

THE TROUBLE WITH TRANSFERS: AN ANALYSIS OF THE REFERRAL OF UWINKINDI TO THE REPUBLIC OF RWANDA FOR TRIAL

I. OVERVIEW

On June 28, 2011, in *Prosecutor v. Uwinkindi*,¹ the International Criminal Tribunal for Rwanda (“ICTR” or “Tribunal”) invoked a procedural rule to transfer a genocide case from the Tribunal to the Rwandan judiciary for the first time.² This decision was approved on appeal,³ and Uwinkindi now sits before the High Court of Rwanda as the first person to be indicted by the ICTR, but prosecuted by Rwanda.⁴ The ICTR has since approved the transfer of seven more accused genocidaires to Rwanda, six of whom remain at large.⁵

The transfer mechanism, Rule 11 *bis*, was adopted in 2004 as part of a completion strategy, which allowed the ICTR to transfer cases to national judiciaries. But, prior to *Uwinkindi*, the Tribunal had denied similar applications for transfer due to the failure of the Rwandan judiciary to meet the requisite conditions. Two key elements were at issue: (1) the assurance that the accused would receive a fair trial⁶ and (2) certainty that the death penalty would not be imposed.⁷ The Rule 11 *bis* jurisprudence illustrates that the Tribunal struggled in determining the appropriate standard for evaluating whether the fair trial element would be satisfied. In so doing, the Tribunal came full circle, beginning and ending with a rigid statutory analysis.

1. Case No. ICTR-2001-75-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (June 28, 2011), <http://www.unict.org/Portals/0/Case/English/Uwinkindi/decisions/110628.pdf>.

2. *Case of Jean Uwinkindi Referred for Trial to the Republic of Rwanda*, INT’L CRIM. TRIBUNAL FOR RWANDA (June 28, 2011), <http://www.unict.org/tabid/155/Default.aspx?id=1216>.

3. *Uwinkindi v. Prosecutor*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi’s Appeal Against Referral of His Case to Rwanda and Related Motions (Dec. 16, 2011), <http://www.unict.org/Portals/0/Case%5cEnglish%5cUwinkindi%5cdecisions%5c11216.pdf>. I will confine my analysis to the Trial Chamber’s decision to transfer, as it provides a more thorough basis for analysis. Furthermore, the Trial Chamber’s holdings on the issues relevant to this Note were all affirmed in the Appeals Chamber. *See id.*

4. *See Rwanda/Justice—Uwinkindi to Appear Before a Judge on Thursday*, HIRONDELLE NEWS AGENCY (Apr. 25, 2012), <http://www.hirondellenews.org/ictr-rwanda/409-rwanda-justice/33086-rwan-dajustice-uwinkindi-to-appear-before-a-judge-on-thursday>.

5. *See ICTR/Referrals—Eighth and Last ICTR Case Transferred to Rwanda for Trial*, HIRONDELLE NEWS AGENCY (June 28, 2012), <http://www.hirondellenews.org/ictr-rwanda/407-collaboration-with-states/collaboration-with-states-rwanda/33409-280612-ictreferrals-eighth-and-last-ict-case-transferred-to-rwanda-for-trial>.

6. *Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, ¶¶ 22–43.

7. *Id.* ¶¶ 44–51.

Under this framework, the Tribunal evaluated the rights conferred to the accused under Rwanda's Transfer Law—a law written specifically for the purpose of fielding cases transferred from the ICTR. However, as recognized early on by the Tribunal, this law did not reflect the reality of fair trial and sentencing in Rwanda. Consequently, the Tribunal engaged in an alternative inquiry into the factual reality of the circumstances in Rwanda. Due to flaws in the structure of the factual inquiry and pressure to transfer, the Tribunal reverted to the statutory framework analysis to approve Uwinkindi's transfer. This shift is particularly interesting because the Tribunal's original concerns regarding the realities of fair trial in Rwanda remained unresolved. Through a monitoring mechanism included in Rule 11 *bis*, the ICTR will monitor the proceedings which, coupled with international scrutiny, is predicted to ensure that Uwinkindi will receive a fair trial. However, the ICTR's approval of transfer has led other countries to begin extraditing accused persons to Rwanda, which persons will not enjoy the benefits of monitoring or high-level international scrutiny. In the end, the Tribunal's decision to transfer has undermined any possibility of effecting real change in the Rwandan judiciary, and those who are soon to be extradited may be unintended casualties of the U.N.'s completion strategy.

This Note will provide a brief overview of the Rwandan genocide, the U.N.'s establishment of the Tribunal, and efforts to bring the Tribunal to a close. It will then examine the transfer applications that preceded *Uwinkindi*, the shifts in precedent that ultimately led to transfer, and, in conclusion, will assess the wisdom of the transfer itself. This approach focuses on the parallel, but sometimes contravening, goals of maintaining the provision of due process and fairness through the structure of an international court and the preservation and improvement of this process in the courts of the country where the crime occurred.

II. BACKGROUND

A. *The Rwandan Genocide*

The western world is familiar with Hollywood's version of Rwanda's 1994 tragedy through *Hotel Rwanda*, a popular film which tells the story of one man's efforts to protect a group of Tutsis from becoming victims of genocide.⁸ But history's details prove difficult to capture in a three-hour movie.

8. HOTEL RWANDA (United Artists 2004).

Ancestors of the Hutu and Tutsi people settled in Rwanda more than two thousand years ago.⁹ It was not until the twentieth century when these settlers began to acquire their Hutu and Tutsi labels, which were used to identify Rwandans as cultivators or pastoralists, respectively.¹⁰ For many years, these two groups coexisted, creating and sharing the same language, religious beliefs, and cultural identity.¹¹ In the 1920s, Belgian colonialism led to the bifurcation of the Hutu and Tutsi, and the origin of their labels was soon forgotten.¹² The colonialists appointed Tutsis into official positions of the newly created administrative machine, while they relegated Hutus to mass labor.¹³ To enforce this order, the Belgians implemented a group registration system, under which all adult Rwandans were required to carry identification cards stating their ethnicity.¹⁴ In the 1950s, decolonization pressure led to a restructuring of the Tutsi-led administration, which included Hutu integration into that system.¹⁵ But with integration came revolution,¹⁶ and so began a lengthy period afflicted with sporadic warfare in Rwanda.¹⁷

On April 6, 1994, the presidents of Rwanda and Burundi were killed when the plane they were flying in was shot down by an unidentified party.¹⁸ *Hotel Rwanda* accurately portrays what happened next: widespread civilian-executed genocide, resulting in the death of 500,000 to 800,000 Tutsis,

9. ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 31 (1999).

10. *Id.* at 32–33. The etymology of these labels reveals that Hutu historically meant “subordinate or follower of a more powerful person,” while Tutsi meant “a person rich in cattle.” *Id.* Most Rwandans married within their occupational class, which created distinctive gene pools amongst the Hutu and the Tutsi people. *Id.* at 34. “This practice . . . meant that over generations, pastoralists came to look more like other pastoralists—tall, thin and narrow featured—and cultivators like other cultivators—shorter, stronger, and with broader features.” *Id.*

11. *Id.* at 31. (The Hutu and Tutsi people “developed a . . . highly sophisticated language, Kinyarwanda, crafted a common set of religious and philosophical beliefs, and created a culture which valued song, dance, poetry, and rhetoric. They celebrated the same heroes: even during the genocide, the killers and their intended victims sang of some of the same leaders from the Rwandan past.”)

12. *See id.* at 34–37.

13. *Id.* at 35.

14. *Id.* at 37.

15. *Id.* at 38.

16. *Id.* at 38–40. As colonial rule came to a close, the Belgian administrators attempted to integrate Hutus into the administrative system that they had previously reserved to the Tutsi. *Id.* at 38. Hutus were named to administrative posts and admitted into secondary schools. *Id.* Integration had serious consequences. *Id.* The Tutsi fought to preserve the monarchy and their power within it, while the taste of opportunity left the Hutu hungry for more. *Id.* This polarization led to violence, and the Belgians responded with yet another plan: democratization. *Id.* Under the banner of democracy, the Belgians replaced half of the local Tutsi authorities with Hutus. *Id.* at 39. Shortly thereafter, the Hutu revolution ensued, and the Tutsi monarchy came to a close. *Id.*

17. *See id.* at 30–48.

18. Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 *YALE J. INT’L L.* 365, 390 (1999).

together with a far smaller number of moderate Hutu victims.¹⁹ During the early stages of the genocide, U.N. peacekeeping troops were present in Rwanda; but having foreseen the horrors to come, countries began to evacuate their troops and diplomats, leaving the Tutsis alone to fight against their own genocide.²⁰ In July of 1994, the Rwandan Patriotic Front (RPF), a rebel force of Tutsi exiles, took control of the country through military force.²¹ Paul Kagame led the RPF in that movement and later assumed the presidency.²² While the atrocities certainly receded under RPF control, they did not end.²³ Rather, the Hutu and Tutsi swapped roles as perpetrators and victims. Following the RPF takeover, the U.N. High Commissioner launched an investigation that revealed RPF-led civilian massacres, political assassinations, and summary executions, with Hutus as the victims.²⁴ Human Rights Watch also documented these crimes and concluded they were “widespread, systematic and involved large numbers of participants and victims.”²⁵

B. RPF Detention Campaign

In a multifaceted plan to bring about justice, the new Tutsi regime launched an aggressive arrest and detention campaign that resulted in the arrests of more than 130,000 Hutus by 1998.²⁶ But Rwanda’s channels for justice had been destroyed along with its people, and holding formal trials for

19. See DES FORGES, *supra* note 9, at 15–16. Others have estimated that as many as 1,000,000 Tutsis were killed. See, e.g., Jesse Melman, Note, *The Possibility of a Transfer (?): A Comprehensive Approach to the International Criminal Tribunal for Rwanda’s Rule 11bis to Permit Transfer to Rwandan Domestic Courts*, 79 FORDHAM L. REV. 1271, 1277 (2010).

20. See DES FORGES, *supra* note 9, at 7.

21. Leslie Haskell & Lars Waldorf, *The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences*, 34 HASTINGS INT’L & COMP. L. REV. 49, 51 (2011).

22. See *id.* at 50; see also Erlinder, *infra* note 48, at 145.

23. See Haskell & Waldorf, *supra* note 21, at 52 (A team from the U.N. High Commission of Refugees “estimated that the RPF killed between twenty-five thousand and forty-five thousand civilians in 1994.”).

24. *Id.*

25. *Id.*; see also YASH GAI, COMMONWEALTH HUMAN RIGHTS INITIATIVE, RWANDA’S APPLICATION FOR MEMBERSHIP TO THE COMMONWEALTH: REPORT AND RECOMMENDATIONS OF THE COMMONWEALTH HUMAN RIGHTS INITIATIVE 9 (Aug. 2009) [hereinafter CHRI REPORT] (“The RPF has used an extraordinary amount of violence, domestically and internationally, in the pursuit of its illegitimate aims. It is responsible for killing almost 500,000 persons, whether citizens or not, and is responsible for the deaths of many times more through displacement, malnutrition and hunger. It has denied hundreds of thousands of children of the opportunity to go to school, and deprived millions of prospects of family and community life.”).

26. Melman, *supra* note 19, at 1277. The arrests and detentions under the new government increased steadily, “rising from around 10,000 detainees in 1994 to 130,000 by 1998, at a rate of one thousand to three thousand per month.” *Id.* See also NICHOLAS A. JONES, THE COURTS OF GENOCIDE, POLITICS AND THE RULE OF LAW IN RWANDA AND ARUSHA 82 (2010) (“[T]he government employed its military to expediently round up suspected genocidaires *en masse*.”).

the myriad suspects proved impossible.²⁷ Accordingly, the Rwandan government reached out to the United Nations for help, asking that a tribunal be established to adjudicate genocide cases.²⁸

C. *United Nations Intervention and the Creation of the Tribunal*

The Security Council²⁹ responded by passing Resolution 955,³⁰ which established the International Criminal Tribunal for Rwanda (ICTR).³¹ Despite Rwanda's initial request for assistance, there was some dissension over the U.N.'s execution of it. The debate surrounding the passage of Resolution 955 included Rwandan resistance regarding the extent of the Tribunal's jurisdiction.³² Specifically, Rwanda opposed: (1) the ICTR's broad subject matter jurisdiction over international humanitarian law;³³ (2) the temporal jurisdiction, which extended to the end of 1994; and (3) the Tribunal's refusal to impose the death penalty.³⁴ Instead, Rwanda hoped the ICTR's subject matter jurisdiction would be limited to the crime of genocide, thereby excluding the prosecution of any war crimes or crimes against humanity committed by the Tutsi-led RPF.³⁵ Rwanda also lobbied to minimize the Tribunal's temporal jurisdiction to conclude in mid-July 1994, the date when the genocide ended and the RPF crimes began.³⁶ This jurisdictional dispute reflects the difference between objectives of Rwanda and those of the international community. The new government, comprised of survivors of the genocide, sought widespread prosecutions and hoped that the ICTR would be another weapon in its arsenal.³⁷ Perhaps driven by a mix of post-genocide guilt and philanthropy, the U.N. had its own, broader objective:

27. Melman, *supra* note 19, at 1277–78.

28. *Id.* at 1278; *see also* KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM* 263 (2011).

