INTERNATIONAL CRIMINAL LAW SERVICES

NOTES ON RWANDA'S TRANSFER LAW

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All notes, views and questions in this document are those of the author writing in his personal capacity, and are not necessarily those of ICLS or anyone who helped to develop or commented on it. Any errors are the author's.

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A. PURPOSE AND BACKGROUND

1. This document contains notes on some aspects of Rwanda's Transfer Law. That law comprises Organic Law no 11/2007 of 16/03/2007 concerning transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States (original Transfer Law/OTL), and the law amending it, Organic Law no 3/2009/OL of 26/5/2009 (amending Transfer Law/ATL).[1] As amended, it is referred to as the "Transfer Law" or "TL" here.[2] The Transfer Law is annexed.

2. It is hoped that the notes would in some way assist Rwandan, ICTR and foreign-state authorities and other practitioners working on potential ICTR-transfer cases (i.e. cases referred to Rwanda by the ICTR under rule 11bis of its Rules of Procedure and Evidence[3] (ICTR Rules)) and extradition cases from foreign states. The ICTR prosecutor has recently indicated that he may file new transfer applications to national jurisdictions with ICTR chambers in early 2010 in relation to eight accused, all of whom are fugitives at present.[4] He did not say whether he would seek the transfer of all eight to Rwanda. Rwanda is actively pursuing the extradition of several suspects of atrocity crimes (i.e. genocide, crimes against humanity, war crimes) from various foreign states, including Sweden, Italy and the UK. As these notes suggest, any actual transfer to Rwanda of ICTR-transfer and extradition cases may throw up several practical and legal challenges.[5] It is hoped that these notes would spur more detailed assessments of this suggestion and any such challenges, and the development of whatever legislation, strategic and action plans and other responses that may be required to address such challenges.

3. The notes stem in part from modules focusing on the Transfer Law which formed part of an international criminal law and practice training event for Rwandan investigators and prosecutors which was co-organised by International Criminal Law Services (ICLS), the Institute for International Criminal Investigations and the Institute of Legal Practice and Development from 17-25 August 2009 in Kigali. The said sessions were facilitated by Rod Dixon.[6] In the light of the discussions on the Transfer Law, ICLS and some participants felt that a set of basic written notes on the law may be useful to Rwandan and other practitioners.[7]

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[1] See Rwanda's Constitution art 93 ("… Organic laws govern all matters reserved for them by this Constitution as well as matters governed by laws which require related special laws. An organic law may not contradict the Constitution. Neither may an ordinary law or decree-law contradict an organic law nor may an Order or regulations contradict law.") and art 200 ("The Constitution is the supreme law of the State. Any law which is contrary to this Constitution is null and void.").

[2] The Kinyarwanda, English and French versions of the OTL and ATL and of other Rwandan laws are available on the codes and laws website of the Ministry of Justice (MOJ) at www.amategeko.net and in the Official Gazette published on the website of the Office of the Prime Minister at www.primature.gov.rw. (At the time of writing the two laws have not yet been integrated into a single text, so they would have to be accessed separately.)

[3] The ICTR rules are available at ICTR website (www.ictr.org). All sources of ICTY and ICTR can be accessed at their respective websites.

[4] Statement of ICTR prosecutor to UN Security Council, 3 Dec 2009. These notes do not address questions concerning any continuing or residual authority that the ICTR might retain after the expiry of its current mandate in relation to the arrests and detention of fugitives whose cases have been transferred earlier to Rwanda.

[5] For the purposes of this document it would be assumed that the country would receive such cases in the near future.

[6] He is a UK-based barrister at Temple 1 Gardens, London and a former solicitor in South Africa. His experience in international criminal law and practice is summarised at www.1templegardens.co.uk/barristers/detail.php?id=437. See cover page of these notes and ICLS' website (www.iclsfoundation.org) for more information on the said project.

[7] This document was prepared to be a stand-alone source. It is likely to form part of a guide on aspects of international criminal law relevant to Rwanda. The said guide is under preparation and is based on the hand-out prepared by ICLS for the August training: "Investigating and prosecuting genocide, crimes against humanity and war crimes: Rwandan law in the light of international criminal law and practice / *Enquete et poursuite des genocides, des crimes contre l'humanite et des crimes de guerre : le droit rwandais a la lumiere du droit penal et de la pratique internationaux* – Hand-out for ICLS/IICI/ILPD international criminal law and practice training for Rwandan investigators

B. PARAMETERS

4. Unless otherwise indicated all references to legislative provisions are to those of the Transfer Law as amended.

5. Generally, these notes are based on data collected up to about mid-October 2009.

6. Parts of the Transfer Law seem to be based on the transfer law adopted by Bosnia & Herzegovina (Bosnia) to facilitate transfers of cases to that country by the ICTY pursuant to ICTY rule 11bis.[8] The ICTY's rule is essentially the same as ICTR rule 11bis. (See Annex B for the terms of ICTR rule 11bis.) The ICTY has transferred several cases to national jurisdictions,[9] and ICTY law on referrals is cited in ICTR referral decisions. ICTY law has not been considered in detail for the purposes of preparing this document. Nor has the various monitoring reports of the Organisation for Security and Co-operation in Europe (OSCE), tasked with monitoring the transferred cases in Bosnia on behalf of the ICTY been studied.[10] The practice of the ICTY regarding transfers,[11] as well as the OSCE reports, may throw some light on challenges that may arise at the ICTR and in Rwanda.[12] Two ICTR cases have been transferred to France. Whether practical lessons of relevance to Rwanda could be learned from these transfers has not been assessed for this document.

7. The author of these notes is not an expert on Rwandan law and practice. His related comments must be read in that light.

8. The English version of the Transfer Law forms the basis of the notes. No account has been taken of any differences between the English, Kinyarwanda and French versions.[13]

C. IMPORTANCE OF TRANSFER LAW

9. The Transfer Law creates a legal framework for facilitating ICTR transfers and extraditions. Importantly, elements of that framework do not apply to other criminal proceedings. Aspects of Rwandan substantive and procedural law applicable to other atrocity-crime cases are also varied by the Transfer Law.[14]

10. The nature and extent of that variation and the degree of novelty introduced by the Transfer Law are not always clear. The law raises some related questions to be answered through further

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& prosecutors / *Document pour la formation de l'ICLS/IICI/ILPD a la pratique du droit penal international destinee aux procureurs & enqueteurs rwandais*", dated 13/08/2009.

[8] The Bosnian law as amended can be accessed at www.sudbih.gov.ba/?opcija=sadrzaj&kat=6&id=20&jezik=e.

[9] A total of eight cases involving 13 ICTY indictees have been referred to the former Yugoslavia, mostly to Bosnia.

[10] Public OSCE monitoring reports can be accessed at www.oscebih.org/human_rights/monitoring.asp?d=1. Progress reports of the ICTY prosecution to ICTY chambers on national proceedings in transferred cases, including OSCE monitoring reports, can be found at www.icty.org/sid/8934.

[11] See e.g. ICTY Manual on Developed Practices, prepared by the ICTY in conjunction with UNICRI, 2009 (ICTY manual), pp 167 et seq. The manual can be accessed at www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf. See in particular section C (pp 171 et seq) on managerial aspects of referrals, including relating to role of registry in making official materials available to all parties; physical transfer of accused; and requests for assistance and variation of protected materials.

[12] See also Pipina Th. Katsaris, "The domestic side of the ICTY completion strategy: focus on Bosnia and Herzegovina", Revue Internationale de Droit Penal, vol 78, 2007 part 1/2, pp 183 et seq, which highlights several transfer-related issues encountered in practice in Bosnia up to that date.

[13] See art 4 ATL on languages in which ATL was drafted and considered. The OTL doesn't have a similar provision. See also Constitution art 93: "… All laws shall be considered and adopted in Kinyarwanda or in the language of preparation in respect of any of the official languages. In case of conflict between the three official languages, the prevailing language shall be Kinyarwanda or the language that was used in the drafting of the law."

