cooperation of the Rwandan government with the Tribunal” and that “the reaction of the Rwandan government to foreign indictments does not necessarily indicate how Rwanda would react to rulings by its own courts[.]” *Id.*

169. *Id.* (finding that Rwanda’s reaction to “foreign indictments does not necessarily indicate how Rwanda would react to rulings by its own courts, and thus does not

Rwanda's recent history of cooperation with the Tribunal.¹⁷⁰ Finally, the Appeals Bench argues that the Trial Chamber did not appropriately address the prospect of monitoring and revocation.¹⁷¹ As a result of these considerations, the Appeals Chamber ultimately overturns the lower court's finding on judicial independence.¹⁷²

2. Witness Availability and Protection

The chambers' second focus is on witness availability and protection. As both decisions note, a number of witnesses in past genocide trials have either been killed or faced violence and harassment because of their testimony.¹⁷³ According to a U.S. State Department report on human rights practices in Rwanda, between twelve and twenty survivors were killed during 2006, some as a result of the testimony they gave or intended to give.¹⁷⁴ Within its *amicus*, HRW argues that at least eight survivors of the genocide were killed in 2007.¹⁷⁵ Furthermore, HRW documented ten cases involving witnesses before the ICTR who were arrested, re-arrested or harassed upon their return to

constitute a sufficient reason to find that there is a significant risk of interference by the government in transfer cases").

170. *See id.* ¶ 28 n.74 (specifically noting a statement made by the Prosecutor of the Tribunal to the United Nations Security Council on June 17, 2008, confirming that "Rwanda continues to cooperate effectively with the Tribunal"). The Chamber also notes that the Tribunal has acquitted five persons since Barayagwiza and "that Rwanda has not suspended its cooperation with the Tribunal as a result of these acquittals." *See id.* ¶ 28.

171. *See id.* ¶ 30 (noting that "the Trial Chamber erred in failing to take into account the availability of monitoring and revocation procedures under Rule 11bis(D) (iv) and (F) of the Rules").

172. *Id.* ¶ 31 (stating that "the Appeals Chamber grants this ground of appeal"). The Chamber, nevertheless, upholds the Trial Court's decision, finding that sufficient problems existed with Rwanda's penalty structure and with the availability and protection of witnesses to warrant a denial. *See id.* ¶ 50.

173. *See Munyakazi* Trial Decision, *supra* note 1, ¶ 51 (noting the Defense submission that "[t]hose who wish to testify for someone accused of genocide are subjected to harassment, and, if they persist, risk being subjected to violence and assassination"); *see also Kanyarukiga* Trial Decision, *supra* note 12, ¶ 63 (noting Defence, International Criminal Defence Attorneys Association ("ICDAA") and Human Rights Watch arguments that "Defence witnesses in particular face threats and harassment, and witnesses residing outside Rwanda will be unwilling to testify").

174. Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *Country Reports on Human Rights Practices—Rwanda* (2006) (stating that "unidentified individuals killed between 12 and 20 genocide survivors and injured 32 in attacks during the year").

175. *Munyakazi* HRW Brief, *supra* note 107, ¶ 96 (stating that "[a]t least eight survivors were murdered in 2007").

Rwanda.¹⁷⁶

In an effort to address this problem, Rwanda strengthened witness protection guarantees within its Transfer Law. Article 14 states that, in cases of referred defendants, the High Court “shall provide appropriate measures for witnesses and shall have the power to order protective measures” similar to those set forth in the ICTR’s statute.¹⁷⁷ Under the Transfer Law, witnesses have immunity when traveling within Rwanda and courts have the right, when deemed necessary, to order closed sessions.¹⁷⁸

Despite these theoretical guarantees, the *Munyakazi* Chamber is concerned about the actual safeguards in place for witnesses. It, for example, expresses dissatisfaction with Rwanda’s witness protection program, arguing that it is understaffed.¹⁷⁹ It also worries that potential witnesses will not make use of the service, because it is run through the police and Office of the Prosecution and as a result, is seen as biased and partisan.¹⁸⁰

Within its decision, the *Kanyarukiga* Chamber provides far greater leeway to the witness protection program. The Bench, for example, notes that the service is experienced, having handled approximately nine hundred previous witnesses.¹⁸¹ It also discounts concerns about its financial stability, arguing that “a mere risk that future funding may not be available is not a sufficient reason to deny transfer.”¹⁸² While it acknowledges the past instances of witness harassment, it concludes that “the large majority of witnesses have testified without such consequences” and that, in general, witnesses will not “face risks if they testify in

176. *Id.* ¶ 97 (“HRW has documented approximately 10 cases where persons who testified for the defence before the ICTR were subsequently arrested, re-arrested, subjected to worse conditions of incarceration or otherwise harassed after returning to Rwanda.”).