29. The Security Council is the decision-making organ of the United Nations. It is comprised of five permanent member countries and ten non-permanent member countries, each of which has a single vote in all U.N. decisions. *UN Security Council: Membership in 2012*, UNITED NATIONS, <http://www.un.org/en/sc/members> (last visited Sept. 2, 2012).

30. S.C. Res. 955, U.N. DOC. S/RES/955 (Nov. 8, 1994). Substantive resolutions such as Resolution 955 require nine affirmative votes, five of which must come from the permanent members. *See U.N. Security Council: Membership in 2012, supra* note 29.

31. *See* Melman, *supra* note 19, at 1278.

32. William A. Schabas, *International Criminal Tribunals: A Review of 2007*, 6 *NW. U. J. INT'L HUM. RTS.* 382, 388–89 (2008).

33. *Id.*

34. *See* Haskell & Waldorf, *supra* note 21, at 54–55.

35. *See* Schabas, *supra* note 32, at 388–89.

36. *See* Haskell & Waldorf, *supra* note 21, at 55.

37. *See* Melman, *supra* note 19, at 1277–78 (explaining the new government's aggressive arrest and detention campaign and subsequent request for the creation of an international criminal tribunal).

“reconciliation and . . . the restoration and maintenance of peace.”³⁸ And, to that end, broad subject matter and temporal jurisdiction were imperative. The text of Resolution 955 suggests that the U.N.’s further-reaching interests superseded those of the Rwandan survivors who had requested U.N. assistance.³⁹ Under this language, the Tribunal was given primary jurisdiction over genocide and crimes against humanity⁴⁰ occurring in Rwanda during 1994.⁴¹ This Note addresses both the existence of substantive and procedural fairness, as well as the appropriateness of available penalties. These elements must be present to allow transfer to a national jurisdiction.⁴²

International criminal law was established to end impunity,⁴³ and a primary purpose for the creation of the ICTR was clearly to ensure that Rwanda’s genocidaires would not be allowed to act with impunity. Importantly, the U.N.’s decision to override Rwanda’s jurisdictional requests evidences its concern that the potential for impunity (*i.e.*, the role as the persecutors) was not exclusive to Hutus. In another decision to override Rwanda, the U.N. refused to include the death penalty as a possible punishment.⁴⁴ The mission then was not only to fight impunity, but to do so in accordance the latest principles of human rights—some of which Rwanda neither abided by nor agreed with.⁴⁵ Its desires disregarded by the

38. S.C. Res. 955, *supra* note 30. This objective finds its roots in Chapter One of the U.N. Charter, calling for the maintenance of international peace and security. U.N. Charter art. 1, para. 1.

39. S.C. Res. 955, *supra* note 30, Annex (establishing jurisdiction over “Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994”).

40. *Id.* arts. 2 & 3. Article 4 also authorizes the Tribunal to hear cases involving violations of the Geneva Conventions of 1949. *Id.* art. 4.

41. *Id.* art. 7. Primary jurisdiction over the above-mentioned subject matter means that the Rwandan judiciary must defer to the Tribunal in cases where there is a jurisdictional overlap. *See id.* art. 8. If the Tribunal is not prosecuting a case that falls under its jurisdiction, Rwanda is free to pursue it. *See Melman, supra* note 19, at 1280–81. However, at any point during the proceedings, the ICTR may request the case. *See S.C. Res. 955, supra* note 30, art. 8.

42. *See infra* note 63.

43. *See generally* Justice Jackson, Opening Statement for the Prosecution in Trial of Major War Criminals Before the International Military Tribunal (Nov. 21, 1945).

44. *See* Statute of the International Criminal Tribunal for Rwanda, art. 23 (Jan. 31, 2010) [hereinafter ICTR Statute].

45. *See supra* note 34 and accompanying text (noting Rwanda’s opposition to the ICTR’s refusal to impose the death penalty). Since 1994, the Rwandan government has continued in its aggressive pursuit for retributive justice, which has often been imposed at the expense of fair trial rights. *See, e.g.*, Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 FLA. J. INT’L L. 421, 435–36 (1994) (stating that the RPF detained more than 80,000 suspects to await trial indefinitely); *infra* note 52 and accompanying text (noting Rwanda’s suspension of cooperation with the ICTR following the ICTR’s acquittal of Barayagwiza due to extended pretrial detention). For further discussion on violations of human rights in Rwanda, see generally RWANDA,

organization that had abandoned it in the midst of the horror, Rwanda did not respond with cooperation and compliance.⁴⁶ This difference in perspectives on what principles should govern justice has been the source of continued tension between the ICTR and Rwanda.⁴⁷ The Tribunal may have won the first battle by appointing itself with broad jurisdiction and refusing to impose the death penalty, but in practice, the international community's objectives have tended to give way to those of Rwanda.

III. PROBLEMS WITH THE TRIBUNAL

A. Rwandan Residual Control

Even a brief summary of the history of the Tribunal suggests that Rwandan influence over decisions has been difficult to neutralize. Revisiting various cases shows how fragile fairness can be.

1. Barayagwiza

Since the creation of the Tribunal, its jurisprudence has been colored by Rwanda's influence.⁴⁸ Perhaps the strongest example of this influence is the case of *Prosecutor v. Barayagwiza*.⁴⁹ In *Barayagwiza*, a former foreign minister was charged with genocide and crimes against humanity for leading an anti-Tutsi party's participation in the genocide.⁵⁰ At the ICTR's behest,

UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2003, available at 2004 WL 790747 (reporting various abuses of human rights in Rwanda).

46. See *infra* Part III.A.

47. Kagame continues to attack the ICTR for its inefficiency, while the ICTR and human rights organizations criticize the government of Rwanda for its failure to protect fair trial. Compare Gonza Muganwa & Berna Namata, *Rwanda: International Justice System a Flop*, THE E. AFR., Apr. 18, 2011, <http://allafrica.com/stories/printable/201104181502.html>, with *infra* Part IV.A (discussing the Tribunal's findings that Rwandan laws were insufficient to guarantee fair trial). Kagame has also criticized the West, more generally, for protecting suspects of genocide. See, e.g., *Rwanda/Genocide—Paul Kagame Accuses Western Countries of Protecting Genocide Suspects*, HIRONDELLE NEWS AGENCY, Apr. 7, 2011, <http://www.hirondellenews.com/ictr-rwanda/412-rwanda-political-and-social-issues/33005-070412-rwanda-genocide-paul-kagame-accuses-western-countries-of-protecting-genocide-suspects>.

48. See Peter Erlinder, *The UN Security Council ad hoc Rwanda Tribunal: International Justice or Jurisdictionally-Constructed "Victor's Impunity"?*, 4 DEPAUL J. FOR SOC. JUST. 131 (2010); see also Haskell & Waldorf, *supra* note 21, at 55–60.

49. Case No. ICTR-97-19, Appeals Chamber Decision (Nov. 3, 1999).

50. Eric Husketh, Note, *Pole Pole: Hastening Justice at UNICTR*, 3 Nw. U. J. INT'L HUM. RTS. 8, ¶ 7 (2005). Jean-Bosco Barayagwiza was the chairman of the Coalition pour la Defense de la Republique in Gisenyi prefecture and was closely associated with powerful genocidaires. *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, ¶¶ 3, 6 (Nov. 28, 2007). He was also an official on the steering committee at Radio Television Libre des Mille Collines, *id.* ¶¶ 3, 359, a radio station that was used to incite ethnic contempt against the Tutsi, *id.* ¶¶ 737–41.

Barayagwiza was detained for almost a year prior to his trial.⁵¹ The Appeals Chamber ordered Barayagwiza's release on procedural grounds, reasoning that his right to a prompt trial had been violated.⁵² When Rwanda got news of Barayagwiza's release, it attacked the prosecution's competence and immediately withdrew cooperation.⁵³ The prosecutor challenged the appeal on grounds of new available facts, and the Chamber changed its mind, indicting Barayagwiza but reducing his sentence based on the length of his pretrial detainment.⁵⁴ Whether Barayagwiza's ultimate indictment was a result of Rwandan pressure, or justice through judicial process, is debatable.

2. *Carla Del Ponte*

Another example of Rwandan influence is seen in the fate of former ICTR Prosecutor Carla Del Ponte.⁵⁵ After launching investigations into alleged RPF massacres, Del Ponte informed Kagame of her bi-tribal prosecutorial plan.⁵⁶ Though Kagame initially expressed support, his actions thereafter looked more like reprisal. In June 2002, he impeded witness travel to the ICTR in Arusha, Tanzania, requiring witnesses to have three clearance certificates, including one confirming the lack of a criminal record.⁵⁷ Without witnesses to testify, the Tribunal was forced to suspend proceedings. Kagame's interference delayed three trials for several months.⁵⁸

B. *Time Constraints and Introduction of Rule 11 bis*

Finding a way to end the expense and bureaucracy involved in such proceedings weighed heavily on the Security Council, which sought eventual closure of the Tribunal. An examination of Rule 11 *bis* as a mechanism for facilitating closure follows. Though the rule seemed a good idea at first, it ultimately might prove dangerous to those falling outside its protections.

51. *Barayagwiza*, Case No. ICTR-97-19, Decision, ¶¶ 3, 100 (finding that the the U.N. had constructive custody over Barayagwiza from March 1997 through his trial, which began in February 1998); *see also* Husketh, *supra* note 50, at ¶ 8.

52. *Barayagwiza*, Case No. ICTR-97-19, Decision, ¶¶ 100–12; *see also* Husketh, *supra* note 50, ¶ 8.

53. Husketh, *supra* note 50, ¶ 11.

54. *Id.* ¶¶ 11–12.

55. *See* Haskell & Waldorf, *supra* note 21, at 56–58; *see also* Erlinder, *supra* note 48, at 158–62.

56. Haskell & Waldorf, *supra* note 21, at 56.

57. Mary D. Shenk et al., *International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 37 INT'L L. 551, 561–62 (2003).

58. Haskell & Waldorf, *supra* note 21, at 57; *see also* Shenk et al., *supra* note 57, at 561–62. Prior to the government's withdrawal, two Rwandan genocide survivors' groups, AVEGA and IBUKA, suspended their participation and lobbied the government to follow suit. *Id.*

1. Adoption of Rule 11 bis

In addition to challenges relating to control, the Tribunal also faced questions regarding how and when to bring the proceedings to a close.⁵⁹ After nearly ten years of operation, efficiency and cost concerns led to a push for completion and closure.⁶⁰ In Resolutions 1503 and 1534, the Security Council urged the ICTR to adopt a completion strategy modeling that of the International Criminal Tribunal for former Yugoslavia (“ICTY”),⁶¹ specifically, transferring lower-level cases to national jurisdictions.⁶² Following these instructions, the ICTR adopted Rule 11 *bis* (“Rule 11 *bis*” or “11 *bis*”).⁶³ This rule authorizes the transfer of a case to a national court of

59. See Cecile Aptel, *Closing the U.N. International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues*, 14 NEW ENG. J. INT’L & COMP. L. 169 (2008).

60. *Id.*; see also Michael Bohlander, *The Transfer of Cases from International Criminal Tribunals to National Courts* (Nov. 30, 2004), <http://unictr.org/Portals/0/English%5CNews%5Cevents%5CNov%202004%5CBohlander.pdf>. Resolutions 1503 and 1534 were applied to ICTR and ICTY alike and were largely the result of findings and suggestions from a working group between the Office of High Representative of Bosnia (OHR) and International Criminal Tribunal for Former Yugoslavia. *Id.* at 19. The OHR-ICTY working group suggested the creation of a specialized, three-panel War Crimes Chamber (WCC) to be housed in the Court of Bosnia and Herzegovina. *Id.* at 18.

61. In 1993, the UN established the ICTY to try perpetrators of war crimes in the Balkans during the conflicts in the region during the 1990s. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

62. S.C. Res. 1503, ¶ 2, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (“Urging the 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”).