[14] In this document, "Rwandan law" and "other Rwandan laws" generally includes any relevant treaties to which Rwanda is a party.

research, in practice and via jurisprudence, and possibly in new or amended laws, regulations and other guidance from Rwandan authorities.[15]

D. SCOPE OF TRANSFER LAW: GENERAL NOTES

(i) ICTR transfers

11. Most of the Transfer Law expressly covers certain issues relating to the transfer of cases to Rwanda from the ICTR under ICTR rule 11bis.

(ii) Extradition

12. The Transfer Law also expressly covers what is referred to as "transfer[s] … from other States", in TL articles 1 and 24. No other provisions expressly refer to non-ICTR transfers.

13. Article 24 ("Applicability of this Organic Law to other matters of transfer of cases between Rwanda and other states") expressly extends the scope of the Transfer Law to non-ICTR, inter-state transfers. It reads: "This Organic Law applies mutatis mutandis in other matters where there is transfer of cases to [Rwanda] from other States or where transfer of cases or extradition of suspects is sought by [Rwanda] from other states." Given the purpose of the Transfer Law and its general context, these notes focus only on the "extradition of suspects".[16]

14. The extent to which the Transfer Law provisions expressly concerning ICTR transfers also apply to extradition is open to question. The extent to which the extradition component of the Transfer Law varies and adds to other Rwandan laws is unclear.

15. Unless otherwise indicated here, "transfers" refers to both ICTR transfers and extraditions.

E. ISSUES RELATING TO COMPETENT COURTS AND THEIR COMPOSITION

(i) Competent courts

16. TL article 2 covers both ICTR transfers and extraditions. This is borne out by the practice of Rwanda, foreign states which have used the Transfer Law, and the ICTR.

17. All transfer cases are to be heard at first instance by the High Court of the Republic (High Court). The Supreme Court will deal with appeals (and review applications) from the High Court (arts 16 and 17).

18. One consequence is that in no transfer case involving (ex) military personnel would Rwanda's military courts have jurisdiction. This is notwithstanding any other Rwandan laws.[17]

19. Another consequence is that accused[18] who otherwise would have fallen under the jurisdiction of other civilian courts (such as Intermediate Courts having first-instance jurisdiction

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[15] See also Rwanda's Constitution art 96: "The authentic interpretation of laws shall be done by both Chambers of Parliament acting jointly after the Supreme Court has given an opinion on the matter… The authentic interpretation of the laws may be requested by the Government, a member of one of the Chambers of Parliament or by the Bar Association. Any interested person may request the authentic interpretation of laws through the members of Parliament or the Bar Association."

[16] In law, 'extradition' and 'transfer' (of cases or of proceedings, etc) are not necessarily synonymous. See e.g. United Nations Office on Drugs and Crime, Cross-Cutting Issues: International Cooperation – criminal Justice Assessment Toolkit, 2006, www.unodc.org/documents/justice-and-prison-reform/cjat_eng/4_International_Cooperation.pdf.

[17] See Organic Law no 03/2004 of 20/03/2004 Determining the Organisation, Powers and Functioning of the Prosecution Service art 38: "In the Supreme Court and in the [High Court], prosecution shall be carried out by the [Prosecutor General] assisted by other Prosecutors based in his or her office. In the Supreme Court cases, where the Prosecution is against soldiers, investigation and prosecution shall be carried out by the Military Prosecutor General assisted by other Military Prosecutors. In such cases, military prosecutors may themselves prosecute or may be assisted by the Prosecutors with national competence."

[18] For the purposes of this document, "accused" includes "suspects".

over certain category-1 accused under the "gacaca-courts law"[19] or other special courts (gacaca courts), must be dealt with by the High Court and Supreme Court where their cases were transferred from the ICTR or extradited from foreign states. Such accused would therefore be subject to a legal regime which differs to some extent from the legal regime applying to non-transfer cases. For example, if convicted, they would benefit from different penalties.

(ii) High Court: enlarged bench, and possible participation of foreign judges

20. The part of TL article 2 granting the President of the High Court "absolute discretion" to designate a quorum of three or more judges – as alternative to the standard single first-instance judge[20] – raises several issues. Five are addressed here.

21. *First*, the Transfer Law is silent on any possible change in the composition of the Supreme Court. So, article 2 would seem to apply solely to the High Court.

22. *Second*, the provision refers to the "[President's] assessment of the complexity and importance of the case" as factors to be considered by him/her when deciding on possible enlargement. Complexity and importance could be interpreted with reference to various considerations. In relation to complexity, potential considerations include the number of accused, number and nature of charges, and geographical basis and period of the alleged crimes. The 'ordinary' and 'average' complexity of other criminal cases, including atrocity-crime cases, dealt with by Rwandan judges, could form the background to such assessment. In relation to importance, perspectives of Rwandan authorities, the accused, victims,[21] the ICTR or extraditing states are possible considerations. Given current circumstances, at least the first or first few ICTR-transfer and extradition cases could arguably be seen 'important' in this sense.

23. *Third*, article 2 is silent on:

(a) Whether the President can decide on enlarged benches on his/her own motion, and/or pursuant to submissions by other parties. *Based on the provisions of article 2 alone, both seemingly are possible. Whether parties such as victims, foreign states,[22] the ICTR, the Minister of Justice of Rwanda and Rwandan and/or foreign NGOs would have legal standing in transfer proceedings is not assessed in this document. Assuming that Rwandan law is unclear on this issue, the timely issuance by Rwandan authorities of legislation, regulations, rules or other appropriate guidance on this and related matters might be beneficial.*

(b) When the President can consider enlargement. *It seemingly ought to happen before the start of the trial once the scope and complexity of a case is sufficiently clear.*

(c) Whether the President's decision must be reasoned and public. *Given the general importance of such cases, the interests of justice and other considerations, decisions on enlarged benches ought in principle to be fully reasoned and publicised.*

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[19] Organic Law no 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994.

[20] See Prosecutor v Munyakazi, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, Case No ICTR-97-36-R11bis, 8 Oct 2008 (Munyakazi AC decision), par 26, regarding size of trial and appeal courts.

[21] The extent to which the usual law on civil action for damages relating to crimes may apply in any transfer proceedings is not assessed here, nor is the potential relevance of prosecution by victims, or the effect of laws such as Law no 69/2008 of 30/12/2008 Relating to the Establishment of the Fund for the Support and Assistance to the Survivors of the Genocide against the Tutsi and Other Crimes against Humanity committed between 1st October 1990 and 31st December 1994, and Determining its Organisation, Competence and Functioning.

[22] The possibility of foreign states and/or the ICTR agreeing before any transfer with Rwanda on enlargement and the effect of such agreement on other Rwandan laws and issues such as the authority and timing of decisions of the President of the High Court are not considered here.

(d) The possibility of appealing or reviewing the President's decision. *Whether other Rwandan laws allow an appeal or review is unclear. The terms of article 2 arguably suggest that appeals or reviews were meant to be excluded.*

24. *Fourth*, considering reasons of judicial economy (including the case-load of judges), among other factors, it would seem that if enlarged, High Court benches would comprise 3 rather than more judges. (Supreme Court/appeal benches comprise 3 judges, and may be increased to 5, 7, 9, 11 or 13 depending on the complexity of a case.[23])

25. *Fifth*, it is unclear whether the President of the High Court could designate foreign judges to participate alongside Rwandan counterparts. The author understands that the possibility of providing for the participation of foreign judges in transfer cases was discussed among Rwandan officials in the run-up to the amendment of the Original Transfer Law. The question whether foreign judges would be able to participate specifically in extradition cases has also been posed by some experts. The following limited discussion of the issue is not meant to suggest that Rwandan authorities ought to consider the participation of foreign judges. The suggestion is that it is an option that they could consider if they wanted to, although it is not clear to the author whether Rwandan law currently provides for an appropriate legal basis for participation of foreign judges.