177. Transfer Law, *supra* note 86, art. 14; *see also Kanyarukiga* Trial Decision, *supra* note 12, ¶ 65.

178. *See* Transfer Law, *supra* note 86, art. 14; *see also Kanyarukiga* Trial Decision, *supra* note 12, ¶ 65.

179. *Munyakazi* Trial Decision, *supra* note 1, ¶ 62 (stating that it has “serious concerns regarding the operation of the Rwandan witness protection program. The Chamber observes that the program is understaffed, employing only 16 individuals to serve the entire country”).

180. *See id.* ¶ 62 (questioning “whether Defence witnesses will actually avail themselves of the program, given that the program is administered by the Prosecutor and the Police”).

181. *See Kanyarukiga* Trial Decision, *supra* note 12, ¶ 67 (observing that “about 900 witnesses have been subject to protection since the service was established”).

182. *Id.*

transfer proceedings.”¹⁸³ Unlike the *Munyakazi* Bench, the *Kanyarukiga* Chamber is, once again, willing to rely on the monitoring mechanism, noting that the monitors would have the right to intervene should any violent incidents occur.¹⁸⁴ It does, however, share concerns about the potential witnesses’ perception of the program. Given its official connections, the Chamber worries that future witnesses will be unwilling to trust the program or rely upon its services.¹⁸⁵

Both chambers also address Rwanda’s history of prosecutions for “genocidal ideology.”¹⁸⁶ In 2003, Rwanda passed the “Genocide Law” which, among other things, prohibits the negation of genocide.¹⁸⁷ It also bans “any gross minimalization of the genocide, any attempt to justify or approve of genocide, and any destruction of evidence of the genocide.”¹⁸⁸ Within their respective decisions, both chambers express a concern that a broad interpretation of this law could lead to the prosecution of defense witnesses who deny a defendant’s role in the genocide.¹⁸⁹ The

183. *Id.* ¶ 69.

184. *See id.* (noting that “[s]hould incidents occur, it will be for the High Court or the Supreme Court to initiate investigation, clarify the facts and ensure the necessary protection” and that “[i]f this is not done, or if the measures taken are insufficient, it would be a matter for evaluation by the monitoring mechanism”).

185. *See id.* ¶ 70 (noting that “the link between the witness protection service and the police may, in the Rwandan context, reduce the willingness of some potential Defence witnesses to testify” and that “[t]he fact that the national prosecutor’s office is responsible for the protection of all witnesses may also be noted by fearful witnesses”).

186. *See id.* ¶ 72 (noting that the material provided “indicates that in several instances, the concept [of genocidal ideology] has been given a wide interpretation” and that “[t]here are examples of persons being too afraid to appear as witnesses for persons who allegedly were innocent.”); *see also* *Munyakazi* Trial Decision, *supra* note 1, ¶ 61 (noting that “Defence witnesses may fear being accused of ‘genocidal ideology’”).

187. *See* *Munyakazi* HRW Brief, *supra* note 101, ¶ 32 (noting that the 2003 law “prohibits ‘any negation of genocide, any gross minimalization of the genocide, an attempt to justify or approve of genocide, and any destruction of evidence of the genocide’”).