63. ICTR R. P. & EVID. 11 *bis*. Rule 11 *bis* provides:

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

(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.

(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.

(D) When an order is issued pursuant to this Rule:

- (i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;
- (ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;
- (iii) the Prosecutor shall provide to the authorities of the State concerned all of the

competent jurisdiction even after an accused has been indicted at the ICTR.⁶⁴ The Trial Chamber may move to transfer on its own initiative, or the Prosecutor may apply for transfer.⁶⁵ The requisite elements for a Rule 11 *bis* transfer are: (1) “that accused will receive a fair trial in the courts of the State concerned” and (2) “that the death penalty will not be imposed or carried out.”⁶⁶ This procedural mechanism was intended to lighten the Tribunal’s docket and thereby ensure compliance with the completion strategy.⁶⁷ Another notable objective of Rule 11 *bis* is to build the capacity of the national judiciary where the atrocities took place.⁶⁸ This goal aligns with one of the original purposes of the Tribunal in its establishment: “to strengthen the courts . . . of Rwanda.”⁶⁹

The requirements for transfer are particularly interesting in light of the Tribunal’s previous decisions to override Rwanda’s wishes for a death sentence option. Under the 11 *bis* conditions, international law would be implemented in accordance with current human rights standards, even where the case was relinquished to the national jurisdiction. By issuing an indictment, the ICTR assumes an obligation to ensure that its indictees receive the rights provided for in its statute.⁷⁰ Without these conditions, the ICTR might be the target of blame and criticism for unfair trials and death penalties following its indictments. Notably, under Rule 11 *bis*, it is important only that the individuals transferred to Rwanda receive the stated protections.⁷¹ But the purpose of the 11 *bis* conditions might have been even broader, with the international community maintaining important influence over Rwanda. By conditioning transfer on a country’s adherence to certain principles, the international community asserts political pressure on that country to adopt those principles. Thus, the U.N. might effect change in

information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;

(iv) the Prosecutor may send observers to monitor the proceedings in the courts of the State concerned on his or her behalf.

...

(F) At any time after an order has been issued pursuant to this Rule and before 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 within the terms of Rule 10.

64. See Rule 11 *bis* (A), *supra* note 63.

65. See Rule 11 *bis* (B), *supra* note 63.

66. See Rule 11 *bis* (C), *supra* note 63.

67. See *supra* notes 62 and 63 and accompanying text.

68. Melman, *supra* note 19, at 1313–14.

69. S.C. Res. 955, *supra* note 30.

70. See ICTR Statute, *supra* note 44, arts. 20–23 (ensuring fair trial rights and no death penalty).

71. See *supra* note 63.

Rwanda, perhaps for the sake of “maintain[ing] international peace and security”⁷² or to “strengthen the courts . . . of Rwanda.”⁷³ However, the way in which the ICTR has applied the 11 *bis* conditions has largely limited their effects to benefit only the accused.

2. *Transfer Granted to Non-Rwandan Jurisdictions*

Rule 11 *bis* was slow to take hold at the ICTR. In 2007, the Tribunal invoked the Rule for the first time to transfer *Bagaragaza*, a genocide case, to the Netherlands.⁷⁴ In assessing whether the conditions for transfer had been met, the Tribunal followed ICTY jurisprudence. Shortly after the ICTR ordered the first transfer, the Netherlands denied its own jurisdiction over the case, forcing the ICTR to revoke the transfer.⁷⁵ It was not until the end of 2007 that Rule 11 *bis* actually—albeit marginally—lightened the docket.⁷⁶ Both of the accused were French residents at the time of transfer, and after consultation with the ICTR Prosecutor, France agreed to prosecute both cases.⁷⁷ France’s legal framework and ratification of international conventions provided the necessary 11 *bis* assurances for fair trial and restrictions against use of the death penalty.⁷⁸ In evaluating the fair trial element, the Tribunal looked to the availability of witness protection under French procedure, finding it to be relevant to the provision of fair trial.⁷⁹

72. U.N. Charter art. 1, para. 1, *supra* note 38.

73. S.C. Res. 955, *supra* note 30.

74. Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-11*bis*, Decision on Prosecutor’s Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 (Apr. 13, 2007).

75. Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-11*bis*, Decision on the Prosecutor’s Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11 *bis* (F) & (G), ¶ 3 (Aug. 17, 2011). The ICTR tried Bagaragaza and sentenced him to eight years in prison. Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-S, Sentencing Judgment, ¶¶ 44–45 (Nov. 17, 2009).

76. In November 2007, the Tribunal invoked the Rule and handed two accused *genocidaires* over to France for trial. *See* Prosecutor v. Munyeshyaka, Case No. ICTR-2005-87-I, Decision on Prosecutor’s Request for the Referral of Wenceslas Munyeshyaka’s Indictment to France (Nov. 20, 2007); *see also* Prosecutor v. Bucyibaruta, Case No. ICTR-2005-85-I, Decision on Prosecutor’s Request for Referral of Laurent Bucyibaruta’s Indictment to France (Nov. 20, 2007).

77. Aptel, *supra* note 59, at 178, n.39.

78. *See* Bucyibaruta, Case No. ICTR-2005-85-I, Decision on Prosecutor’s Request for Referral of Laurent Bucyibaruta’s Indictment to France, ¶¶ 18–24. In holding that the accused would receive a fair trial, the Tribunal reasoned that France ratified the European Convention for the Protection of Human Rights in 1974 and the International Covenant on Civil and Political Rights in 1980. *Id.* ¶ 21. It also noted special provisions within French domestic law that guarantee fair trial, such as the independence of the courts, the presumption of innocence, and the right of assistance to counsel. *Id.* ¶ 22. In evaluating the death penalty restriction element, the Tribunal found France’s abolition of the death penalty, the provision of the Constitution protecting against it, and the French ratification of Protocol No. 13 of the European Convention for Protection of Human Rights and Fundamental Freedoms to be sufficient. *Id.* ¶¶ 18–19.

79. *Id.* ¶¶ 26–28.

3. *Rwanda's Response*

By 2007 the government had been substantially rebuilt, and its legal system had evolved. To manage the post-genocide arrests and need for justice, the government revived an age-old tradition of dispute resolution: the *Gacaca*.⁸⁰ Under this modernized *Gacaca* system, communities elected to each court nine laymen of integrity, who were charged with serving Rwanda in its mission to end impunity.⁸¹

In addition to the *Gacaca*, there was again a working, formal judicial system comprised of a multilevel judiciary.⁸² Also, a new constitution had been adopted by referendum in 2003, and one of its most notable provisions was the presumption of innocence in judicial proceedings.⁸³ The country was making meaningful steps toward becoming one which could adjudicate its own problems. Recognizing this maturation and seeking to recover its lost sovereignty, the Rwandan government passed the Transfer Law, and the 11 *bis* requirements were written into this new legislation.⁸⁴ Under the Transfer Law, fair trial was provided for in principle,⁸⁵ witness protection programs were set to be implemented,⁸⁶ and the death penalty was abolished.⁸⁷ At this point, under the ICTY precedent and its ICTR progeny, Rwanda's new legal framework arguably demonstrated competence sufficient for transfer.⁸⁸

80. JONES, *supra* note 26, at 53. The traditional *Gacaca* system was a voluntary community-based dispute resolution system where a third party helped the disputing parties to craft a resolution or punishment. *Id.* at 54–55. While the modern *Gacaca* courts were based on the traditional model, there are significant procedural and jurisdictional differences between the traditional and modern *Gacaca*. *Id.* at 54–57. One key difference is that, in the traditional system, cases of severe gravity—such as those involving murder—were heard by the Mwami (king). *Id.* The traditional *Gacaca*'s jurisdiction, on the other hand, was limited to less serious disputes between families or clans. *Id.* at 54. *See also* Bert Ingelaere, *The Gacaca Courts in Rwanda*, in *TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT* 32 (Luc Huyse & Mark Salter eds., 2008) (“The ‘new’ *Gacaca* courts are in the truest sense an ‘invented tradition’ State intervention through legal and social engineering has designed and implemented a novelty, loosely modelled on an existing institution.”).

81. JONES, *supra* note 26, at 57, 59–60.

82. *Id.* at 89–93.

83. RWANDA CONST. art. 19 (2003).

84. Organic Law No. 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Official Gazette of the Republic of Rwanda [hereinafter Transfer Law].

85. *Id.*, ch. III, art. 13. Rwanda had also ratified the International Covenant on Civil and International Rights, which contains internationally accepted standards on fair trial. *See* JONES, *supra* note 26, at 82.

86. Transfer Law, ch. III, art. 14.

87. *Id.*, ch. VI, art. 21. “A primary reason for the abolition [of the death penalty] was to facilitate the rendition of persons to Rwanda that the regime wanted to try for various offences (many countries, including those in the EU, do not extradite suspected offenders to a country which has capital punishment)” CHRI REPORT, *supra* note 25, at 38.

88. *See* Prosecutor v. Munyeshyaka, Case No. ICTR-2005-87-I, Decision on the Prosecutor's Request for the Referral of Wenceslas Munyeshyaka's Indictment to France, ¶¶ 18–19, 21–24 (Nov. 20,

IV. ANALYSIS OF SUBSEQUENT CASE LAW: APPLICATIONS FOR 11 *BIS* TRANSFER TO RWANDA

A. *Early Transfer Applications*

In September 2007, ICTR Prosecutor Hassan Jallow filed the first three applications for transfer to Rwanda.⁸⁹ The Tribunal denied its first application in *Prosecutor v. Munyakazi* and rewrote the 11 *bis* requirements to implement a heightened stringency.⁹⁰ The Tribunal acknowledged Rwanda's abolition of the death penalty but was not satisfied that any punishment imposed would be consistent with international standards.⁹¹ This hesitancy was based on an ambiguity in Rwandan law. Specifically, the Transfer Law abolished the death penalty, but the Abolition of the Death Penalty Law provided for "life imprisonment with special provisions" (i.e., in solitary confinement).⁹² The Tribunal noted that solitary confinement was an exceptional measure that was only appropriate where necessary and proportionate.⁹³ Because Rwanda did not have safeguards in place to curtail the imposition of solitary confinement, the Appeals Chamber affirmed that "the penalty structure was inadequate, and the referral must be denied."⁹⁴ In *Munyakazi*, the Tribunal effectively exchanged the restriction on the death penalty element for one that requires all potential punishments comport with international standards.⁹⁵ The

2007) (finding French laws and international agreements guaranteeing non-imposition of the death penalty and fair trial to be sufficient to support transfer); *Prosecutor v. Bucyibaruta*, Case No. ICTR-2005-85-I, Decision on Prosecutor's Request for Referral of Laurent Bucyibaruta's Indictment to France, ¶¶ 18–19, 20–24 (Nov. 20, 2007) (same).

89. See *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, ¶ 3 (May 28, 2008) [hereinafter *Munyakazi* Trial Decision]; *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 3 (June 6, 2008) [hereinafter *Kanyarukiga* Trial Decision]; *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on Prosecutor's Request for the Referral of the Case of Ildéphonse Hategekimana to Rwanda, ¶ 2 (June 19, 2008).

90. See *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (Oct. 8, 2008) [hereinafter *Munyakazi* Appeals Decision]; see also *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (Oct. 30, 2008) [hereinafter *Kanyarukiga* Appeals Decision].

91. *Munyakazi* Appeals Decision, ¶¶ 16–20.

92. *Id.*

93. *Id.* ¶¶ 11, 20 (citing the Trial Chamber's findings).