26. Whether article 90 of Rwanda's "courts law"[24] could serve as basis for the designation of foreign judges to form part of an enlarged bench is uncertain.[25] In relevant part it reads:

> Article 90: International crimes in jurisdiction of the High Court
>
> ... The High Court shall also have jurisdiction to try any person including non-nationals …, alleged to have committed, within or outside the territory of Rwanda, any crimes falling within the category of international or cross-border crimes especially, torture, inhuman or degrading treatment of persons, the crime of genocide, crimes against humanity, war crimes, genocide denial or revisionism, inciting, mobilizing, aiding and abetting, or otherwise influencing, whether directly or indirectly, the commission of any of the offensive specified in this paragraph.
>
> When the High Court is sitting in the exercise of its universal jurisdiction, the President of the Supreme Court may, in the interest of justice and with a view to harmonise universal jurisprudence, seek cooperation from the United Nations, international organizations or a member state in which the crime was committed, to provide foreign judges to sit with their Rwandan counter parts to hear such cases. …

27. As far as could be ascertained, this part of the provision has never been invoked in Rwanda.

28. Article 90 provides for the full participation of foreign judges.

29. The President of the *Supreme Court* is empowered to seek the participation – in the High Court – of foreign judges. Assuming that the provision could apply to transfer cases, the latter President seemingly would be able to request the former President to consider applying this provision.[26] Whether the former could delegate his article 90 powers to the latter is unclear.

30. The quoted part is confusing in some respects. For example, it seems as if the intention was to deal with universal jurisdiction, a principle of jurisdiction which ordinarily concerns foreign suspects. In that light, the provision's inclusion of Rwandan suspects of crimes committed in Rwanda itself – such as accused subject to actual or possible ICTR transfer and extradition proceedings – is noteworthy.

31. It could be argued that the participation of foreign judges in one or more transfer cases might be "in the interest of justice", broadly defined (which is not to suggest that the non-participation of foreign judges would be contrary to the interests of justice). Put simply, for

[23] Organic Law no 01/2004 of 29/01/2004 Establishing the Organisation, Functioning and Jurisdiction of the Supreme Court.

[24] Organic Law no 51/2008 of 09/09/2008 Determining the Organisation, Functioning and Jurisdiction of Courts.

[25] The brief discussion at the training event in Kigali in August was inconclusive. It does not seem as if there are other legal bases upon which foreign judges could be asked to participate, but this issue may require further study, including a consideration of possibly relevant treaties.

[26] Some of issues raised in par 23 above may also apply to such requests.

foreign states and/or the ICTR the participation of foreign judges may be a factor when considering whether to grant transfer or extradition requests. Depending on other relevant factors, they may, for example, consider the participation of experienced foreign judges as somehow addressing any remaining concerns that they rightly or wrongly may have about fair-trial issues and the independence of Rwanda's judiciary. Seen in this light, it could be argued that such participation might be in the interests of justice from the perspective of Rwandan authorities which want to ensure that the relevant suspects face justice in Rwanda.

32. There are other possible considerations in favour of an argument that it might be in the interests of justice. For example, from the perspective of the judiciary in Rwanda, the participation of experienced foreign atrocity-crimes judges, if properly arranged, could free up one or more Rwandan judges to deal with other criminal and civil cases, and it possibly could strengthen the High Court's expertise. The duration of complex atrocity-crime cases is likely to put strain on the capacity, management and planning of the High Court in general. From the perspective of the accused and victims and witnesses, it could add to their confidence in the ability of the High Court to deal with transfer cases fairly and expeditiously.

33. Such participation could also help "harmonise universal jurisprudence".

34. Seeking the participation of one or more judges from extraditing states or from other states nominated by extraditing states utilising the UN, AU, EAC or EU as channel should be possible. In relation to ICTR-transfer cases, the UN would be the most obvious channel; Rwanda should be able to ask for assistance in selecting specific judges. In relation to both extraditions and ICTR transfers, various existing decisions and other sources, including UN Security Council resolutions, could add to the weight of such requests.

35. The participation of foreign judges would raise numerous issues. One set of examples concern languages. It would seem as if provision would have to be made for interpretation and translation, possibly for several languages. (In this regard, the language skills of Supreme Court judges would also have to be borne in mind.) Translation and interpretation services are expensive, and related issues can complicate and slow down proceedings significantly. Advance budgeting (including, possibly, fundraising by Rwanda) and planning (also in relation to the possible additional recruitment of qualified and experienced interpreters and translators) would be required. (Interpretation and translation issues would seemingly arise even where foreign judges do not participate, as not all observers (including from extraditing states) and monitors (e.g. in relation to ICTR transfers) are likely to understand Kinyarwanda.)

36. Were Rwanda to want foreign judges to participate in one or more transfer cases, it might be advisable for it to start preparing the ground as soon as possible, given the possible importance of the issue, and given the range of practical and other issues that might have to be addressed to facilitate such participation. For example, it may be necessary to amend existing laws and/or to issue regulations, rules or other appropriate guidance, including on issues such as the composition of mixed benches, majority-minority decision-making procedures, the publication of minority opinions if any, etc. It may also be necessary to consult with possible extraditing states on the terms of a 'standard' international agreement or set of specific international agreements on the participation of foreign judges. Such agreement(s) might have to address a range of issues, including the nomination, immunities, responsibilities, removal, and security of foreign judges. Such negotiations may be time-consuming, and may be subject to high-level approval in the respective states. Such agreements themselves may also serve to strengthen Rwanda's case for extradition in foreign jurisdictions. For these reasons, priority might have to be given to the development and conclusion of such agreement(s). It is unclear to the author to what extent Rwandan law already addresses issues raised here.

37. It is not unusual for foreign (non-resident) judges to sit in foreign (national) jurisdictions. It is done for various reasons, and is not seen as turning the relevant court into an international or

hybrid court or to impinge on the sovereignty of the relevant state for that reason. For example, a five-bench court of appeal in Botswana was recently constituted by 5 non-resident current and former judges, including from South Africa, Lesotho, Zimbabwe and Ghana (the Botswana judges were unavailable, including due to illness).[27] Foreign judges would work alongside their Rwandan counterparts, and unless Rwanda decides differently, foreign judges need not hold any 'veto' decision-making powers nor form a majority of the bench.

(iii) Possibility of legal challenges

38. Assuming that avenues for challenging the legality, constitutionality, human-rights compliance, etc of Rwandan laws exist,[28] it is possible that accused transferred to Rwanda as well as accused in other atrocity-crime cases in Rwanda (e.g. in remaining category-1 cases) would seek to challenge the Transfer Law.

39. For example, accused could seek to challenge what they could refer to as the unfair and/or discriminatory nature/effect of the law, in that it, for example, creates a more beneficial legal regime for fugitives from Rwandan law compared to those accused who chose not to flee (more beneficial penalties, more judges at first instance, enhanced fair-trial guarantees through extra monitoring of transferred cases, etc). Whether such or any other challenges to the constitutionality, etc, of the Transfer Law would have any merit, is an issue not addressed here.

F. TRIABLE CRIMES, ROLE OF RWANDAN CRIMINAL LAW, AND ADAPTATION AND AMENDMENT OF ICTR INDICTMENTS

40. TL articles 3 and 4 are applicable only to ICTR-transfer cases.

41. The two provisions raise several questions which cannot be explored in detail here. However, some interrelated issues are briefly highlighted.

(i) Triable crimes

42. TL article 3 is generally clear: "Notwithstanding the provisions of other laws applicable in Rwanda, a person whose case [is] transferred by the ICTR to Rwanda shall be liable to be prosecuted only for crimes falling within the jurisdiction of the ICTR." Its importance is obvious: Rwanda cannot prosecute transferred accused for non-ICTR crimes.