188. *Id.*

189. *See* *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 71 (“[A]n expansive interpretation and application of the prohibition of ‘genocidal ideology’ will lead to Defence witnesses not being willing to testify, as they are afraid of being accused of harbouring this ideology.”); *see also* *Munyakazi* Trial Decision, *supra* note 1, ¶ 61 (noting that “Defence witnesses may fear being accused of ‘genocidal ideology’”). Both benches rely heavily on the information presented by HRW within their respective conclusions. The *Kanyarukiga* Chamber, for example, notes HRW’s argument that “the concept has been considered to cover ‘a broad spectrum of ideas, expression, and conduct, often including those perceived as being in opposition to the policies of the current government’ and ‘questioning the legitimacy of detention of a Hutu’” *Kanyarukiga* Trial Deci-

chambers, ultimately, conclude that some Rwandans may have a legitimate fear of being charged with "genocidal ideology" and thus, be unwilling to testify for the defense.¹⁹⁰

Finally, the benches address the potential difficulties in securing testimony from the large number of defense witnesses living overseas. As both decisions note, defendants at the ICTR rely heavily upon witnesses who have left Rwanda and settled abroad.¹⁹¹ While these people may be willing to travel to the ICTR, many refuse to return to Rwanda. Some of those living abroad are simply afraid to leave their new homes, worried that it will hurt their efforts to obtain asylum or new citizenship.¹⁹² Others fear retribution or prosecution if they travel back to Rwanda.¹⁹³ Within its *amicus* brief, HRW states that it had interviewed over twenty four Rwandans living abroad about their willingness to testify in an *11 bis* proceeding in Kigali and that none were willing to do so.¹⁹⁴

Rwanda, in fact, recognized the potential difficulty in convincing its expatriates to return and in Article 14 of the Transfer Law, provided that "[a]ll witnesses who travel from abroad to Rwanda to testify in the trial of cases referred from the ICTR

sion, *supra* note 12, ¶ 72 n.104 (quoting HRW); *see also* *Munyakazi* Trial Decision, *supra* note 1, ¶ 61.

190. *See Kanyarukiga* Trial Decision, *supra* note 12, ¶ 72 (stating that "the Chamber cannot exclude that some potential Defence witnesses in Rwanda may refrain from testifying because of fear of being accused of harbouring 'genocidal ideology'"); *see also* *Munyakazi* Trial Decision, *supra* note 1, ¶ 61 (noting that "Defence witnesses may fear being accused of 'genocidal ideology'").

191. *See Kanyarukiga* Trial Decision, *supra* note 12, ¶ 76 (noting that the Kanyarukiga Defence "states that most of its witnesses are residing abroad" and that "[t]his is not unusual at the ICTR"); *Munyakazi* Trial Decision, *supra* note 1, ¶¶ 63-64 (noting that "most Defence witnesses reside outside of Rwanda" and that "[t]he Chamber considers that in the context of Rwanda, this places the Defence in a disadvantageous position with regard to the right to obtain the attendance and examination of witnesses"). One defense lawyer interviewed by HRW estimated that ninety percent of his potential witnesses lived overseas. *See Munyakazi* HRW Brief, *supra* note 105, ¶ 38.

192. *See Munyakazi* HRW Brief, *supra* note 105, ¶ 105 ("Even Rwandans otherwise willing to travel to Rwanda might be reluctant to do so because returning to their home country could prevent their obtaining asylum or delay their obtaining citizenship in their countries of residence.").

193. *See id.* ¶ 101 (stating that "defence witnesses have expressed fears of recrimination, arbitrary detention and false charges" and that "[t]hey express these fears for themselves as well as for their family members").

194. *Id.* ¶ 104 ("HRW questioned some two dozen Rwandans living abroad about their willingness to travel to Rwanda to testify for the defence in cases transferred under article 11 *bis*; none was willing to do so.").

shall have immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials.”¹⁹⁵ For those who remain unwilling to testify in country, the GOR has also provided for video-link testimony within its courtrooms.¹⁹⁶

While the chambers acknowledge these theoretical protections, they, nevertheless, conclude that “many Rwandans in the Diaspora will be afraid to testify in Rwanda.”¹⁹⁷ In turn, they dismiss the video-link option as overly prejudicial, arguing that a different weight could be attributed to the prosecution witnesses, who testify in court, than the defense witnesses, who testify via a television.¹⁹⁸ While the *Kanyarukiga* Chamber is more willing to excuse problems by relying on the monitoring mechanism, it admits that, in this situation, monitoring can not overcome the potential bias to the prosecution.¹⁹⁹ The chambers, ultimately, find that the defendants will not “be able to call witnesses residing outside Rwanda to the extent and in a manner which will ensure a fair trial if [their] case[s] [are] transferred” and thus, deny referral.²⁰⁰

195. Transfer Law, *supra* note 86, art. 14.

196. See *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 78 (noting “that witnesses residing abroad may be heard by video-link conference, and that the necessary facilities exist in Rwanda”); see also *Munyakazi* Trial Decision, *supra* note 1, ¶ 65 (arguing that “the availability of video-link facilities is not a complete solution to obtaining the testimony of the witnesses residing outside of Rwanda”).