94. *Id.*

95. *Id.* ¶¶ 20–21 (affirming the Trial Chamber's holding that the potential imposition of life imprisonment in isolation precludes transfer). To support its extension of the Rule 11 *bis* punishment prong, the Trial Chamber cited case law from the International Criminal Tribunal for the former Yugoslavia (ICTY). *Munyakazi* Trial Decision, *supra* note 89, ¶ 21, n.39. (citing *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 bis, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia May 17, 2005); *Prosecutor v. Todavić*, Case No. IT-97-25/1-AR11bis.1, Decision on

Tribunal's position on what constitutes a fair trial also evolved, becoming more nuanced and subjective, based on the factual circumstances in Rwanda.⁹⁶ The nuances resulted in the creation and analysis of several factors in determining whether a fair trial would in fact be afforded to the accused.⁹⁷ These factors included: judicial independence; availability and protection of resident witnesses of Rwanda; and the availability and protection of non-resident witnesses.⁹⁸

B. Fair Trial Factorial Analysis

1. Munyakazi

In *Munyakazi*, the Appeals Chamber found the Rwandan judiciary to be sufficiently independent, despite the Trial Chamber's finding of political influence over the judiciary.⁹⁹ The Trial Chamber's finding rested on Rwanda's suspension of cooperation in response to Barayagwiza's acquittal as well as Rwanda's reaction to foreign indictments of the RPF.¹⁰⁰ In rejecting the Trial Chamber's finding of political influence over the judiciary, the Appeals Chamber noted that more than nine years had passed since Rwanda's reaction to the *Barayagwiza* acquittal.¹⁰¹ Since then, the Tribunal had acquitted five people and maintained Rwanda's cooperation throughout.¹⁰² In regard to Rwanda's reaction to foreign RPF indictments, the Appeals Chamber was dismissive, stating that such a reaction by Rwanda does not mean the country will have a similar response to its own national indictments.¹⁰³ The Appeals Chamber also rejected evidence of political influence in national proceedings on grounds that the evidence of such

Savo Todović's Appeals Against Decisions on Referral Under Rule 11bis, ¶ 99 (Int'l Crim. Trib. for the Former Yugoslavia September 4, 2006)). The cited ICTY jurisprudence provides some support for the Tribunal's conclusion that national detention should accord with international standards. *See generally* Prosecutor v. Todović, Case No. IT-97-25/1-AR11bis.1, Decision on Savo Todović's Appeals Against Decisions on Referral Under Rule 11bis, ¶¶ 94–99 (addressing an argument from the defense that the national detention was not in compliance with international standards). However, neither *Todović* nor *Stanković* supports the Munyakazi bench's decision to roll this principle into an element essential to transfer. *See generally id.* ¶ 97 (noting that the conditions of detention are relevant in considering whether the accused would receive a fair trial).

96. *Munyakazi Appeals Decision*, ¶¶ 22–42.

97. *See id.*

98. *See id.*

99. *Id.* ¶¶ 22–31.

100. *Id.* ¶ 22.

101. *Id.* ¶ 28.

102. *Id.*

103. *Id.*

influence came from the lower *Gacaca* courts.¹⁰⁴ Transfer cases would go directly to the High Court per the Transfer Law.¹⁰⁵ Accordingly, Rwanda prevailed on the judicial independence factor, one of three supportive of a finding of fair trial.¹⁰⁶

Rwanda did not, however, receive the stamp of approval for the witness protection factor.¹⁰⁷ The Trial Chamber found that witnesses' fear of testifying would preclude Munyakazi from receiving a fair trial,¹⁰⁸ and the Appeals Chamber affirmed.¹⁰⁹ Supporting evidence included testimony from potential witnesses regarding their unwillingness to testify before the High Court of Rwanda for fear of "harassment, torture, arrest, or being killed."¹¹⁰ Additionally, witnesses expressed fear of being "accused of adhering to 'genocidal ideology'" and facing trial before *Gacaca* courts.¹¹¹

The Appeals Chamber then shifted its focus to the third factor, non-resident testimony, as the majority of Munyakazi's witnesses were non-residents.¹¹² The issue of witness fear of intimidation and threats was similar in the non-resident context,¹¹³ but Rwanda had attempted to mitigate this issue by providing an option to testify via video-link.¹¹⁴ The Appeals Chamber found that the video-link option for testimony was not an adequate solution.¹¹⁵ It reasoned that the resulting inequities in direct testimony from the Prosecution and the Defense witnesses would violate the equality of arms principle,¹¹⁶ under which "each party must be afforded a reasonable opportunity to present his or her case—including evidence—under conditions

104. *Id.* ¶ 29. Additionally, the Appeals Chamber refuted the Trial Chamber's holding that trial by a single judge necessarily violated Munyakazi's right to trial before an independent tribunal. *Id.* ¶ 26. It should be "recall[ed] that international legal instruments, including human rights conventions, do not require that a trial or appeal be heard by a specific number of judges to be fair and independent." *Id.*

105. *See id.* ¶¶ 28–29; *see also* Transfer Law, *supra* note 84, art. 2.

106. *Munyakazi* Appeals Decision, ¶ 31.

107. *Id.* ¶¶ 32–43.

108. *Id.* ¶ 32.

109. *Id.* ¶ 37.

110. *Id.*

111. *Id.* The Trial Chamber also found that the witness protection program was inadequate due to lack of resources, understaffing, and its administration under the Office of the Prosecutor (OTP). *Id.* ¶ 38. Specifically, there was a concern that defense witnesses would fear bias and unfair treatment from the OTP. *Id.* Although it cited the Trial Court's inadequacy rationale, the Appeals Chamber did not accord significant weight to that finding in its analysis. *Id.*

112. *Id.* ¶ 40.

113. *Id.*

114. *Id.* ¶ 42; *see also* Transfer Law, *supra* note 84, art. 14.

115. *Munyakazi* Appeals Decision, ¶ 42.

116. *Id.*

that do not place him or her at a substantial disadvantage vis-à-vis the other party.”¹¹⁷

Reviewing the totality of the fair trial factors, the Appeals Chamber affirmed the Trial Chamber’s refusal to transfer the case to Rwanda,¹¹⁸ holding that “Munyakazi’s right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as witnesses called by the Prosecution, cannot be guaranteed at this time in Rwanda.”¹¹⁹

Munyakazi transformed 11 *bis*. An inference of this change in the 11 *bis* framework can be ascertained from the Tribunal’s punishment and fair trial holdings.¹²⁰ Under *Munyakazi*, a statute banning the imposition of the death penalty was no longer viewed as sufficient to satisfy the Rule’s punishment requirement. Likewise, the fair trial principles in the Rwandan Constitution and the Transfer Law were insufficient to satisfy the Rule’s fair trial element. By adopting a factorial analysis for evaluating whether the accused could expect a fair trial, the Tribunal refuted the Prosecution’s argument that statutory safeguards were sufficient to support the requisite 11 *bis* elements¹²¹ and held that “under the current conditions in Rwanda, the[] laws [are] inadequate to guarantee witness protection.”¹²² The transfer applications to follow would therefore be adjudicated based on the “current conditions in Rwanda.”¹²³

2. *Reasons for Abandoning ICTY Jurisprudence*

In *Munyakazi*, both Chambers abandoned 11 *bis* jurisprudence to deny transfer. Up until that point, the ICTR had applied ICTY jurisprudence and the transfer plan which preceded it—both of which were written by the ICTY.

A comparison of the relationship between Rwanda and the ICTR and that between the former Yugoslavia and the ICTY reveals significant differences. For example, the ICTY had various longstanding safeguards built into its system to maintain ICTY control over the handling of war crimes by other judiciaries. The ICTR, on the other hand, had no real safeguards to ensure fair resolution by Rwandan courts. Given Rwanda’s history of political favoritism

117. Prosecutor v. Gatete, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, ¶ 71 (Nov. 17, 2008).

118. *Munyakazi* Appeals Decision, ¶ 50.

119. *Id.* ¶ 45.

120. *Id.* ¶¶ 20, 45.

121. *Id.*

122. *Id.* ¶ 47.

123. *Id.*

and suppression of human rights, such safeguards were particularly necessary. Because of these relational differences between the tribunals and their respective jurisdictions, the statutory framework analysis applied by the ICTY was ill-suited for determining whether an accused would receive a fair trial in Rwanda.

Most significantly, the ICTY had been addressing problems of arbitrary arrests in the former Yugoslav nations for years. From 1996 to 2004, the ICTY had implemented a comprehensive program to neutralize fears of arbitrary arrests for war crimes.¹²⁴ Under the “Rules of the Road” program, local prosecutors were obliged to obtain ICTY approval before pursuing any arrests for war crimes.¹²⁵ Balancing its paternalism against benefits to the nations, the ICTY also contributed to national prosecutions by turning over files to local prosecutors in cases it decided not to pursue.¹²⁶ After years of this successful give-and-take relationship, the ICTY helped establish the War Crimes Chambers in Bosnia Herzegovina, a national judiciary that would hear transfer cases as well as war crime appeals from lower courts.¹²⁷ Not until it had taken all of these steps did the ICTY apply the statutory framework analysis. In contrast, the ICTR spent its formative years trying to maintain its primacy over a country that never fully accepted that primacy. And during that time, Rwanda and its judiciaries developed a track record of political suppression, especially in the context of genocide.

Under Rule 11 *bis*, the Tribunal is required to “satisfy itself that the accused will receive a fair trial . . . and that the death penalty will not be imposed or carried out.”¹²⁸ Unsatisfied that the statutory framework in Rwanda was sufficient to ensure fair trial, the Tribunal tailored its analysis to the context in front of it.

3. *The Munyakazi Loophole*

Unfortunately, the ICTR’s new approach in *Munyakazi*, while insightful, was not without flaws. The *Munyakazi* Appeals Chamber created a loophole that would be utilized and stretched in the cases to follow. In its analysis of judicial independence, the Appeals Chamber refused to consider evidence of political influence over the *Gacaca* because it would have no bearing on *Munyakazi*’s trial (which would be heard before the High Court). By

124. See *Working With the Region*, UNICTY, <http://www.icty.org/sid/96> (last visited Nov. 12, 2012).

125. *Id.*

126. *Id.*

127. See Bohlander, *supra* note 60.

128. Rule 11 *bis* (C), *supra* note 63.

explicitly limiting its inquiry to conditions that would affect Munyakazi, the Appeals Chamber opened the door for Rwanda to obtain transfer without modifying its “current conditions.”

4. Case Law Following Munyakazi

Not surprisingly, a week and a half after the Appeals Chamber denied the Prosecutor’s request for transfer in *Munyakazi*, it denied another in *Kanyarukiga*.¹²⁹ An alternative finding would have been nearly impossible to justify, as the “current conditions in Rwanda” were unlikely to have undergone a complete transformation in a week’s time. Then, in December 2007, the Tribunal denied Prosecutor Jallow’s third and final application for transfer in *Prosecutor v. Hategekimana*.¹³⁰

Ambitious and determined, Prosecutor Jallow did not retreat, filing a fourth application for transfer in November 2007.¹³¹ In *Prosecutor v. Gatete*,¹³² the Tribunal evaluated the conditions of Rwanda as instructed by *Munyakazi*. Of course, some modifications were made, too. First, the Trial Chamber severed from the penalty restriction the requirement that any punishment imposed comport with international standards.¹³³ The Trial Chamber shoehorned that requirement into its fair trial analysis, asserting that “conditions of detention in a national jurisdiction . . . touch[] upon the fairness of that jurisdiction’s criminal justice system.”¹³⁴ By shifting the

129. See *Kanyarukiga* Appeals Decision, *supra* note 89. The *Kanyarukiga* Appeals bench relied heavily on *Munyakazi* precedent. See *id.* ¶¶ 4, 5. The holding and rationale in these back-to-back transfer applications were substantially the same, although the Trial Chamber’s opinion in *Kanyarukiga* expressed deference toward Rwanda in contrast to the undertones of distrust in the *Munyakazi* opinion. Compare *Munyakazi* Trial Decision, *supra* note 89, with *Kanyarukiga* Trial Decision. This difference in tone is likely due to the fact that the cases were heard in different trial chambers before different judges. For a more in-depth analysis on the differences between the trial chambers’ decisions in *Munyakazi* and *Kanyarukiga*, see Amelia S. Canter, Note, “For These Reasons the Chamber: Denies the Prosecutor’s Request for Referral”: The False Hope of Rule 11 bis, 32 FORDHAM INT’L L.J. 1614 (2008).

130. Case No. ICTR-00-55B-R11bis, Decision on Prosecutor’s Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda (June 19, 2008).

131. See *Prosecutor v. Gatete*, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (Nov. 17, 2008). Prosecutor Jallow made another such request in November 2010. See *Prosecutor v. Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (June 28, 2011).

132. Case No. ICTR-2000-61-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (Nov. 17, 2008).

133. See *id.* ¶¶ 25, 85–87 (considering the potential imposition of solitary confinement in its fair trial analysis as opposed to its penalty structure analysis).