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[27] Of interest may be Prosecutor v Stankovic, Decision on referral of case under Rule 11 bis Partly Confidential and Ex Parte, Case No IT-96-23/2-PT, 17 May 2005 (Stankovic decision), par 26, in which the ICTY rule 11bis Referral Bench noted: "With regard to the Defence submission that the War Crimes Chamber of the State Court is incapable of characterization as a "national court," it is apparently assumed by the submission that to be a national court it must be composed of judges who are nationals of the State concerned. No authority is offered for this proposition. The view of the Referral Bench is that in the relevant context, which is Article 9(1) of the Statute of the Tribunal, there is no apparent justification for giving to the phrase "national court" any meaning other than the normal connotation, which is a court of or pertaining to a nation. The State Court of Bosnia and Herzegovina, of which the War Crimes Chamber is a component, is a court which has been established pursuant to the statutory law of Bosnia and Herzegovina. It is thus a court of Bosnia and Herzegovina, a "national court." Bosnia and Herzegovina has chosen to include in the composition of the State Court judges who are not nationals of Bosnia and Herzegovina. That is a matter determined by the legislative authorities of Bosnia and Herzegovina. The inclusion of some non-nationals among the judges of the State Court does that make that court any less a "national court" of Bosnia and Herzegovina."

[28] See e.g. the Rwanda's Constitution arts 11, 16, 44, 96 (quoted in footnote 15; it is unclear to the author how and to what end this provision is used in practice) and 145 ("The jurisdiction of the Supreme Court is provided for in this Constitution and other laws and includes, inter alia: … (3) hearing petitions on the constitutionality of organic laws, laws, decree-laws and International treaties and agreements…").

43. ICTR law on rule 11bis requires that a transferred accused be prosecuted for 'ICTR crimes', i.e., international crimes. Unlike Rwanda's Transfer Law, ICTR law arguably does not require that any prosecution be limited exclusively to such crimes.[29]

44. The Transfer Law phrase "crimes falling within the jurisdiction of the ICTR" and related aspects of ICTR rule 11bis law raise various questions. For example:

- Is Rwanda expected to prosecute and try a transferred accused on the basis of the three general categories of substantive crimes (genocide, crimes against humanity, and war crimes) *as they are defined in the ICTR Statute and jurisprudence*, including in relation to definitions of chapeau elements such as 'armed conflict', 'widespread or systematic attack against any civilian population', and the nexus requirements?
- Must Rwanda use the definitions of the underlying crimes – such as murder, rape, extermination, and outrages upon personal dignity – as found in ICTR law, or would it use Rwandan law definitions?[30] Assuming that Rwandan law would be applied, what would be the consequence of substantive definitional differences between Rwandan and ICTR law? Similar questions apply to modes and principles of liability.
- Does "crimes falling within the jurisdiction of the ICTR" refer to and limit Rwanda to the temporal jurisdiction of the ICTR? The ICTR's territorial jurisdiction extends to the territory of Rwanda as well as to the territory of neighbouring states, and its temporal jurisdiction covers 1 January 1994 to 31 December 1994.[31] Rwandan laws do not contain the same temporal jurisdiction.[32] See also paragraph 51 below.

45. Such questions are of potential practical importance. Two examples are highlighted. First, using the relevant Rwandan law would generally be easier for Rwandan practitioners than using ICTR law. The second concerns the possibility of the ICTR revoking a referral order. ICTR rule 11bis(F)[33] does not spell out the grounds on which revocation could be based. However, it conceivably could include concerns relating to definitions in Rwandan law that may result in the acquittal or conviction of an accused who may not have been acquitted or convicted on that basis had s/he been tried at the ICTR. Whether any such relevant and substantive differences between Rwandan and ICTR law in fact exist has not been assessed here.

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[29] See Prosecutor v Hategekimana, Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to the Republic of Rwanda - Rule 11 bis of the Rules of Procedure and Evidence, Case No ICTR-00-55B-R11bis, 19 June 2008 (Hategekimana TC decision), par 21 incl footnote 29 citing Prosecutor v Milan Lukic & Sredoje Lukic, Decision on Referral of Case Pursuant to Rule 11 bis (Referral Bench), Case No IT-98-32/1-PT, 5 April 2007 (Lukic decision): "…the ICTY Referral Bench engaged in a long discussion of whether referral States could prosecute a referred person for additional national crimes. While the Referral Bench did not consider there to be a simple answer to this question, it did note that, where the accused was a citizen of the referral State prosecution of the accused for national crimes by the referral State was generally not problematic unless such prosecution violated the international obligations of the referral State. The [ICTR] Chamber approves of this reasoning…"

[30] See ICTR Statute arts 2 (genocide), 3 (crimes against humanity) and 4 (violations of article 3 common to the four 1949 Geneva conventions and of the 1977 additional protocol II thereto) and relevant ICTR jurisprudence.

[31] See ICTR Statute art 7.

[32] Though not having the status of law, in the Munyakazi TC amicus curiae brief of Rwanda (Prosecutor v Munyakazi, Amicus Curiae Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11bis, Case no ICTR-97-36A-1, 21 Dec 2007 (signed 20 Dec 2007 by Prosecutor-General of Rwanda), par 57), Rwanda submitted that the terms of TL article 3 "seek to specifically address the need to proceed only within the transferred case within the limits of ICTR temporal jurisdiction."

[33] It reads: "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." The reference to a conviction or acquittal is likely to be interpreted as a reference to the final, including any final appeal, verdict.

46. The transfer decisions rendered thus far at the ICTR[34] address issues such as the above to varying degrees. Future transfer decisions may address some of these issues in more detail. The *general* positions in relation to the issues raised above seem to be as follows.

47. Generally, Rwanda will apply Rwandan law, including incorporated international law, as far as the general definitions of the three categories of atrocity crimes are concerned.[35] The said ICTR-law definitions[36] are generally the same as in Rwandan law, and ICTR-referral decisions do not express concerns in this regard.[37] What the ICTR has not enquired about, for example, is whether definitions of elements like 'widespread or systematic attack' and nexus requirements in Rwandan law are the same as in ICTR law, and if not, whether this would be of any potential consequence.

48. Generally, Rwanda would seemingly also use definitions of underlying crimes and of modes and principles of liability as defined in Rwandan law. ICTR-referral decisions contain no analysis of Rwandan law definitions of the relevant underlying crimes, including rape and extermination. The author has not enquired whether there are any relevant and substantive differences between ICTR and Rwandan law in this regard. Final ICTR-referral decisions raise no qualms about definitions in Rwandan law on modes and principles of liability, although, with the exception of

[34] There are decisions relating to transfers to Rwanda as well as other jurisdictions. Regarding Rwanda, the ICTR prosecutor has sought the transfer of five accused, four of whom were in custody at the time (Kayishema was and still is on the run). Following the chambers' rulings refusing transfer to Rwanda, the four in-custody accused were put on trial at the ICTR. For examples of transfer decisions see Prosecutor v Bagaragaza, Decision on Rule11bis Appeal, Case no ICTR-05-86-AR11bis, 30 Aug 2006 (Bagaragaza AC decision); Prosecutor v Kanyarukiga, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, Case No ICTR-2002-78-R11bis, 6 June 2008 (Kanyarukiga TC decision); Prosecutor v Kanyarukiga, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11bis, Case No ICTR-2002-78-R11bis, 30 Oct 2008; Hategekimana TC decision; Prosecutor v Hategekimana, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11bis, Case No ICTR-00-55B-R11bis, 4 Dec 2008 (Hategekimana AC decision); Prosecutor v Munyakazi, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda - Rule 11 bis of the Rules of Procedure and Evidence, Case No. ICTR-97-36-R11bis, 28 May 2008; Munyakazi AC decision; Prosecutor v Kayishema, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda - Rule 11 bis of the Rules of Procedure and Evidence, Case No ICTR-2001-67-R11bis, 16 Dec 2008.