197. See *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 75. The *Kanyarukiga* Chamber argues that it was persuaded by the *amicus curiae* briefs of ICDA, HRW and the *Kanyarukiga* Defence. See also *Munyakazi* Trial Decision, *supra* note 1, ¶ 59 (noting that “the Chamber shares the concerns expressed by the Defence, the ICDA and HRW, that, under the current conditions in Rwanda, it is likely that [fair trial] rights would likely be violated”).

198. See *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 80 (arguing that “the hearing of most Prosecution witnesses in the courtroom while most of the Defence witnesses either refuse to give evidence or testify by video-link would not be in conformity with” the principle of equality of arms); *Munyakazi* Trial Decision, *supra* note 1, ¶ 65 (“[I]f the majority of Defence witnesses are heard via video-link, while the majority of those for the Prosecution are heard in person, the right to examine witnesses under the same conditions, and consequently the principle of equality of arms, is undermined.”).

199. See *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 80 (arguing that there is a real risk that defence witnesses will either refuse to testify or testify via video-link, “even if the trial is subject to monitoring”).

200. *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 81; see also *Munyakazi* Trial Decision, *supra* note 1, ¶ 66 (finding that “the Accused’s fair trial right to obtain the attendance of, and to examine, Defence witnesses under the same condition as witnesses called by the Prosecution” cannot be guaranteed in Rwanda).

D. *The Chambers' "Concluding Remarks"*

While both chambers refuse the Prosecutor's 11 *bis* requests, fearing that the defendants will be subjected to life imprisonment in isolation and will not receive the necessary fair trial guarantees, each decision attempts to end on a positive note.²⁰¹ The *Kanyarukiga* decision concludes that "the Republic of Rwanda has made notable progress in improving its judicial system."²⁰² The *Munyakazi* decision takes this praise one step further, noting the "positive steps taken by Rwanda to facilitate referral" and promising that "if Rwanda continues along this path, the Tribunal will hopefully be able to refer future cases to Rwandan courts."²⁰³

III. "IF RWANDA CONTINUES ALONG THIS PATH . . . : " THE FUTURE OF RULE 11 BIS²⁰⁴A. *An Argument for Greater Leeway*

Having outlined the reasons discussed within each decision, this Note will now assess the different approaches taken by the *Munyakazi* and *Kanyarukiga* Chambers. It, ultimately, comes down to a difference in tone. Within the *Munyakazi* Trial decision, the Chamber appears distrustful of Rwanda and unwilling to grant the nation any flexibility. The *Kanyarukiga* decision, in contrast, adopts a much more reasonable tone. It expresses a greater willingness to rely on the monitoring mechanism and thus, appears more open to giving Rwanda the benefit of the doubt on contentious issues.

By adopting such different tones, the two decisions point to an underlying sense of confusion within the ICTR as to the degree of leeway which should be granted to Rwanda. The ICTR needs to recognize, however, that it is no longer dealing with the same country that banned the Tribunal Prosecutor in 2000. Faced with the prospect of 11 *bis* referrals, Rwanda has made

201. See *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 104 (concluding that "the Republic of Rwanda has made notable progress in improving its judicial system"); see also *Munyakazi* Trial Decision, *supra* note 1, ¶ 67 (noting the "positive steps taken by Rwanda to facilitate referral" and promising that "if Rwanda continues along this path, the Tribunal will hopefully be able to refer future cases to Rwandan courts").

202. *Kanyarukiga* Trial Decision, *supra* note 12, ¶ 104.

203. *Munyakazi* Trial Decision, *supra* note 1, ¶ 67.