134. *Id.* ¶ 76 (citation omitted). In shifting the punishment element into the fair trial analysis, the *Gatete* bench diverged from the 11 bis framework as set by the appeals chambers in *Munyakazi* and *Kanyarukiga*. See *supra* Part IV.A. On the other hand, this shift is in harmony with ICTY case law. See *supra* note 95. The *Kanyarukiga* Trial Chamber also addressed the potential imposition of solitary confinement amongst other fair trial factors, but this approach was abandoned by the Appeals Chamber.

solitary confinement question into the multi-factor fair trial analysis, under which no single factor is dispositive, the Tribunal created a situation where the availability of solitary confinement as a punishment might not bar transfer.¹³⁵ Despite the new, non-dispositive position of the solitary confinement question in the analytic framework, the Tribunal's analysis of the issue resembled that of the Appeals Chamber in *Munyakazi*. Due to ambiguity in Rwandan statutory law—the Organic Law allowing solitary confinement, and the Transfer Law silent on that subject—the Tribunal was faced with uncertainty regarding the potential outcome of any transferred case. Such uncertainty was not conducive to transfer.¹³⁶

Before applying the fair trial factors, the Tribunal applauded Rwanda for its statutory progress, noting that its “legal framework generally mirrors the right to a fair trial as embodied in Article 20 of the ICTR Statute.”¹³⁷ Having set a tone of deference to Rwanda and its Transfer Law, the *Gatete* bench proceeded to determine whether the legal framework in fact provided what it purported to.¹³⁸ The application of the *Munyakazi* factors led to nearly identical findings: judicial independence was sufficient to support transfer,¹³⁹ while witness protection for residents and non-residents was not.¹⁴⁰

Perhaps due to arguments asserted in briefs from Human Rights Watch and International Criminal Defense Attorneys Association,¹⁴¹ the *Gatete* bench applied additional fair trial factors related to the availability of an effective defense.¹⁴² These factors included consideration of the availability

Compare Kanyarukiga Trial Decision, ¶¶ 85, 94–96 (analyzing solitary confinement as a factor bearing on “the fairness of [Rwanda’s] criminal justice system”), with *Kanyarukiga* Appeals Decision, ¶ 7 (assessing solitary confinement in connection with the non-imposition of the death penalty).

135. *Gatete*, Case No. ICTR-2000-61-R11bis, ¶ 25 (holding Rwanda “removed one of the impediments to transfer of cases from the ICTR”).

136. *Id.* ¶ 87.

137. *Id.* ¶ 31.

138. *Id.* ¶¶ 33–88.

139. *See id.* ¶ 39. The *Gatete* bench provided rationale resembling that of the Appeals Chamber in *Munyakazi*. *Compare Gatete*, Case No. ICTR-2000-61-R11bis, ¶ 36 (noting there is no recent evidence of judicial corruption in connection with the High Court or Supreme Court, the designated fora for transfer cases), with *Munyakazi* Appeals Decision, ¶ 29 (same). Additionally, the Trial Chamber noted that many Hutus have been acquitted in Rwandan ordinary courts, thus providing further support for judicial independence. *Gatete*, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, ¶ 35.

140. *Gatete*, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, ¶¶ 64, 72.

141. In their briefs, Human Rights Watch (HRW) and International Criminal Defense Attorneys Association (ICDAA) raised arguments regarding impediments to *Gatete*’s right to representation, such as the low budget for legal aid and the small community of lawyers within Kigali. *Id.* ¶ 44.

142. *Id.* ¶ 43. Additional factors considered included presumption of innocence, *id.* ¶ 40; double jeopardy, *id.* ¶ 73; unlawful and arbitrary arrest, *id.* ¶¶ 78–79; and conditions of arrest and detention, *id.* ¶¶ 80–84. All of these sub-factors were determined to be sufficient for transfer purposes. *Id.* ¶¶ 40, 73, 78–

of counsel and legal aid¹⁴³ and the working conditions for the defense attorneys.¹⁴⁴ In assessing whether counsel was available to Gatete, the Tribunal declared that it had no doubt that Gatete would be able to find representation, despite that only approximately 280 lawyers were practicing in Rwanda at that time.¹⁴⁵ The next factor, the availability of legal aid, received a similarly cursory analysis.¹⁴⁶ Because the Ministry of Justice in Rwanda provided a \$500,000 budget for transfer cases, the Tribunal found the legal aid factor to be satisfied.¹⁴⁷ Diverging from the reality-based analysis of *Munyakazi*, the Tribunal stated that it was not obliged to “establish in detail the sufficiency of the funds available as a precondition for referral.”¹⁴⁸ Sometimes the “current conditions in Rwanda” mattered, but here they clearly did not.¹⁴⁹ Evaluating the working conditions for defense attorneys, the Tribunal acknowledged evidence of threats and arrests endured by lawyers who had represented accused genocidaires.¹⁵⁰ It then dismissed such evidence on grounds that these threats and arrests had taken place in connection with proceedings in the ordinary courts (as opposed to the High Court where transferred cases would be heard).¹⁵¹ If any threats or arrests occurred in Gatete’s case, the High Court or Supreme Court would be under a duty to investigate and remedy hindrances to his defense.¹⁵² Accordingly, the Tribunal held that threats and harassment to attorneys did not interfere with

79, 80–84. Because *Gatete* was before the Trial Chamber that heard *Kanyarukiga*, the fair trial analysis in these cases is largely identical. See *Kanyarukiga* Trial Decision, ¶¶ 26–97.

143. *Gatete*, Case No. ICTR-2000-61-R11bis, Decision on the Prosecutor’s Request for Referral to the Republic of Rwanda, ¶¶ 45, 47.

144. *Id.* ¶ 50.

145. *Id.* ¶ 46.

146. *Id.* ¶¶ 47–49.

147. *Id.* ¶¶ 48–49.

148. *Id.* ¶ 48.

149. The *Gatete* bench did not acknowledge its shift away from the *Munyakazi* framework. Instead, it made seemingly contradictory statements. First, the Trial Chamber used language from *Munyakazi* in its statement of the issue: whether the “right [to legal aid] w[ould] be ensured in practice.” *Id.* ¶ 47. Then, in the following paragraph, the Chamber held that “[i]t is not for the Chamber to venture into the question whether th[e] amount w[ould] be sufficient.” *Id.* ¶ 48 (citing *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, (Int’l Crim. Trib. for the Former Yugoslavia May 17, 2005)). Under this rationale, the availability of one dollar would support transfer, yet would obviously not, in practice, ensure the accused’s right to legal aid. A determination of whether the accused will be afforded this right in practice necessarily calls for an inquiry into the amount of funds made available for his defense. The flaw in the Trial Chamber’s reasoning is due to its attempt to follow *Munyakazi*’s reality-based inquiry and ICTY jurisprudence at the same time. The two are irreconcilable. See *infra* note 157.

150. *Gatete*, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, ¶ 52.

151. *Id.*

152. *Id.*

Gatete's right to a fair trial.¹⁵³ However, the Tribunal found ICTR defense attorneys' previous difficulties obtaining official documents and meeting with detainees could affect the fairness of trial.¹⁵⁴ Based on its analysis of the totality of the factors, the Tribunal concluded that Rwanda could not provide Gatete with a fair trial.¹⁵⁵

The *Gatete* bench purported to follow *Munyakazi*,¹⁵⁶ and perhaps it did. But at the same time, it opened the door for Rwanda to pursue transfer with a legal framework argument—something *Munyakazi* did not recognize as the relevant inquiry.¹⁵⁷ By merely stating the realities, without acknowledging the improbability that such would support a fair trial, the *Gatete* bench deemphasized the “current conditions of Rwanda.” Further diluting the reality-based approach, the *Gatete* bench utilized the *Munyakazi* loophole to dismiss evidence of threats and arrest endured by defense lawyers because they took place in connection with proceedings in the ordinary courts.¹⁵⁸ Although the *Gatete* Trial Chamber did not explicitly so state, Rwanda's statutory progress was the new focus. The deferential tone of the opinion and

153. *Id.*

154. *Id.* ¶ 53.

155. *Id.* ¶ 95.

156. *Munyakazi* Appeals Decision, *supra* note 90. *See, e.g., id.* ¶ 38 (“The Appeals Chamber has also found that the composition of the Rwandan High Court by a single judge is not as such incompatible with the right to a fair trial.”); *id.* ¶ 61 (acknowledging that the Appeals Chamber has accepted that the prosecution's administration of the witness protection program may deter fearful witnesses from using it); *id.* ¶ 87 (finding that Gatete's transfer runs the risk of punishment inconsistent with international standards “conforms to case law of the Appeals Chamber”).

157. The Tribunal's shift away from the reality-based analysis seems to be driven by policy and supported by a mixture of ICTY and ICTR jurisprudence. The 11 *bis* jurisprudence of the ICTY supports transfer where the receiving nation's constitution, statutory scheme, and treaty participation provide for fair trial. *See, e.g.,* Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, (Int'l Crim. Trib. for the Former Yugoslavia May 17, 2005), ¶¶ 52–68. Accordingly, the ICTY has not found reason to inquire into the “current conditions” of the former Yugoslavia; inquiry into statutory framework is sufficient. *Id.* Despite the inconsistency between the ICTY test and that of *Munyakazi*, the *Gatete* bench wove ICTY authority into its rationale and holdings. *See, e.g., Gatete*, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 48 n.78, ¶ 60 n.94. In so doing, it diluted *Munyakazi*'s reality-based test. Another potential explanation for the Tribunal's shift is that *Munyakazi* left a loophole. In *Munyakazi*, the Appeals Chamber rejected evidence of political influence over the judiciary on the grounds that such evidence was connected to hearings before the *Gacaca* courts, and *Munyakazi*'s case would not be heard there. *Munyakazi* Appeals Decision, ¶ 29. Under this rationale, the *Gatete* Trial Chamber dismissed evidence of threats and arrests endured by defense counsel, stating that such instances had occurred in connection with proceedings before *Gacaca* courts. *See Gatete*, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda ¶ 52. The extension of this rationale, as applied in *Munyakazi*, is flawed. Judicial bias of the *Gacaca* courts has no potential to affect the trial of the accused. But the effect of threats made to defense counsel and arrests of same is not as easily confined. Potential defense counsel for the accused are unlikely to assess the risks of representing an accused genocidaire according to the judiciary he or she stands before—whether it be the *Gacaca* or the High Court.

158. *See supra* note 155.

the extension of the *Munyakazi* loophole sent a signal to Rwanda and Prosecutor Jallow: rewrite some statutes and apply again. And so they did.

Just a few short days after the *Gatete* opinion was issued, Rwanda added a provision to the Abolition of the Death Penalty Law, which clarified what Rwanda had been arguing in its briefs to the Tribunal:¹⁵⁹ life imprisonment with special provisions would not be imposed in transfer cases.¹⁶⁰ Instead, transfer cases would be governed by the Transfer Law, which states that the highest punishment is life imprisonment.¹⁶¹ In early 2009, Rwanda also amended Article 13 of the Transfer Law to afford witnesses immunity from the law for statements made during trial.¹⁶² This protection would shield witnesses from prosecution under the “genocidal ideology” charge of Rwanda’s constitution.¹⁶³ The 1994 regime that had sought summary prosecutions and death penalty judgments had begun to resemble a French or United Nations-type system with human rights at its core—quite a stride for a government comprised of the victims of the horrid atrocities that occurred less than two decades prior. International influence and guidance seemed to be expediting the healing process, statutorily speaking, anyway.¹⁶⁴ Even then, the progress was limited, as the amendments’ protections were exclusive to transfer cases.

V. CONDITIONS IN RWANDA AS A STANDARD IN 2010

A. *The State of Rwandan Justice in 2010*

Unfortunately, in 2010, the “conditions in Rwanda” indicated that the healing apparent in Rwanda’s Transfer Law did not translate into the nation’s reality.¹⁶⁵ In late May 2010, American law professor Peter Erlinder was

159. Rwanda argued that Article 21 of the Transfer Law resolved this ambiguity, as it provides that where there is an inconsistency between the Transfer Law and another national statute, the text of the Transfer Law governs. *Gatete*, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, ¶ 85. Because the Transfer Law provides that the highest penalty is life imprisonment, the higher penalty of life imprisonment with special provisions would not be imposed in transfer cases. *Id.*

160. Organic Law No. 66/2008 of 21 Nov. 2008 Relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda [hereinafter Amendment Abolishing Solitary Confinement in Transfer Cases].

161. *Id.*

162. See *Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, ¶ 88 n.127 (June 28, 2011) (citing Organic Law No. 03/2009/OL, Article 13 of 26 May 2009 (amending the Transfer Law)).

163. See *id.* ¶ 95 (“The Chamber considers that Article 13 of the Transfer Law, as amended, provides immunity to defence witnesses and defence counsel for anything said or done in the course of a trial.”).