[35] But see Kanyarukiga TC decision par 18: "The Chamber considers that the formulation in Article 3 of the Transfer Law (providing for prosecution "only for crimes falling within the jurisdiction of the Tribunal") strongly suggests that they will be tried for the crimes as they are defined in Article 2 (genocide) and Article 3 (crimes against humanity) of the ICTR Statute…" See also ibid footnote 30. See also ICTR-referral decisions relating to Norway and France, in which it is stated that those states should be able to prosecute "those international crimes listed in [the ICTR] Statute" (Bagaragaza AC decision par 16; and Prosecutor v Bucyibaruta, Decision on Prosecutor's Request for Referral of Laurent Bucyibaruta's Indictment to France Rule 11 bis of the Rules of Procedure and Evidence, Case No ICTR-2005-85-I, 20 Nov 2007, par 8). See also Prosecutor v Mejakic et al, With confidential annex - Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 bis, Case No. IT-02-65-PT, 20 July 2005 (Mejakic RB decision), par 43: "…The Referral Bench must therefore consider whether the laws applicable in proceedings before the State Court would permit the prosecution and trial of the Accused, and if found guilty, the appropriate punishment of the Accused, for offences *of the type currently charged before the Tribunal*" (emphases added). The ICTR prosecution submitted the following in the Kayishema referral application (Prosecutor v Kayishema, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11 bis of the Tribunal's Rules of Procedure and Evidence, Case No ICTR-2001-67-I, 11 June 2007): pursuant to TL art 2 the relevant Rwandan courts have competence to adjudicate "the very same" international crimes over which ICTR has jurisdiction (par 15); the said courts are empowered by the Transfer Law to prosecute accused "only with crimes identical to those that fall within the [ICTR's] jurisdiction" (par 21).

[36] See various 2008 ICTR referral decisions for discussions on Rwandan legal bases for prosecutions of genocide, crimes against humanity and war crimes of transferred accused in the light of non-retroactivity principle. Rwanda's "atrocity-crime repression law" (Law No 33 Bis/2003 of 06/09/2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes) would not necessarily apply to transfer cases.

[37] Whether it can be said that the ICTR chambers have fully considered the related questions on their own motion or in response to submissions by parties has not been assessed here.

command/superior responsibility, other modes and principles of liability are not addressed in detail in the decisions.[38]

49. ICTY jurisprudence on rule 11bis transfers do not seem to be very onerous in regards to such issues. By way of example, in the Stankovic case it would seem as if the ICTY was satisfied that certain legal provisions of one of the potentially applicable criminal codes in Bosnia "would… appear to be applicable to the conduct under…counts of rape…charged as crimes against humanity" even though that provision essentially deals with war crimes rather than crimes against humanity as defined at the ICTY, and in one instance it was satisfied that underlying crimes charged in the ICTY indictment were "substantially analogous" as those in a Bosnian criminal code.[39] As noted earlier, the author has not analysed ICTY jurisprudence in detail.

50. Lest any relevant and substantial differences between Rwandan and ICTR law relating to underlying crimes and modes and principles of liability become problematic, it may be worth considering such matters in more detail with a view to removing any hurdles. As in relation to other issues, international law, including in relation to definitions of underlying crimes, may be used in various ways by Rwandan practitioners, even if the particular international law does not form part of Rwandan law. It could, for example, be used as an aid in interpretation.

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[38] See Hategekimana TC decision par 18 ("…The Chamber considers that the modes of criminal responsibility covered in the Rwandan Penal Code are adequate to cover the crimes of the accused as alleged in the Amended Indictment pursuant Article 6(1) of the ICTR Statute."); and Kanyarukiga TC decision par 21 ("…The Chamber finds the modes of participation in Rwandan law to be similar in substance to those found in Article 6(1) of the Statute and Tribunal jurisprudence."). See also Hategekimana AC decision pars 6-13. At par 12 the appeals chamber held that it is "satisfied that command responsibility is recognized under Rwandan law, in particular the *Gacaca* Law and the Organic Law No. 33*bis*/2003, and that the Trial Chamber therefore erred in assuming that Rwandan law does not recognize command responsibility, or that it did not do so at the time relevant to the Amended Indictment." See also par 9 where the chamber notes: "[The Prosecution] argues that neither Rule 11*bis* of the Rules, nor the jurisprudence of this Tribunal or the ICTY, requires that the laws of the referral State cover all modes of participation pleaded in the indictment, and that it is sufficient that Rwanda adequately criminalizes the crimes charged as international crimes rather than ordinary crimes. It further submits that the applicable mode of participation could still be addressed during the adaptation phase of the indictment." The appeals chamber did not address these prosecution arguments.

[39] Stankovic decision pars 39 and 46: "(39) Thus, at the time of the alleged conduct of the Accused, Article 142(1), which was expressly directed at crimes against a civilian population in time of war, armed conflict or occupation, would appear to apply to the conduct alleged to constitute the two counts of rape which are charged as "war crimes" by Counts 3 and 7 of the present Indictment. This provision of the SFRY CC [Criminal Code] would also appear applicable to the conduct under the other two counts of rape cumulatively charged as crimes against humanity by Counts 2 and 6 of the present Indictment. The acts of the Accused charged in the present Indictment as enslavement in Counts 1 and 5 would also appear to be within the scope of the provisions of Article 142(1) which make illegal detention and forcible labour war crimes. While no provision of the SFRY CC specifically proscribed outrages upon personal dignity as a violation of the laws or customs of war (Counts 4 and 8 in the present Indictment), the prohibitions in Article 142(1) against inhuman treatment and violations of bodily integrity would appear to be substantially analogous. (46) … Nevertheless, this Referral Bench has been able to satisfy itself, for the reasons already discussed, that whichever of the possible alternatives is held by the State Court to apply, there are appropriate provisions to address each of the criminal acts of the Accused alleged in the present Indictment and there is an adequate penalty structure." See also Mejakic RB decision par 56: "In its decision on referral under Rule 11 *bis* in *Prosecutor v. Mitar Rasevic and Savo Todovic*, the Referral Bench considered whether there were provisions in the SFRY CC in 1992 which were comparable in effect to Article 7(3) of the Statute with respect to command responsibility. It was concluded that, while there were provisions in the SFRY CC which appeared to address most of the field covered by Article 7(3), it was uncertain whether the SFRY CC would permit the imposition of liability where a commander did not know that a crime had been, or was about to be, committed by persons under his command, but had "reason to know", and yet failed to prevent the offence, or punish the offenders. The current charges against the four Accused are all based on individual criminal responsibility under Article 7(1) of the Statute of the Tribunal, with criminal responsibility pursuant to Article 7(3) also charged against only three of the Accused. *Given the factual circumstances alleged in the present case*, the Referral Bench does not regard this possible and limited difference in the law as an obstacle to the referral proposed by the Motion" (emphasis added). See also Prosecutor v Ademi and Norac, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis (TC), Case No IT-04-78-PT, 14 September 2005, pars 38 et seq (relating to command/superior responsibility).

51. There are seemingly contradictory signals from ICTR decisions as to whether Rwanda, should it choose to do so, could ignore the temporal jurisdiction of the ICTR in ICTR-transfer cases.[40] See also paragraph 44 above. In practice this may not be an important issue. The question also relates to issues about the adaptation and possible amendment by Rwanda of transferred indictments, addressed in section E(iii) below.

(ii) Indictments to be transferred

52. Does the ICTR prosecutor have any discretion whether or not to refer the whole indictment in a case ordered by an ICTR chamber to be transferred to Rwanda? Could s/he refer a case more limited in scope? The question stems from the wording of TL article 3 ("… a person whose case [is] transferred by the ICTR to Rwanda…") and ICTR rule 11bis(D)(iii) (where a referral order is issued "the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment").

53. The position seems to be as follows. ICTR-transfer proceedings centre on cases as reflected in particular indictments. Chambers' transfer decisions are bases on those indictments. There seems to be no ground for arguing that the ICTR prosecutor would subsequently be able to transfer only parts of cases to Rwanda – on his/her own motion or at the behest of Rwandan prosecutors – where ICTR chambers have ordered the referral of whole cases. S/he would have to transfer all the appropriate information and supporting material relating to the indictments which were the subject of chambers' decisions.[41]

54. However, it would seem possible, in principle, for the ICTR prosecutor to amend indictments – in accordance with the ICTR rules such as rule 50[42] – which s/he wants to have transferred to Rwanda before again approaching ICTR chambers for referral orders.[43] If correct, it would presumably be possible for the Prosecutor-General of Rwanda to approach the ICTR prosecution with a request to, for example, simplify existing indictments.[44] Simpler, more focused indictments

[40] See Hategekimana TC decision par 21 incl footnote 29 citing Lukic decision ("… The [ICTR] Chamber … finds no problem with the possibility that, if transferred, Rwanda may prosecute Mr. Hategekimana for international crimes that fall within the subject matter jurisdiction of the Tribunal but outside the Tribunal's temporal jurisdiction."). But see Kanyarukiga TC decision par 20 in relation to Transfer Law as currently formulated: "… The Chamber recalls that Article 3 of the Transfer Law provides that "notwithstanding the provisions of other laws in Rwanda", persons who are transferred from the Tribunal shall be prosecuted "only" for crimes falling with the jurisdiction of the ICTR. It follows from Articles 1 and 7 of the Statute that the ICTR only has jurisdiction to prosecute acts committed between 1 January and 31 December 1994. The formulation in the Transfer Law indicates that Kanyarukiga, if transferred, will not be prosecuted for acts committed before or after this period."