204. *Id.*

significant changes as a nation. Through its widespread reforms, it has demonstrated a good faith effort to improve its legal structure and guarantee greater rights to defendants.²⁰⁵ It has also opened itself up to monitoring and established its willingness for the ICTR, the Red Cross and other international bodies to oversee its progress.²⁰⁶

In the face of this good faith effort, it is important that the ICTR adopt a more reasoned and liberal attitude towards Rwanda. When one considers the importance of these cases for improving relations between the Tribunal and Rwanda, for strengthening domestic institutions and for assisting with national reconciliation, it appears clear that the *Kanyarukiga* decision is a better approach for the ICTR. The *Kanyarukiga* Bench seems to recognize the changes made by Rwanda, willing to give the nation the benefit of the doubt and rely on future monitoring in those situations where potential trouble could arise.²⁰⁷ In contrast, the *Munyakazi* Trial Chamber appears suspicious and even, prejudiced.

The most glaring example of this contrast arises out of the discussion over judicial independence. While both chambers share a concern that the “concept of judicial independence is relatively new in Rwanda,” the *Kanyarukiga* Chamber is satisfied that the defendant can receive a fair and independent trial.²⁰⁸ It

205. See *supra* notes 85-92 and accompanying text. Rwanda's good faith effort has been further demonstrated in the wake of the *Kanyarukiga*, *Munyakazi* and *Hategekimana* decisions. In response to the ICTR's complaints regarding the nation's penalty structure, Rwanda passed a law in December 2008 which prohibited solitary confinement for suspects transferred from the ICTR. See *supra* note 95 and accompanying text.

206. See *supra* note 90 and accompanying text. In addition, it is important to remember that a referral is reversible. Rule 11 *bis* allows the ICTR to take back any case which it believes is not experiencing a fair trial or a diligent prosecution. In fact, the *Munyakazi* Appeals Chamber chastised the Trial Bench for failing to consider this possibility, noting that “the African Commission on Human and People's Rights (‘African Commission’), which has undertaken to monitor the proceedings in transfer cases . . . could inform the Prosecutor and the Chamber of any concerns regarding the independence, impartiality or competence of the Rwandan judiciary.” See *Munyakazi* Appeals Decision, *supra* note 97, ¶ 30. For Rwanda, a nation seeking international legitimacy and the chance to become further involved with the genocide prosecutions, revocation of a case would be the ultimate blow.

207. See *supra* notes 136-41 and accompanying text (discussing *Kanyarukiga* case in relation to monitoring system).

208. See *supra* notes 156-64 and accompanying text (discussing interference with the judiciary, fair trial guarantees and Rwanda's single judge system).

bases its conclusion on fact, noting that “Rwanda has had single judge trials in genocide cases since 2004, and there is no information available that the acquittal rate has been lower in such trials.”²⁰⁹ When a defense claim is not grounded in research or backed up by statistics, as seen with the argument relating to an ethnically biased judiciary, the Chamber simply dismisses it.²¹⁰ By better grounding its decision with facts and by allowing room for monitoring and revocation, the *Kanyarukiga* Chamber appears as a court should: reasoned, objective and logical.

In contrast, the *Munyakazi* Bench seems distrustful and skeptical. The Chamber appears convinced that an independent tribunal will not be possible within Rwanda and yet, fails to cite supporting evidence. It argues that there is a strong chance of executive interference but, as noted by the Appeals Chamber, “did not refer to any information demonstrating actual interference by the Rwandan government in any cases before the Rwandan courts.”²¹¹ The closest the Chamber comes to grounding its decision in fact is to recall Rwanda’s past behavior toward the ICTR and foreign judges.²¹² As noted by the Appeals Chamber, however, Rwanda’s reaction to foreign judges, and particularly those from a nation with which it has a contentious relationship, like France, provides little indication of how it will behave toward a domestic court.²¹³ While its past treatment of the ICTR is more relevant, the event in question, the banning of del Ponte, still occurred almost a decade ago and prior to the introduction of Rule 11 *bis*. As the Appeals Chamber notes, and the Trial Chamber omits, relations between the ICTR and Rwanda have been amicable since then.²¹⁴

Within its discussion, the *Munyakazi* Bench also questions

209. See *supra* note 164 and accompanying text.

210. See *supra* notes 157-64 and accompanying text (dismissing complaints relating to interference with the judiciary and Rwanda’s single judge system).