164. See *supra* text accompanying notes 157–59.

165. See generally Erlinder, *supra* note 48.

arrested and imprisoned for genocide denial.¹⁶⁶ There are many theories as to the grounds of his arrest.¹⁶⁷ Notably, in 2007 Erlinder successfully led the ICTR defense team for Major Aloys Ntabakuze, achieving Ntabakuze's acquittal for "conspiracy to commit genocide."¹⁶⁸ When a police spokesman was asked to comment on the grounds for Erlinder's arrest, he pointed to the professor's statements both at the Tribunal and in publications.¹⁶⁹ Publicly, the government stated that the arrest was based on Internet opinion pieces authored by Erlinder.¹⁷⁰ Also relevant was Erlinder's presence in Rwanda to defend presidential candidate Victoire Inagabire, who faced charges for genocide denial.¹⁷¹

Just days before Erlinder's arrest, U.S. Assistant Secretary of State for African Affairs Johnnie Carson warned Congress "that the Rwandan government was restricting human rights ahead of presidential elections."¹⁷² Human rights groups have also asserted that the Kagame regime uses the loose and expansive "genocidal ideology" charge to curtail opposition.¹⁷³ It appears that, in his campaign against Inagabire, Kagame used "genocidal ideology" to curtail opposition twice—the first time directly, and the second time to imprison Inagabire's counsel.

While Erlinder does not dispute that he was arrested to suppress Inagabire's political opposition, he also believes that his work in the *Ntabakuze* case played a part.¹⁷⁴ This is because during the trial, he discovered and publicized the U.N. "Rwanda Genocide Papers," previously suppressed documents that exposed evidence of RPF-led executions of Hutu civilians.¹⁷⁵ Whatever the real grounds for the arrests, summary prosecutions under the RPF regime had taken a new form by 2010, and that form appears

166. Josh Kron & Jeffrey Gettleman, *American Lawyer for Opposition Figure is Arrested in Rwanda*, N.Y. TIMES, May 28, 2010, at A9.

167. *See id.*; *see also* Erlinder, *supra* note 48, at 138, 153.

168. Erlinder, *supra* note 48, at 138.

169. Kron & Gettleman, *supra* note 166.

170. Erlinder, *supra* note 48, at 153.

171. *Id.* at 133. When Victoire Inagabire "claimed that crimes committed in 1994 against Hutus by the ruling party had gone unpunished," her arrest and imprisonment followed. Kron & Gettleman, *supra* note 166.

172. Kron & Gettleman, *supra* note 166.

173. *See* Prosecutor v. Uwinkindi, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 79 (June 28, 2011) ("ICDAA refers to the Rwandan laws on 'genocide ideology' as 'the most powerful weapon in Rwanda's legal arsenal against political dissidents.'"). Moreover, CHRI has observed that the Kagame regime also uses arbitrary detentions as a means of political and social control. *See* CHRI REPORT, *supra* note 25, at 48–49. The overpopulated jails of Rwanda "enable the present government to sanctuarise itself in its moral superiority and to extract a maximum of political advantages from the situation." *Id.* at 48.

174. Erlinder, *supra* note 48, at 153.

175. *Id.*

to be more expansive than Rwanda's newly ratified transfer amendments might suggest.

The *Gacaca* court proceedings taking place in Rwanda during that time also suggest that the country's amendments to its Transfer Law were more a façade than genuine progress.¹⁷⁶ The local *Gacaca* courts, which served as the primary adjudicative organs for the genocide, were particularly susceptible to corruption and administrative influence.¹⁷⁷ Moreover, the informal procedures of the *Gacaca* courts placed accused suspects at the mercy of nine laymen,¹⁷⁸ without providing any access to defense counsel.¹⁷⁹ Another indication that the *Gacaca* courts were not as impartial or as fair as the international community would have liked is found in the courts' jurisdiction, which was limited to crimes committed against Tutsis.¹⁸⁰ Those who killed Hutus were not liable before the *Gacaca*.¹⁸¹ Despite the lack of safeguards for the accused and the incongruity in jurisdiction, *Gacaca* courts were empowered to impose life imprisonment in isolation.¹⁸² In 2009, the courts exercised this authority, sentencing sexual violence offenders to life imprisonment in isolation.¹⁸³

In the years and months leading up to *Uwinkindi*, Rwanda and its judiciary did not appear to be guided by the principles enshrined in the recent amendments to the Transfer Law. This mismatch between statute and reality is precisely the reason for the emergence of the *Munyakazi* approach. But the Tribunal's subsequent departure from *Munyakazi* did not come as a complete surprise. By 2010, Rwanda had managed to reduce the mismatch between

176. See *infra* notes 177–83 and accompanying text; see also CHRI REPORT, *supra* note 25, at 9 (stating that Rwanda “uses [its] constitution opportunistically as a façade, which hides the exclusionary and repressive nature of the regime; relies on power structures that sometimes run parallel to, and sometimes cross-cuts the formal government . . .”).

177. See *Ahorugeze v. Sweden*, App. No. 37075/09, Eur. Ct. H.R. 1, 13 (2011) (noting concerns about fairness and impartiality). “[S]ome courts have spent only a few hours hearing each case and poorly qualified, ill-trained and corrupt *gacaca* judges . . . have fuelled widespread distrust of the system.” *Id.* at 13–14. There have been reports of judges making false accusations of genocide for personal gain, such as acquisition of land. *Id.* at 14.

178. *Gacaca* judges are popularly elected. JONES, *supra* note 26, at 60. A legal education is not required for the post, and, upon election, the training period ranges from one to three months. See Constance Morrill, *Reconciliation and the Gacaca: The Perceptions and Peace-Building Potential of Rwandan Youth Detainees*, 6 OJCPR 1, 11–12 (2004), http://trininstitute.org/ojpcr/6_1morrill1.pdf.

179. CHRI REPORT, *supra* note 25, at 46.

180. *Id.*

181. *Id.*

182. See Amendment Abolishing Solitary Confinement in Transfer Cases, *supra* note 160.

183. See HUMAN RIGHTS WATCH, WORLD REPORT 2010: RWANDA 148 (2004); see also PAUL CHRISTOPH BORNKAMM, RWANDA'S GACACA COURTS: BETWEEN RETRIBUTION AND REPARATION 77 (2011) (“*Gacaca* courts can . . . impose prison sentences of up to 15 years upon people aged between 14 and 17 years at the time of their crimes.”).

statute and reality by making all of the fair trial protections and penalty limits exclusive to transfer cases, of which it had none. After all, it was impossible to breach principles that had not yet been invoked. The troubling realities in Rwanda would not govern transfer cases because Rwanda promised to treat those cases differently. In addition to Rwanda's dual statutory scheming, the ICTR had faced criticism for its decision to engage in a factual inquiry to deny transfers to Rwanda.¹⁸⁴ By the time the Prosecutor had filed the *Uwinkindi* application, the ICTY had already transferred thirteen cases, each time applying a statutory framework analysis.¹⁸⁵ Again, the ICTR was under pressure to complete its mandate and transfer cases just like its sister tribunal had. Transfer had plainly become the easier option, despite the persistence of macro-level ethical problems.

B. Uwinkindi

1. *Factual Background*

In substance, the facts and related allegations of *Uwinkindi* were not meaningfully different from those of the transfer applications that preceded it. But the ICTR's changing approach dictated a different result.

Jean-Bosco Uwinkindi was the pastor of the Pentecostal Church of Kayenzi, located in Kigali-Rural prefecture.¹⁸⁶ After President Habyarimana's death on April 6, 1994, Uwinkindi allegedly sent messengers to Hutus in the area to invite them to his church for a meeting.¹⁸⁷ At this meeting, a *bourgmestre*¹⁸⁸ ordered the killing of Tutsis.¹⁸⁹ Then, on April 7, 1994, Uwinkindi went to a roadblock near his church and allegedly ordered that no Tutsi be permitted to pass.¹⁹⁰ Tutsi civilians who were captured at the roadblock were brought to Uwinkindi's church, where they were killed.¹⁹¹ At the same time, the prosecution also alleged that Uwinkindi turned Tutsis away from his church in early April.¹⁹² In that time period, after an attack in

184. See, e.g., Canter *supra* note 129.

185. See *Status of Transferred Cases*, UNICTY, <http://www.icty.org/sid/8934> (last visited Sept. 8, 2012).

186. Prosecutor v. Uwinkindi, Case No. ICTR-2001-75-I, Indictment, ¶ 2 (Sept. 11, 2001).

187. *Id.* ¶ 5.

188. A *bourgmestre* sits at the head of each commune in Rwanda. DES FORGES, *supra* note 9, at 41. In 1991, there were 145 communes in Rwanda, with an average population of 40,000–50,000 people. *Id.* In the hierarchical Rwandan system of governance, *bourgestres* are inferior in rank to heads of prefects and sub-prefects. However, in practice, *bourgestres* have significant control over ordinary Rwandans. *Id.*

189. *Uwinkindi*, Case No. ICTR-2001-75-I, Indictment, ¶ 6.

190. *Id.* ¶ 8.

191. *Id.* ¶ 9.

192. *Id.* ¶ 10.

the area, Tutsis fled from their homes, and many fell victim to continued attacks.¹⁹³ The prosecution alleged that Uwinkindi led and participated in these attacks.¹⁹⁴ In July of 1994, Uwinkindi fled Rwanda.¹⁹⁵ After his departure, an investigation uncovered two thousand corpses in the area surrounding his church.¹⁹⁶ Uwinkindi was indicted on September 11, 2001 on charges of genocide, conspiracy to commit genocide, and extermination as a crime against humanity.¹⁹⁷

2. *The Tribunal's Analysis of the Rule 11 bis Conditions*

Following Uwinkindi's indictment by the ICTR, Prosecutor Jallow filed an application in November 2010 for transfer to Rwanda.¹⁹⁸ First, the Referral Chamber assessed the current penalty structure.¹⁹⁹ Because Rwanda had amended its law to address the ambiguity that troubled the Tribunal in *Munyakazi* and *Gatete*, life imprisonment in isolation would only be imposed in non-transfer cases.²⁰⁰ With this change, the Tribunal was satisfied that any penalty imposed against Uwinkindi (and in other transfer cases) would accord with international penal standards.²⁰¹

The Tribunal then turned its analysis to witness availability.²⁰² Under the amended version of Article 13 of the Transfer Law—which provided witnesses with immunity for statements made during trial—the Prosecutor argued that witnesses' fears of being charged with genocidal ideology were unfounded.²⁰³

In response, Uwinkindi's counsel made the same argument that had helped Munyakazi avoid transfer to Rwanda: the accused's witnesses would not testify before the Rwandan judiciary out of fear that they would be “threatened, harassed, jailed or even killed.”²⁰⁴ Thus, the defense countered the prosecution's assertion that Article 13 of the Transfer Law was sufficient to allay witnesses' fears by attacking the genuineness of the amendment. And

193. *Id.* ¶¶ 13–14.

194. *Id.* ¶¶ 16–17.

195. *Id.* ¶ 25.

196. *Id.*

197. *Id.* at 1.

198. Prosecutor v. Uwinkindi, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (June 28, 2011).

199. *Id.* ¶¶ 44–51.

200. See Amendment Abolishing Solitary Confinement in Transfer Cases, *supra* note 160.

201. *Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 51.

202. *Id.* ¶¶ 61–132.

203. *Id.* ¶ 61.

204. *Id.* ¶ 71.

those attacks were not without merit. When the Senate discussed adding the additional immunity provision to Article 13, the incumbent Minister of Justice had stated:

We have nothing to lose [by granting immunity.] [I]f anything, we have everything to gain, by these people turning up, it will be a step toward their being captured. They will sign affidavits on which their current address will be shown and that would at any other time lead to their arrest.²⁰⁵

Notably, Rwanda's Genocide Fugitive Tracking Unit supervises the office that facilitates travel for defense witnesses and counsel.²⁰⁶ The minister's proposal to use immunity claims to facilitate future arrests provides reasonable grounds for witnesses to distrust Article 13's immunity provisions. Furthermore, the defense argued that, even if witnesses were to receive absolute immunity against further prosecution, Article 13 does not adequately address witness fears of abduction and murder, nor does it address fears that their family members might be subject to the same.²⁰⁷

But the Tribunal was not persuaded by these concerns. It found for the Prosecutor and concluded that witnesses' fears related to testifying before the Rwandan judiciary were premature in light of the immunity conferred by Article 13.²⁰⁸ Responding to the defense's argument regarding fear of murder and abduction as an impediment to witness testimony, the Tribunal stated that its role was not to determine the legitimacy of fears, but rather "to ascertain that the Accused will be able to secure the appearance of witnesses on his behalf and thus ensure a fair trial."²⁰⁹ Under this standard, the Tribunal held that Article 13 adequately provides for a fair trial.²¹⁰ Legislative progress favored fair trial, which supported transfer.