[41] Seen in this light, the ICTR rule 11bis(D)(iii) phrase "which the Prosecutor considers appropriate" would qualify the information to be sent rather than the charges/case to be pursued. The latter part of the quoted sentence – the material supporting *the indictment*, i.e., not selected charges – also lends weight to the foregoing, as does ICTY and ICTR practice. On this reading, the ICTR prosecutor would send to Rwanda the indictment in question; what is referred to as the indictment supporting material (ISM) (such as witness statements, other documents, video and audio materials); any other relevant material not included in ISM, e.g. witness testimonies/transcripts in other relevant ICTR cases); ICTR rule 68 material (including exculpatory material); and available material disclosed by the defence.

[42] One relevant part (rule 50(A)(i)) reads: "The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President…"

[43] Should the ICTR prosecutor seek an amendment of an indictment in a case already ordered to be transferred by an ICTR chamber, the amendment application, pursued under ICTR rule 50, would presumably be handled by the same chamber.

[44] Regardless of the prior understanding and undertaking that Rwanda would be able to prosecute the case as reflected in the current indictment. Such a process would present the ICTR prosecution with some challenges.

could facilitate easier and more expeditious prosecution in Rwanda should referral orders be granted.

(iii) Adaptation and amendment of indictments in Rwanda and related issues

55. TL article 4 provides that Rwanda's Prosecutor General's Office "shall adapt" the ICTR indictments "in order to make them compliant with the provisions of" Rwanda's Code of Criminal Procedure (CPC) and they "shall be forwarded to the High Court President. The [High Court] shall accept the indictments after verifying they fulfill the formal requirements of the [CPC]."

56. This is a novel and unique procedure in Rwandan law, raising questions such as:

- Is 'adaptation' different from and more limited than 'amendment'?
- Generally, how does the provision fit in Rwanda's CPC?[45]
- Would Rwandan prosecutors be able to trim an ICTR indictment with a view to prosecuting a simpler, narrower case? If so, what are the limits to this power?
- How much time would Rwandan prosecutors have to prepare and forward an adapted indictment to the High Court? From when would that time start to run? From the date that it formally receives the indictment from the ICTR? From the date that the accused, if in custody, is received in custody by Rwanda?
- How much time would the High Court have to consider whether to accept the indictment?
- If at all, would the defence and other parties be able to challenge the adapted indictment before or after its acceptance?
- What would be the legal basis for the detention of any transferred accused before the adaptation and acceptance of the indictment?[46]
- Would transferred accused be able to challenge the duration of their detention before Rwandan courts pursuant to the usually relevant Rwandan law provisions? Would the transfer of any accused in the custody of the ICTR be delayed until the acceptance of the indictment by the High Court, and if so, what would the legal basis of such detention by the ICTR be?

57. Except as in paragraphs below, these questions are not addressed here.

58. Apart from raising important practical, fundamental human rights and other legal issues, some of the above questions may also have a direct bearing on considerations by the ICTR on whether Rwanda is diligently and fairly prosecuting and trying transferred cases. For example, the longer it takes to adapt an indictment while an accused is in custody, the more questions may be asked about whether Rwanda is genuinely prosecuting the case. As noted before, the grounds for revocation of referral orders are not apparent from the wording of ICTR rule 11bis, but considerations relating to the fairness of proceedings and the diligence with which Rwanda is prosecuting and trying transferred cases are likely to be key. Especially in relation to cases involving transferred accused the ICTR may expect Rwanda to prioritise transferred cases to some extent, and to proceed reasonably expeditiously with adaptation, prosecution and trial. The ICTR is likely to consider Rwanda's capacity to do so, but in law it would be able to do so only to some degree. The ICTR will not be totally 'closed down' any time soon. It will continue to exist in some form for several years and such a residual ICTR may very well retain the power to revoke referral orders.

[45] Law no 13/2004 of 17/5/2004 Relating to the Code of Criminal Procedure. Even a cursory comparison of the CPC with the Transfer Law and ICTR rule 11bis raises a range of questions including regarding the rights of victims to prosecute crimes and the role, if any, of the judicial police in any transfer proceedings. There is no space in this document to highlight or address all of them.

[46] See TL arts 5, 22 and 23.

59. What is the practical significance of the requirement that the adaptation of an ICTR indictment is meant to be aimed at making it compliant with Rwanda's CPC? The ICTR indictment may have to be cast into a somewhat different format, or have some 'administrative' data removed and others added, for example. But beyond that, not being an expert on Rwandan law, the significance, if any, is unclear to the author.[47] The CPC in any event does not say much about the form that a 'complete criminal case file transmitted'[48] to a competent court should take.[49] ICTR-transfer law does not offer much guidance on this.[50]

60. Would Rwandan prosecutors be able to amend ICTR indictments in the sense of trimming ICTR indictments, picking and choosing which charges to include in an adapted indictment? The answer would seem to depend in part on the answer to the question posed in the preceding paragraph. Beyond that, the terms of the Transfer Law as well as ICTR rule 11bis would suggest that Rwandan prosecutors might not have such freedom. ICTR and ICTY jurisprudence generally seems ambiguous on the point. For example, in the Bagaragaza case the appeals chamber "agree[d] with the Prosecution that the concept of a "case" is broader than any given charge in an indictment and that the authorities in the referral State need not necessarily proceed under their laws against each act or crime mentioned in the Indictment *in the same manner* that the Prosecution would before this Tribunal."[51] See also paragraph 49 above on the Stankovic case. Of relevance too may be the ICTY's Ljubicic transfer case. The ICTY indictment included crimes against humanity and war crimes charges based on direct perpetration, command responsibility and joint criminal enterprise committed throughout central Bosnia *including* the village of Ahmici.

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[47] For example, according to ICTR statute art 18, an ICTR judge has to be satisfied that an indictment establishes a prima facie case in order to confirm an indictment. It is unclear to the author what the relevant standard under Rwandan law is.

[48] CPC art 119. See also CPC art 143 re summons by court at commencement of trial, including charge sheet.

[49] In the Munyakazi TC amicus curiae brief of Rwanda, par 50, Rwanda noted: "… upon transmission of the case file/dossier by the public prosecutor to the High Court it is up to the Judge to endorse or otherwise qualify the indictment. *In practice*, the formal requirements for an indictment, in order for it to be accepted for filing before a judge of the High Court, require that it contain: - a statement of the laws on which the Prosecutor general bases the indictment - the identity of the accused - 'The case number - The court seized of the case - 'The charges and the particular laws infringed - 'The alleged individual criminal responsibility of the accused - a list of witnesses and summary of prosecution evidence -list of any exhibits - the sentence for which the accused is liable" (emphasis added).

[50] In relation to the differently formulated transfer law of Bosnia (BiH) see Mejakic RB decision par 89: "As a general matter, the Referral Bench understands that the adaptation of the Indictment is required by the procedure in the BiH Law on Transfer. Article 2(1) provides that: 'If the ICTY transfers a case with a confirmed indictment according to Rule 11 bis… the BiH Prosecutor shall initiate criminal prosecution according to the facts and charges laid out in the indictment of the ICTY. The BiH Prosecutor shall adapt the ICTY indictment in order to make it compliant with the BiH Criminal Procedure Code, following which the indictment shall be forwarded to the Court of the BiH. The Court of BiH shall accept the indictment if it ensured that the ICTY indictment has been adequately adapted and that the indictment fulfills the formal requirements of the BiH CPC.' The nature of what is contemplated by this provision suggests that the procedure should not be lengthy, particularly in light of the submission of [Bosnia] that "as a general matter, the BiH Prosecutor will use the indictment prepared by the ICTY with only such formal changes as are necessary to bring the indictment into conformity with BiH procedural law" and that the "BiH Prosecutor would be bound to adapt the ICTY indictment and file the adapted indictment with the Court of BiH as soon as reasonably practicable"."