211. See *supra* note 162 and accompanying text. This is particularly damning when one considers, as the *Kanyarukiga* Chamber notes, that Rwanda has held single judge trials since 2004 and there is “no information available that the acquittal rate has been lower in such trials.” See *supra* note 164 and accompanying text.

212. See *supra* notes 148-50 and accompanying text (recalling Rwanda’s ban on the ICTR and the nation’s past criticism of French and Spanish judges).

213. See *supra* notes 168-69 and accompanying text (questioning whether the reaction of the Rwandan government to foreign indictments is a true indicator of how it will behave towards a national court).

214. See *supra* note 170 and accompanying text (discussing recent cooperation between Rwanda and the ICTR).

Rwanda's chosen court structure, arguing that a single judge system is too susceptible to outside interference.²¹⁵ It does not, however, ground this conclusion on past examples of interference or point to requirements set forth by international human rights conventions.²¹⁶ Instead, the Chamber seems to simply prefer a system of its own choosing.²¹⁷

By failing to point to specific examples or rely upon statistics, the *Munyakazi* Chamber opens itself up to claims that it is paternalistic and possibly, even prejudiced. Throughout this section of the decision, the underlying message is that there is a different standard for African nations. It is unlikely, for example, that the ICTR would hesitate to transfer a case to the United States, irrespective of whether the defendant would be tried before a single judge. In fact, the ICTR has already transferred two defendants to France, where their cases will be heard by an individual judge.²¹⁸ When it comes to Rwanda, however, the Chamber expects something more. One Rwandan judge is simply not enough. In order for a Rwandan court to be fair and free from outside interferences, it is necessary for there to be multiple judges, as though, through sheer numbers, the Africans may be able to prevail against an interfering government. While there is some validity to the Bench's underlying concern about politically sensitive cases in Rwanda, it is lost within the Chamber's distrustful tone. Instead, the *Munyakazi* Bench sets up a larger question of whether the United Nations is, ultimately, holding African countries to a different standard than their European counterparts.²¹⁹

215. See *supra* notes 151-54 and accompanying text (discussing the susceptibility of a single judge to outside pressures).

216. See *supra* notes 163-64, 166-67 and accompanying text (discussing lack of evidence of interference and bias).

217. See *supra* note 153 and accompanying text (arguing in favor of a panel of judges).

218. See *supra* note 9 and accompanying text (discussing *Munyeshyaka* and *Bucyibaruta* cases).

219. This is further supported by a general examination of the transfer proceedings in both the ICTR and ICTY. At the ICTR, the *Munyakazi* Chamber refuses transfer, appearing to base its decision more on its distrust for Rwanda than factual concerns. The ICTY, in contrast, faced legitimate problems within its referral states with funding, a lack of appropriate training and experience amongst potential defense lawyers and a lack of detention facilities and yet, the ICTY has transferred eight cases to BiH and Croatia. See *supra* notes 80-82 and accompanying text (discussing problems with the infrastructure of BiH).

B. *An Impossible Promise?*

Through an examination of the *Munyakazi* and *Kanyarukiga* decisions, this Note has, thus far, argued that the ICTR should give Rwanda greater benefit of the doubt within the transfer process. There is, however, a limit to the possible leeway which can be granted by the Tribunal. Within their respective decisions, both chambers point to undeniable, and potentially insurmountable, problems with Rwanda's referral framework. Their strongest argument lies in the difficulty in obtaining defense witnesses.²²⁰ Rule 11 *bis* requires that a defendant be able to receive a fair trial and yet, problems relating to witnesses may make this impossible.²²¹

As discussed within both cases, witnesses are hesitant to testify in genocide trials in Rwanda, out of fear of harassment, violence or further prosecutions.²²² The chambers note Rwanda's prior willingness to prosecute perceived "negation" of the genocide and the impact that this may have on a witness' desire to speak freely.²²³ Both decisions also rely heavily on the information presented by HRW, outlining the violence and intimidation faced by past witnesses.²²⁴

To make matters worse, many of the witnesses that would be relied upon by the defense live overseas and are unwilling to return to Rwanda.²²⁵ The Rwandan Government, in fact, appears to have recognized this problem and attempted to address the situation through its Transfer Law. As previously discussed, Article 14 guarantees widespread protections for witnesses, including "immunity from search, seizure, arrest or detention during their testimony and their travel to and from the trials."²²⁶ Rwanda has also made video-link testimony available within the

220. See *supra* notes 173-200 and accompanying text (discussing witness availability and protection).

221. See *supra* notes 173-200 and accompanying text (discussing witness availability and protection).

222. See *supra* notes 173-76 and accompanying text (discussing examples of violence, harassment and persecution of witnesses).