Following its determination on witness availability, the Tribunal commended the government of Rwanda for its willingness to change, as reflected in its recent statutory amendments and its rewritten and revamped

205. *Id.* ¶ 86.

206. *Id.* ¶ 87.

207. *Id.* ¶ 71.

208. *Id.* ¶ 88.

209. *Id.* ¶ 90. The defense also argued Uwinkindi's transfer would result in double jeopardy because he had been convicted in absentia by the two *Gacaca* courts on these same facts. *Id.* ¶ 33. In support of this argument, the defense brought to light the fact that a Rwandan High Court is pursuing charges against accused, Leonidas Nshogoza, for charges already adjudicated by the ICTR. *Id.* ¶ 34. The Chamber dismissed the defense's argument regarding the Nshogoza proceedings, stating that "a single case do[es] not provide conclusive evidence for the lack of impartiality." *Id.* ¶ 35.

210. *Id.* ¶ 90.

witness protection programs.²¹¹ Moreover, the Tribunal noted that Rwanda's brief expressed a commitment for continued self-reflection and change.²¹² Specifically, Rwanda promised that legislation creating a panel to hear transfer cases was underway, and the panel would include judges from foreign or international courts.²¹³ Another measure the Tribunal found to be illustrative of Rwanda's progress was that the Minister of Justice was conducting a study to determine whether the constitutional concept of genocidal ideology is too vague or expansive in its application.²¹⁴

The Tribunal next looked to the working conditions for defense counsel in Rwanda, first noting that the immunities and protections of the latest amendments also inure to defense counsel in transfer cases.²¹⁵ Turning then to the realities, the bench looked to the government imposed barriers which interfered with defense counsel's ability to obtain official documents and meet with detainees. While these barriers were accorded significant weight in *Gatete*, here, they were deemed insufficient—by themselves or in conjunction with the other factors—to deny transfer of Uwinkindi's case.²¹⁶

Noting the recent arrest of Peter Erlinder, the Tribunal briefly reevaluated the argument that defense counsel's subjection to threats, harassment, and arrests interferes with the accused's right to representation, and ultimately, to a fair trial.²¹⁷ Rwanda had also arrested and tried ICTR defense investigator, Léonidas Nshogoza, for witness bribery despite his acquittal by the ICTR for the same.²¹⁸ In so doing, the High Court violated the double jeopardy principle enshrined in its own statutory framework.²¹⁹ The Referral Chamber acknowledged that these recent arrests might have a chilling effect on defense representation but nevertheless found that they did not preclude transfer.²²⁰ Placing confidence in the judiciary (which had just violated its own double jeopardy law), the Tribunal stated that future incidents of this nature could be resolved by the Rwandan High Court or Supreme Court.²²¹ After recognizing and dismissing the barriers to defense, the Referral Chamber reiterated that the protections in the Transfer Law had not yet been tested.²²²

211. *Id.* ¶ 101.

212. *See id.* ¶¶ 95, 114.

213. *Id.* ¶ 114.

214. *Id.* ¶ 67.

215. *Id.* ¶¶ 147–152.

216. *Id.* ¶ 161.

217. *Id.* ¶ 154.

218. *Id.* ¶ 150.

219. *Id.* ¶ 34.

220. *Id.* ¶ 161.

221. *Id.* ¶ 159.

222. *Id.* ¶ 167.

VI. UWINKINDI ANALYSIS

As it had done in *Gatete*, the Tribunal purported to assess the “current conditions of Rwanda” in *Uwinkindi*, but its holdings were ultimately based on Rwanda’s newly amended Transfer Law.²²³ In essence, each of the components of the “current conditions” standard was no longer applied to the actual current conditions, but rather to the conditions currently dictated by the Transfer Law. This new approach made the transfer of *Uwinkindi*’s case easy to approve and was not without reason. Also, provisions were put in place to ensure the cases transferred by the ICTR were handled in accordance with the Transfer Law’s protections. But in allowing Rwanda to dictate the process legislatively, the ICTR forfeited its last, best opportunity to effect greater change in Rwanda’s judicial system.

A. Witness Availability: A Disconnect Between Theory and Reality

In examining the issue of witness availability, the *Uwinkindi* bench acknowledged the reality of witness fears but then dismissed that reality, finding their fears to be unwarranted.²²⁴ Perhaps attempting to undermine its assessment on the reasonability of these fears, the Chamber asserted that its job was not to determine the legitimacy of fears, but instead to ascertain whether *Uwinkindi* would be able to “obtain the attendance and examination of witnesses on his . . . behalf under the same conditions as witnesses against him.”²²⁵ In framing its task as such, the Chamber failed to acknowledge that the legitimacy of witness fears directly affects *Uwinkindi*’s ability to secure their appearances. Any assessment of whether he will be able to secure witnesses necessarily calls for an inquiry into whether those witnesses would in fact testify on his behalf.²²⁶ Witnesses who are afraid for their lives, futures, and families will not testify, despite any conference of statutory immunity.

According to the Tribunal, witness refusal to testify is hypothetical, as Rwanda has the power to compulsorily apprehend resident witnesses.²²⁷ But

223. See, e.g., *supra* note 203 and accompanying text.

224. See *supra* text accompanying note 203.

225. Prosecutor v. *Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, ¶ 85 (June 28, 2011).

226. The Tribunal assumed that, because defense witnesses had testified before the High Court in previous genocide cases, they would also testify on behalf of *Uwinkindi*. Prosecutor v. *Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, ¶ 100 (June 28, 2011). The number of defense witnesses who testified before the High Court in genocide cases was markedly less than the number of prosecution witnesses. *Id.* ¶ 63.

227. *Id.* ¶ 104.

such is hardly the case; forty-one of Uwinkindi's witnesses are non-residents and therefore beyond Rwanda's summoning power.²²⁸ Moreover, of the eight witnesses remaining, their forced testimony will surely be tainted by their fear.²²⁹ These witnesses' fear-ridden testimony will potentially be more detrimental to Uwinkindi than their absence might have been—damning with faint corroboration, so to speak. But the Tribunal dismissed these problems, finding that Rwanda's summoning procedure is a generally accepted means of ensuring witness testimony at trial, and therefore “cannot be properly regarded as prejudicial to the right to a fair trial.”²³⁰ By relying on international norms, the judges ignored the “current conditions of Rwanda.” Where witnesses are genuinely and effectively protected, there is little risk that their compulsory testimony will be tainted with fear. But in Rwanda, the summonses precede the security.²³¹

As Human Rights Watch highlighted in its brief to the Referral Chamber, the conditions in Rwanda had not improved for defense witnesses.²³² They continued to be victimized and jailed, and they were still afraid.²³³ But the same conditions that precluded transfer in *Gatete* were no longer sufficient to do so.

B. *The Munyakazi Loophole*

By acknowledging and ignoring the realities in Rwanda, the *Uwinkindi* bench inadvertently revised the “current conditions” inquiry such that its application has become impossible. The Tribunal closed its eyes to Rwandan reality, instead homing in on transfer justice. Priming this shift in focus, the Chamber stated that “Rwanda ha[d] shown the willingness and the capacity to change by amending its relevant laws over the past two years.”²³⁴ But Rwanda's willingness to amend its laws can hardly be considered a change, as it had been doing exactly that since the ICTR adopted Rule 11 *bis*. Pre-*Uwinkindi*, there was a concern that Rwanda's willingness to amend its laws

228. *See id.* ¶ 70. One of the many amendments Rwanda made to its Transfer Law allows defense witnesses to testify in a foreign jurisdiction before a judge or by deposition, and again, the Referral bench was satisfied that Rwanda had taken positive steps toward fair trial. However, neither of these options addresses the concern that the accused will be at a disadvantage if most of his witnesses are unable to provide face-to-face testimony.

229. *See id.* ¶ 104.

230. *Id.*

231. *See supra* Part V.A.

232. *Uwinkindi*, Case No. ICTR-2001-75-R11bis, ¶ 77.

233. *Id.* ¶ 99.

234. *Id.* ¶ 101.

was incommensurate with its willingness to change. Apparently that concern has been reconciled.

Driven by its newfound trust in Rwanda, the *Uwinkindi* bench minimized the effect of arrests and victimizations on fair trial. And it continued to highlight the fact that the noted infractions did not fall under the statutory protections of the Transfer Law.²³⁵ By limiting the scope of its inquiry to the protections of a statute that had never before been invoked, the Tribunal rendered the reality-based inquiry obsolete. *Munyakazi* left the door open to this reasoning in its dismissal of evidence of injustice in the *Gacaca* courts on grounds that such influence would not affect the accused.²³⁶ Stretching this rationale, not even the “current conditions of Rwanda” might affect an accused who was not yet there. Only Rwanda’s promises and Transfer Law might have any bearing on *Uwinkindi*’s trial. The new inquiry then is whether the Transfer Law provides for fair trial and punishment that comports with international standards. Since this question was addressed and answered in *Uwinkindi*, the Tribunal has approved the transfer of seven more accused genocidaires, six of whom remain fugitive.²³⁷

C. Rationale for Departing from the *Munyakazi* Approach

As noted above, the reality-based inquiry was not without flaw. While the Referral Chamber did not explicitly state that it was departing from the previous approach, it did provide some rationale for doing so.²³⁸ Specifically, it stated that “no judicial system can guarantee absolute witness protection.”²³⁹ Even at the ICTR—where fair trial principles are implemented at great expense—witnesses often fear their testimony might invite repercussions.²⁴⁰ Furthermore, the Tribunal asserted that it was impossible to judge the efficacy of a statute in its abstract and that, without an opportunity to operate, the Transfer Law’s protections would not be able to allay witnesses’ fears. Viewed in this light, the reality-based approach was

235. See *supra* notes 205–07, 219 and accompanying text.

236. See *supra* notes 102–04 and accompanying text.

237. See ICTR/Referrals—Eighth and Last ICTR Case Transferred to Rwanda for Trial, HIRONDELLE NEWS AGENCY (June 28, 2012), <http://www.hirondellenews.org/ict-rwanda/407-collaboration-with-states/collaboration-with-states-rwanda/33409-280612-ictreferrals-eighth-and-last-ict-rwanda-for-trial>.

238. The Appeals Chamber was more forthcoming in holding that it was “within the scope of [the Referral Chamber’s] discretion [to] rely[] on the . . . legal framework as a primary basis for determining whether an accused will be able to secure the attendance of reluctant witnesses.” *Uwinkindi v. Prosecutor*, Case No. ICTR-2001-75-AR11bis, Decision on *Uwinkindi*’s Appeal Against the Referral of His Case to Rwanda and Related Motions, ¶ 64 (Dec. 16, 2011).

239. *Uwinkindi*, Case No. ICTR-2001-75-R11bis, ¶ 128.

240. See *id.* ¶ 102.

perpetuating a stalemate between the government of Rwanda and its witnesses. The government was without a means to dispel witnesses' fears, which left the witnesses without impetus to trust in the government.

It is easy to see how a factual inquiry into witness fear might perpetuate such an impasse. However, when viewed in context, the rationale behind this concern falls short. First, no such impasse exists here. Rwanda could allay the fears of all of its witnesses by adopting and implementing these protections nationally. Instead, Rwanda has chosen to adopt a dual statutory scheme, by which relevant protections inure exclusively to those involved in transfer cases. Second, this dual statutory scheme greatly undermines the Transfer Law's potential to alleviate witness fear. Even if the protections were perfectly implemented, for the law to have the predicted fear-relieving effect, transfer witnesses would have to be able to distinguish the government's treatment of witnesses in transfer cases from those in non-transfer cases. But witnesses' fears are more likely to be affected by the atmosphere in Rwanda than by a nuanced statutory scheme, which was enacted solely for the purpose of attaining transfer cases. In fact, by acknowledging that witnesses were also afraid to testify in its own chambers, the Tribunal highlighted the problem: Rwandan witnesses fear Rwandan repercussions.

Like other issues before it, the Tribunal did not address the witness fear impasse head-on but used it to support its departure from the "current conditions" approach. Had the Tribunal explicitly acknowledged the flaws in that approach, it might have created a new standard, fit for Rwanda. Instead, it inadvertently endorsed Rwanda's dual statutory scheme and its limited and imperfect protections.