[51] Bagaragaza AC decision par 17 (emphasis added), citing Prosecutor v Mejakic et al, Decision on Joint Defence Appeal Against Decision on Referral under Rule 11bis, Case No IT-02-65-AR11bis.1, 7 April 2006 (Mejakic AC decision). The Bagaragaza opinion was cited with approval in e.g. Hategekimana TC decision, footnote no 28. That the ICTR prosecution considers that at least some substantive changes not flowing from the CPC but from the Rwandan criminal code could be made to an adapted indictment, is suggested in its submission in the Hategekimana case. It suggested that "the applicable mode of participation could still be addressed during the adaptation phase of the indictment." The appeals chamber did not address this argument, which in any event was not an argument in favour of Rwandan prosecutors having the power to pick and choose among the substantive charges. See Hategekimana AC decision par 9.

After plea-bargaining talks, the Bosnian prosecutor submitted to the Bosnia court a plea agreement containing, as put by the ICTY prosecutor in its report to the ICTY referral bench, "considerably less charges" than the ICTY indictment, i.e., only one count of war crimes for aiding and abetting the planning and execution of crimes in Ahmici only over two days and his related command responsibility.[52] Neither the ICTY prosecutor nor the referral bench raised any concerns about the non-adherence to the original indictment, the prosecutor simply noting that none of the issues raised in the attached OSCE monitoring report "appear to have affected [Ljubicic's] right to a fair trial."[53]

61. It would seem possible to advance arguments in favour of Rwandan prosecutors being able to prosecute selected charges only.[54] The Transfer Law, ICTR rule 11bis and the relevant ICTR and ICTY jurisprudence could possibly be interpreted so as not to preclude such an argument.

62. The core purpose of transfers – which are generally aimed at clearing the case-load of the ICTR – arguably is not the national prosecution and trial of exactly the same case as originally prepared by the ICTR prosecutor. National proceedings for international crimes bearing some obvious and reasonable resemblance to the ICTR case should suffice.

63. Practical considerations may necessitate a selection – or substitution – of charges. For example, witnesses on a particular charge may no longer be alive or willing to testify. The indictment-adaptation process presumably would have to include a review of all the charges and information and supporting material received from the ICTR. Some of the supporting material may not have been revisited since its collection years ago.[55] New evidence may come to light (e.g. in the course of further investigations in Rwanda or in the process of reviewing the case and preparing an adapted indictment) or may have come to light (e.g. in the course of other, recent ICTR proceedings), strengthening or weakening parts of a case.[56]

64. Capacity constraints and prioritisation considerations may also demand selection. Depending on how many cases involving in-custody accused are transferred to Rwanda (and how many extraditions are effected) at about the same time, Rwanda's prosecutors may simply lack the capacity (like most national prosecution services anywhere in the world would) to expeditiously tackle multiple prosecutions diligently and in a manner that will not affect the rights of accused and victims.

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[52] Prosecutor v Ljubicic, Public Filing - Prosecutor's Final Progress Report, Case No IT-00-41-PT, 23 Dec 2008, par 4.

[53] Ibid par 6.

[54] These notes do not deal with amendment of indictments during trial in Rwanda. This is a potentially relevant issue in transfer cases. The author did not enquire whether such amendments are known to Rwandan law.

[55] In the ICTR's Report on the completion strategy of the International Criminal Tribunal for Rwanda, S/2009/247, 14 May 2009, par 53, the prosecutor noted: "OTP investigations continue to focus on trial and appeal support, preparation of cases of fugitives and other indictees in custody for referral." It is not clear whether the preparation of cases for referral includes substantive indictment reviews, etc. This is also relevant to issue of the amendment of ICTR indictments by the ICTR prosecutor.

[56] The substance of the foregoing is reflected in the Munyakazi TC amicus curiae brief of Rwanda, pars 48-49, 58: "[Rwanda] submits that upon referral of the indictment and supporting material, the case will undergo the normal investigations procedure and transmission to the High Court as provided for under the Criminal Procedure Code. … In this regard investigations will be conducted by the Criminal Investigations Department under the supervision of the National Prosecution Service, in order to establish whether the evidence relied upon by the ICTR still exists and is available for trial. Where necessary supplementary evidence will be collated and added to the dossier in conformity with the law. This procedure is necessary to ensure that the evidence still exists or is obtained through investigation to sustain the charges. Given the lapse of time between the commission of the alleged crimes and the trial process, this procedure assumes critical importance in ensuring a fair trial for the accused. … The Defence provides a false and misleading context as it unjustifiably stretches it to mean change or revision of the indictment. The common understanding of specific undertakings within the scope of the term adaptation is vital and exhaustively stated under paragraphs 48 to 50 [of the amicus curiae brief]."

65. Assuming that Rwandan prosecutors would be able to select charges, which selection principles and criteria would satisfy the ICTR?[57] It would serve very little purpose to speculate, in part because the author has not studied the ICTR indictments earmarked for transfer to Rwanda. It may be best for Rwanda to approach the ICTR on these matters before any transfer. This may require Rwandan prosecutors and other authorities to develop and implement an action plan to review current indictments and any related public materials earmarked for possible transfer to that country, and to assess as far as possible the challenges that would be faced in prosecuting and trying particular transfer cases as well as transfer cases in general, and to approach the ICTR for guidance on how to proceed and/or with request for amendments of current ICTR indictments where necessary. (See also paragraph 54 above.)

66. Among the questions worth considering, should Rwandan prosecutors and other authorities want to select (or substitute) charges, could be whether the ICTR would frown upon, for example, decisions by Rwandan prosecutors:

- Dropping some geographical locations from an ICTR indictment in relation to genocide charges?
- Dropping some underlying crimes charged in an ICTR indictment in support of genocide charges?
- Selecting one or more acts of participation in genocide (e.g. dropping commissioning, but sticking with incitement)?
- Dropping crimes against humanity charges but retaining genocide charges (or vice versa) where the underlying conduct for both categories is the same? (For example, dropping rape as part of genocide charges but retaining it as crimes against humanity charge.)

It would seem as if Rwandan prosecutors wanting to select charges might have to advance clear and good reasons for doing so.

67. Would defendants be able to challenge amended indictments under Rwandan law? This important question is not explored here.[58] Neither is the question whether they would be able to raise challenges at the ICTR against any Rwandan amendments going beyond adaptation and/or the scope of such amendments at the ICTR (though the general answer to this particular question would seem to be negative).

G. EVIDENCE-RELATED ISSUES

68. This section relates to TL articles 7-12, which seem to apply only to ICTR-transfer cases.

69. The provisions generally seem to comply with international law and Rwandan constitutional law. They seem to safeguard the rights of accused and victim witnesses properly.

70. Using evidence in one legal system that was collected for use in another legal system often presents legal and practical problems. One set of practical problems may concern language issues. Would all relevant materials transferred to Rwanda,[59] including written statements of potential witnesses, be translated into French and English? Into Kinyarwanda? Depending on the language capacity of the relevant prosecutors, courts and other parties, this may pose challenges during the pre-trial and later phases.

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[57] Selecting among ICTR charges presumes that Rwandan prosecutors would prosecute international as opposed to 'ordinary' crimes. It can be assumed that the ICTR would not lightly accept prosecution of 'ordinary' crimes only, much less a decision not to prosecute. It is assumed that what is noted here in relation to selection of charges would also largely apply to substitution of international-crime charges.

[58] See e.g. ICTR rules 50 and 72 in relation to challenges to and amendments of indictments. This question may be of interest to Rwandan authorities, defendants and the ICTR.