223. See *supra* notes 186-90 and accompanying text (discussing the possible prosecution of defense witnesses who deny a defendant's role in the genocide).

224. See *supra* notes 173-76 and accompanying text.

225. One defense lawyer interviewed by Human Rights Watch estimated that ninety percent of his potential witnesses were living abroad. See *supra* note 191.

226. See *supra* note 195 and accompanying text.

courts.²²⁷

The chambers find, however, that most expatriate Rwandans continue to be distrustful and unwilling to return, irrespective of the theoretical protections in place.²²⁸ Even if some are persuaded by the new guarantees, others will remain overseas. There, thus, exists a real potential for the defense to be at a disadvantage when presenting their cases because they will be unable to call the witnesses they want. Rwanda's introduction of video-link testimony, while commendable, is insufficient to overcome the potential disparity. As discussed within both decisions, there is an important difference between live testimony and that conducted over a television.²²⁹ The electronic testimony creates both a real, and imagined, distance between the witness and the bench. The judges are inherently disconnected from the witness who, in turn, is removed from the pressure of testifying within a courtroom.²³⁰ The live version, in contrast, allows the witness to see the impact of his testimony and provides the bench with a better opportunity to judge his information and credibility.²³¹ Once again, the possibility arises for the defendant to be at a disadvantage in presenting his case, thus preventing a fair trial.²³² Finally, monitoring and revocation can do little to assist with the problem. While the presence of the African Commission convinced the *Kanyarukiga* Chamber to ignore some potential issues, it can not force witnesses to appear or remove the underlying bias of video-link testimony.²³³

When confronted with these problems, the ICTR and the GOR appear to be at an impasse. Both parties want to transfer cases, either to assist with a "completion strategy" or with national reconciliation. Rwanda has taken the necessary steps to meet the 11 *bis* requirements and continues to vociferously declare its right to try these cases. For the ICTR, however, these

227. See *supra* note 196 and accompanying text (discussing availability of video-link facilities in Rwanda).

228. See *supra* note 197 and accompanying text. For details about the threats faced by possible witnesses, see *supra* notes 173-76 and accompanying texts.

229. See *id.* (discussing prejudicial nature of video-link option).

230. *Id.*

231. *Id.*

232. See *supra* note 198-99 and accompanying text (discussing prejudicial nature of video-link option).

233. See *supra* note 199 and accompanying text (arguing that monitoring cannot overcome potential bias to the defendant).

transfers cannot come at the expense of the defendant's rights. The Tribunal would lose its legitimacy and fail to achieve its secondary purpose of promoting human rights and the rule of law.²³⁴

The *Munyakazi* Appeals decision captures the underlying dilemma. Within its *amicus curiae* brief, the GOR states that "it is prepared to receive the first transfer case. The structures and procedures are in place and in many respects have been tested. The GOR is unquestionably committed to fulfilling its international obligations to deliver justice fairly, mindful that the proceedings will be closely monitored."²³⁵ While the brief notes the Trial Chamber's praise of the progress made thus far by Rwanda, it complains that the Bench "did not identify any concrete steps in respect of the present case that it believed had to be initiated with a clear strategy and timetable" in order to permit referral.²³⁶ It further states that "in light of the Security Council's call for cases to be transferred in appropriate circumstances in accordance with the completion strategy of the ICTR, it is incumbent on the ICTR in the transfer cases presently under consideration to address any perceived shortcomings of the national system with the GOR"²³⁷ Within its decision, however, the Appeals Chamber ignored this request for clarity. Like the Trial Chamber below it, the Bench was willing to point to Rwanda's failings but refuses to suggest ways to address these shortcomings.²³⁸

This silence may reflect the ultimate problem for the ICTR: a lack of viable solutions. Although the Tribunal continues to hold out the possibility of a transfer, it cannot ignore the problems inherent in securing a fair trial, like those related to

234. Within a decision on referral at the ICTY, Judge Hunt recognized the underlying issues at stake for the international tribunals, noting that the court "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." *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.4, Appeal Decision on Admissibility of Written Statements, ¶22 (Sept. 30, 2003) (Hunt, J., dissenting); see also *supra* note 78 at 156.