VII. REVOCATION: A TEMPORARY SOLUTION FOR TRANSFERRED CASES

A. *11 bis Monitoring and Revocation Mechanism*

Fortunately for Uwinkindi and the other transferees, Rule 11 *bis* contains a monitoring and revocation provision which allows the ICTR to monitor Uwinkindi's trial in Rwanda and revoke the transfer if he is not afforded a fair trial.²⁴¹ This mechanism allows the Tribunal to give Rwanda's newly written laws an opportunity to function and thereby furthers one of the Tribunal's initial objectives of reconciliation and judicial capacity building.²⁴² However, the monitoring and revocation mechanism is not without criticism. The primary criticism voiced has been that the monitoring and revocation

241. See Rule 11 *bis* (F), *supra* note 63.

242. See S.C. Res. 955, *supra* note 30.

mechanism cannot ensure that the witnesses of the accused will testify and receive protection in so doing.²⁴³ Indeed, it would be difficult to ascertain beforehand whether witnesses who would have testified at the Tribunal will actually testify in Rwanda. That said, *Uwinkindi* has attracted substantial attention from international human rights groups²⁴⁴ and, accordingly, is sure to be monitored with the utmost scrutiny. In addition, the ICTR has appointed two of its own monitors and is negotiating with an independent agency, which will also monitor the proceedings, further ensuring scrutiny over the Rwandan judiciary.²⁴⁵ Rwanda has promised to grant the monitors access to the court proceedings, documents, and records.²⁴⁶ And with the eyes of the international community watching over *Uwinkindi*, Rwanda will probably stay true to its promises, resulting in a fair trial—at least for *Uwinkindi*. However, it is unclear whether the Rwandan judiciary as a whole will make the larger policy changes hoped for.

B. A Dangerous Signal: Legitimizing a Flawed System to the International Community

The danger of *Uwinkindi*, then, is not its application to the named accused, but rather in its precedent. When the Tribunal issues an opinion, it writes international law, binding on its chambers and applicable at the transnational

243. See, e.g., Prosecutor v. Hategekimana, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis, ¶ 29 (Dec. 4, 2008) (stating that monitoring and revocation "procedures and remedies would not necessarily solve the current problems related to the availability and protection of witnesses") (citing Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, ¶ 38 (Oct. 30, 2008) (same)); Prosecutor v. Gatete, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 94 (Nov. 17, 2008) ("[M]onitoring will not . . . solve the problems relating to availability and protection of witnesses . . ."). Another criticism noted by the Tribunal in previous cases was that the OTP had sole discretion over the monitoring and revocation, leaving the accused with no means to challenge the fairness of the trial. See, e.g., *Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis, ¶ 38 ("[B]oth the decision to send monitors and the right to request a Trial Chamber to consider revocation lie within the sole discretion of the Prosecution. Therefore, the Accused would not be able himself to trigger the operation of these 'remedies.'"); *Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis, ¶ 29 (same). However, Rule 11 bis was amended, enabling the Chamber to appoint a monitor, making this criticism obsolete in *Uwinkindi*. See Prosecutor v. *Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 205 (June 28, 2011).

244. Human Rights Watch and the International Criminal Defence Attorneys Association filed briefs on *Uwinkindi*'s behalf and both have been monitoring the actual progress of the Rwandan judiciary. See *Uwinkindi*, Case No. ICTR-2001-75-R11bis.

245. Prosecutor v. *Uwinkindi*, Case No. ICTR-01-75R11bis, Decision on the Monitoring Arrangements for the Trial of Jean Uwinkindi in the Republic of Rwanda, 6–7 (Apr. 5, 2012).

246. Prosecutor v. *Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 209 (June 28, 2011).

level as well. Prior to *Uwinkindi*, the United Kingdom, France, Germany, Switzerland, and Finland all denied extradition requests from Rwanda on fair trial grounds.²⁴⁷ Notably, in each of these denials, the courts deferred to the Tribunal's findings regarding the flaws within Rwanda's maturing judiciary.²⁴⁸ But in *Uwinkindi*, under the guise of recognizing progress in Rwanda's justice system, the Tribunal necessarily ignored certain flaws in that system.²⁴⁹ The effects of this disregard of Rwanda's "current conditions" are two-fold. The first effect is that Rwanda will now have the opportunity to apply its newly written statutes. This result is in accord with one of the aims of the Tribunal, to build the capacity of the Rwandan judiciary.²⁵⁰ The second effect appears to be more of an externality. By relinquishing its jurisdiction over a high-level accused, the Tribunal generally signaled to the rest of the world that Rwanda is ready to try all of its suspects.²⁵¹ This signal will affect the fate of many Rwandan accuseds who are residing in Europe and Canada,²⁵² whose rights, unlike those of *Uwinkindi*, will remain unprotected.²⁵³

The monitoring and revocation mechanism of Rule 11 *bis* helps to maintain a vertical hierarchy between the Tribunal and Rwanda.²⁵⁴ *Uwinkindi*'s transfer affords Rwanda an opportunity to develop its judiciary, but not at the expense of *Uwinkindi*'s fundamental rights.²⁵⁵ If Rwanda's imposition of justice upon *Uwinkindi* begins to resemble that of the country's lower courts, the Tribunal can revoke the transfer.²⁵⁶ In contrast, the horizontal structure of extradition is inherently without such a safeguard.²⁵⁷ After a nation extradites an accused, that nation is without power to revoke

247. See, e.g., *Brown v. Gov't of Rwanda*, [2009] EWHC (Admin) 770, (U.K.), available at <http://www.unhcr.org/refworld/docid/49f848212.html>; *Ahorugeze v. Sweden*, App. No. 37075/09, Eur. Ct. H.R. 1, 22–23 (2011); Press Release, Finnish Ministry of Justice, Genocide Suspect not to be Extradited to Rwanda (Feb. 20, 2009), <http://www.om.fi/en/Etusivu/Ajankohtaista/Uutiset/Uutisarkisto/Uutiset2009/1232607458297>.

248. See *Ahorugeze*, App. No. 37075/09, Eur. Ct. H.R., at 22–24.

249. See *supra* Part VI.

250. S.C. Res. 955, *supra* note 30.

251. See *Ahorugeze*, App. No. 37075/09, Eur. Ct. H.R., at 37–39.

252. See Schurr, *infra* note 262; Philippa Croome & Bosco Hitimana, *Mugasera Case Paves Way for More Rwanda Deportations, Prosecutor Says*, THE TORONTO STAR, Jan. 25, 2012, <http://www.thestar.com/news/world/article/1121516--mugasera-case-paves-way-for-more-rwanda-deportations-prosecutor-says>.

253. See *Ahorugeze*, App. No. 37075/09, Eur. Ct. H.R., at 32. In 2009, the Rwandan legislature made the Transfer Law applicable to extradition, but without monitoring or revocation available as safeguards, the assurances of the Transfer Law carry little weight. See Transfer Law, *supra* note 84, arts. 1, 24.

254. See *supra* Part VII.

255. See *id.*

256. See Rule 11*bis* (E), *supra* note 63.

257. See *Ahorugeze*, App. No. 37075/09, Eur. Ct. H.R., at 32.

that extradition.²⁵⁸ Despite this significant difference between transfer and extradition cases, on October 27, 2011, the European Court of Human Rights (ECHR) made transfer jurisprudence binding on extradition cases.²⁵⁹ In *Ahorozeze v. Sweden*, the ECHR granted the extradition of a suspect from Sweden to Rwanda, holding that his extradition would not violate the European Convention on Human Rights and comported with the accused's right to a fair trial.²⁶⁰ Notably, Norway and Canada have each granted a post-*Uwinkindi* extradition request from Rwanda.²⁶¹

The implications of the ECHR's green light to extradite are significant. Following the atrocities of 1994, hundreds of Rwandan suspects left the country,²⁶² and Rwanda has expressed a commitment to bring them to justice.²⁶³ At the time of this writing, Rwanda has more than forty pending extradition requests for Rwandans residing in Europe and nine more for Rwandans in Canada.²⁶⁴ As the influx of extraditions begins, the international community is without power to remedy any miscarriages of justice that may arise at the hands of the Rwandan judiciary.²⁶⁵ The rights of *Uwinkindi* and the other ICTR transferees will likely be protected, but the rights of the extradited accuseds who follow them may not.²⁶⁶ It can only be hoped that the faith placed in Rwanda's maturing system of justice was not premature.

VIII. AN ALTERNATIVE APPROACH: TAILORED INQUIRY

Through its application of the 11 *bis* conditions and the monitoring mechanism, the ICTR will be able to fulfill its obligation to provide its indictees with certain rights and protections. The ICTR has allowed the Rwandan judiciary to complete the ICTR mandate (i.e., the prosecution of ICTR indictees), and there appear to be adequate safeguards for its proper completion. In that sense, the Tribunal's mission has been accomplished. But other goals of the ICTR's creation seem to have been abandoned in the process. In particular, it is doubtful that the U.N.'s stated judicial capacity

258. *Id.*

259. *See generally* *Ahorozeze*, App. No. 37075/09, Eur. Ct. H.R.

260. *Id.* at 39.

261. *See* Prosecutor v. Munyagishari, Case No. ICTR-2005-89-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, ¶¶ 43–44 (June 6, 2012); Mark B. Taylor, *A Nordic Safe Haven No More?*, THE LAWS OF RULE (Nov. 24, 2011), <http://www.lawsorule.net/2011/11/24/2152/>.

262. Juergen Schurr, *Green Light—Sweden to Rwanda Genocide Extradition*, INT'L JUST. TRIB. (Nov. 7, 2011), <http://www.rnw.nl/international-justice/article/green-light-sweden-rwanda-genocide-extradition>.

263. *See generally id.*

264. *Id.*; Croome & Hitimana, *supra* note 252.

265. *See supra* note 257 and accompanying text.

266. *See id.*

building goal was limited to enabling the Rwandan judiciary to carry out the ICTR's own mandate. Had the ICTR tailored its application of the 11 *bis* conditions to the Rwandan context, the effects of those conditions could have been much greater, potentially transforming Rwanda's larger approach to human rights and due process.

Because Uwinkindi's transfer will affect the extraditions to come, the ICTR should not have limited its inquiry to the conditions that might affect Uwinkindi. Instead, the Tribunal should have looked at the judicial culture in the country, pushing Rwanda to make the transfer protections applicable in all cases. This approach on its own might not be sufficient to transform an entire judicial system, but it would have bought time. While requiring Rwanda to broaden the scope of its protections, the Tribunal could have invited Rwandan prosecutors and judges to play a bigger role in the ICTR proceedings, providing opportunities for both buy-in and training. Instead, the Tribunal accepted Rwanda's flawed (and disingenuous) scheme to win transfer. And, in so doing, it has given up an opportunity to effect lasting change.

IX. CONCLUSION

Almost eighteen years after the atrocities in Rwanda, the Tribunal has found both the means and a rationale to reduce its role. During its years of service, the ICTR has prosecuted genocide, war crimes, and crimes against humanity. But in its decision to hand control over to Rwanda, a significant part of its mission has been left unfulfilled: "to strengthen the courts and judicial system of Rwanda."²⁶⁷

The ICTR will soon hand over to the High Court the last accused in U.N. custody, Bernard Munyagashari.²⁶⁸ Had the Tribunal retained Uwinkindi and Munyagashari and invited Rwanda to work with it on those cases, it might have slowed the extraditions and even changed conditions under which extradited cases would be heard. Instead, the ICTR is shutting down, satisfied in having fulfilled its obligation to ensure that all of its indictees have received or will receive fair trials.²⁶⁹ But there is a real sense of a job left

267. See S.C. Res. 955, *supra* note 30.

268. See *Prosecutor v. Munyagashari*, Case No. ICTR-2005-89-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (June 6, 2012).

269. See *Status of Cases*, INT'L CRIM. TRIBUNAL FOR RWANDA, <http://www.unictr.org/Cases/tabid/204/Default.aspx> (last visited Nov. 12, 2012) (88 cases have been tried before the Tribunal, and two cases were transferred to France); see also *ICTR/Referrals—Eighth and Last ICTR CASE Transferred to Rwanda for Trial*, HIRONDELLE NEWS AGENCY (June 28, 2012), <http://hirondellenews.org/ictr-rwanda/>

undone and an opportunity lost. Furthermore, the transfers of Uwinkindi and Munyagishari convey a dangerous false message to the international community: that the transformation of the Rwanda's judiciary is complete, and Rwanda can be counted on to handle all of its cases in accord with international standards of justice.

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407-collaboration-with-states/collaboration-with-states-rwanda/33409-280612-ictreferrals-eighth-and-last-ict-case-transferred-to-rwanda-for-trial (eight other cases have been transferred to Rwanda).

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