235. See *Munyakazi* Rwanda Appellate Brief, *supra* note 1, ¶ 26.

236. See *id.*

237. See *id.*

238. In certain instances, the Appeals Chamber actually went one step further and actively dismissed the suggestions made by Rwanda to address the ICTR's complaints. One example of this can be found in regards to the issue of punishment, where the Bench dismissed the government's promised statements of clarification. See *supra* notes 123-24 and accompanying text.

witness participation. While it is important that Rwanda have the opportunity to try its own high-profile cases, the ICTR cannot give the nation the benefit of the doubt on these fair trial issues without jeopardizing the full rights of the defendants. A compromise, however, is not obvious. Unlike the death penalty, which can simply be abolished through legislation, Rwanda cannot fix a climate and culture of fear through a new law or procedural guarantee. The Government has, in fact, tried to address this problem through the Transfer Law and yet, potential witnesses continue to be distrustful.

In the face of what appear to be insurmountable problems, one is forced to question whether the ICTR is, in fact, holding out the impossible. For years, it has offered Rwanda the dream of an 11 *bis* referral and yet, cannot make it a reality without damaging its own legitimacy and sidestepping international human rights standards, something which it will clearly be unwilling to do. The referral system is, thus, at an impasse: Rwanda cannot fix its failings and the ICTR cannot compromise. In the process, 11 *bis* has become a cruel joke, a dream dangled before an eager nation that has little hope of actually becoming reality. In an effort to bring the Tribunal to a close, one is, ultimately, left wondering whether the ICTR has promised what it could never truly deliver.

CONCLUSION

Through an examination of the *Kanyarukiga* and *Munyakazi* decisions, this Note has argued in favor of greater leeway for Rwanda within the referral process. It noted, however, that the ICTR cannot always give Rwanda the benefit of the doubt and in the face of potentially insurmountable problems guaranteeing a fair trial, asks whether a referral to Rwanda is, in fact, an impossible dream.

While the issues addressed within this Note are specific to the ICTR, the debate over 11 *bis* has much larger implications for the world. Faced with the emergence of new humanitarian crises, and even genocides, the international community is left with the question of how best to secure justice for the victims. Some argue for a truly international approach, as seen with the ICTR and ICTY. Others look for the local community to play a

greater role and thus, prefer the "hybrid" system adopted in Sierra Leone and Cambodia.

In theory, the referral system offers a middle ground. In the aftermath of a genocide, it is not unreasonable to imagine that a state's judicial framework will be decimated and thus, unable to take a meaningful role in the prosecution of those responsible. Given the circumstances, the best, and quickest, response may be to set up a purely international tribunal, like the ICTR. If an 11 *bis* transfer provision were incorporated from the very beginning, however, the potential would exist for the country, once it had regained strength, to begin to take control of the trials and by extension, its own national reconciliation. Justice could remain within the grasp of the affected population but, at the same time, would not have to wait for the country to heal.

Such a proposal cannot, however, become reality until the current impasse at the Tribunal is addressed. Since the introduction of Rule 11 *bis*, the ICTR has only referred two cases, both to France. Such transfers are, however, comparatively simple. France is a western European country and inherently familiar to both the United Nations and the ICTR. The real test for the Tribunal is with Rwanda. The ICTR must decide whether it can, in fact, permit transfers to a nation that is inherently "foreign," an African country with a questionable human rights record. Future crises are unlikely to occur in nations like France, but instead, in countries with which the international community is uncomfortable and unfamiliar. Through a test case, like Rwanda, the United Nations must determine whether it can permit transfers to a more unconventional target state and if so, on what terms. If a compromise cannot be reached, however, the possibility of achieving a middle ground, through the 11 *bis* referral system, will remain little more than a dream.