[59] It is not only transferred materials, nor only written materials, which may pose problems. For example, the ICTR may hold audiovisual recordings in another case; the recordings may be relevant to a transferred case, and Rwandan prosecutors and the defence may approach the ICTR for access.

71. Regarding TL article 7 (a general evidence-related provision), one could imagine the defence challenging whether some evidence intended to be used in Rwanda was collected 'in accordance with the ICTR Statute and Rules'. Relevant ICTR rules include rule 89,[60] and rule 92bis (on proof of facts other than by oral evidence), rule 95 (on exclusion of evidence on the grounds of the means by which it was obtained[61]) and rule 97 (relating to lawyer-client privileged communications).

72. Article 8 expressly reflects the gist of ICTR rule 94(B) which reads: "At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings." The Mejakic transfer decision of the ICTY in relation to a generally similar provision in the BiH transfer law relevantly notes:

> The effect of Article 4 of the BiH Law on Transfer[[62]] is essentially the same as [ICTY Rule 94].[[63]] … It is true…that Article 4 does not compel the State Court to accept and apply the decision of the Trial Chamber of this Tribunal in this case concerning previously adjudicated facts. Rather, Article 4 empowers the State Court to apply that decision but requires that the parties are heard before a decision is made to do so. It appears to the Referral Bench that this provision is fair and appropriate. It ensures that any concerns of the Defence can be considered by the State Court when it reaches its decision whether or not to apply the adjudicated facts decision of this Tribunal. This provides a means by which the interests of the Defence are duly protected.[64]

The article 8 references to "facts established by the ICTR" and "documentary evidence from proceedings of the ICTR" should seemingly be read as references to facts adjudicated and documentary evidence ruled admissible and relevant in inter-partes contentious proceedings at the ICTR. In practice, decisions and judgments of ICTR chambers are not always crystal clear on which facts they found to be established.[65]

73. What is the relevance of article 8 to ICTR rule 94(A), which reads: "A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof."? The ICTR has taken judicial notice of certain facts – in the sense of accepted certain facts as established beyond any dispute and not requiring any proof – such as that between 6 April 1994 and 17 July 1994:

- There was a genocide in Rwanda against the Tutsi ethnic group.
- There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandans killed

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[60] See e.g. ICTR rules 89(C): "A Chamber may admit any relevant evidence which it deems to have probative value." See also rule 92bis(A)(ii)(b): "Factors against admitting evidence in the form of a written statement include whether: … a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value …" ICTR and ICTY case-law could be useful sources for the interpretation of the relevant Rwandan law provisions.

[61] It reads: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."

[62] As quoted in par 93 of the Mejakic RB decision, the equivalent provision in the BiH transfer law reads: "Article 4 (Facts Established by Legally Binding Decisions by the ICTY) At the request of a party or *proprio motu*, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept as documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings."

[63] The equivalent ICTR rule has the same number.

[64] Mejakic RB decision par 95.

[65] For example, could obiter dicta be said to be 'established by the ICTR'? "Obiter dictum" is defined as "Words of an opinion entirely unnecessary for the decision of the case. A remark made or opinion expressed by a judge in a decision upon a cause, "by the way", that is, incidentally or collaterally, and not directly upon the question before the court or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such [obiter dicta] are not binding as precedent" at http://legal-dictionary.thefreedictionary.com/obiter+dictum.

or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity.[66]

74. At first glance it would seem as there is no relation between ICTR rule 94(A) and article 8. The latter could have reflected the former expressly had that been intended.[67] Consequently, it would seem as if Rwandan courts could not take judicial notice of facts which the ICTR chose to take judicial notice of. The author understands that Rwandan law is unfamiliar with the practice of taking judicial notice of facts as used at the ICTR. Provided that any legal hurdles to an interpretation of article 8 as covering judicial notice could be overcome, transfer proceedings could be completed more speedily, and the workload of the prosecutors could be reduced, were judicial notice to be accepted as acceptable practice (at least in ICTR-transfer proceedings). However, any decision to adopt the practice – which is controversial in relation to at least some of the so-called facts taken judicial notice of by the ICTR – must be subject to and fully protect the procedural and substantive fair-trial rights of accused.

75. Regarding article 9, the ICTR testimonies and depositions referred to should probably be read as references to testimonies and depositions accepted as being admissible before the ICTR. Rwandan courts could consult ICTR and ICTY jurisprudence on the meaning of 'evidence the probative value of which is outweighed by its prejudicial value'.[68]

76. Regarding ICTR-protected witnesses, any disclosure of their identity or the fact of their testimony to the ICTR must be done in strict compliance with ICTR rules 11bis and 75 as well as any relevant decision of the ICTR. This applies to articles 9 and 11 of the Transfer Law too. Unless specifically disclosed as part of transfer decisions[69] or other decisions by ICTR judges varying or lifting protective measures, Rwandan prosecutors and other parties to Rwandan proceedings would have to approach the ICTR for disclosure. That is notwithstanding the fact that at present ICTR rule 75 does not expressly refer to the force and variation of ICTR-ordered protective measures for witnesses and victims in transfer proceedings, unlike at the ICTY.[70] It is unclear

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[66] See Prosecutor vs Karemera et al, Case No ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, pars 25-31 and 33-38. See also Prosecutor v Karemera et al, Decision on Motions for Reconsideration, Case No ICTR-98-44-AR73(C), 1 Dec 2006, par 11. Core facts such as these no longer need to be proven in each case, and they cannot be rebutted by evidence to the contrary. The ICTR has taken judicial notice of other facts too, including relating to the 'ethnic' composition of Rwandan society in 1994.

[67] On the other hand, the use of "established facts" in article 8 as opposed to "adjudicated facts" as used in rule 94(A) may suggest that the former was meant to be different and possibly broader than the latter – though such interpretation depends on the exact meaning given to "established".

[68] The phrase appears in ICTR rule 92bis(A)(ii)(b). See also ICTR rule 89(C).

[69] See e.g. ICTR rule 11bis(D): "(D) Where an order is issued pursuant to this Rule: … (ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force…"

[70] For example, for reasons unknown to the author, ICTR rule 75 does not have provisions similar to those underlined in the following quotations from ICTY rule 75: "(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures: (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal ("second proceedings") <u>or another jurisdiction</u> unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule…" (compare terms of ICTR rule 75(F)); "(H) <u>A Judge or Bench in another jurisdiction, parties in another jurisdiction authorised by an appropriate judicial authority, or a victim or witness for whom protective measures have been ordered by the Tribunal may seek to rescind, vary, or augment protective measures ordered in proceedings before the Tribunal by applying to the President of the Tribunal</u>, who shall refer the application (i) to any Chamber, however constituted, remaining seised of the first proceedings; (ii) if no Chamber remains seised of the first proceedings, to a Chamber seised of second proceedings; or, (iii) if no Chamber remains seised, to a newly constituted Chamber" (compare to ICTR rule 75(G)); "(J) The Chamber determining an application under paragraphs (G) and (H) above shall ensure through the Victims and Witnesses Section that the protected victim or witness has given consent to the rescission, variation, or augmentation of protective measures; <u>however, on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, the Chamber may, in exceptional circumstances, order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent</u> (compare ICTR rule 75(I))).

whether the absence of ICTR rule 75 provisions similar to the ICTY rules would present practical obstacles in the ICTR/Rwanda context.

77. Regarding TL article 11, it is likely that the defence would seek to exercise their right to examine ICTR investigators. Unless properly planned for by Rwandan authorities and the ICTR, this may cause practical problems and delays. It may be expected that a significant body of potentially relevant materials transferred to Rwanda would be in the form original, signed statements.

78. Regarding article 12, the reference to original documents or their certified copies should be read as referring to materials held and certified by the ICTR registry, which is the custodian of the ICTR's official record, and by the ICTR prosecution, which holds some case materials that do not form part of the official record but which could be relevant to transfer proceedings.[71]

79. The author does not know the size of cases earmarked for transfer to Rwanda. However, it is quite likely that the relevant materials held by the ICTR in relation to each transfer case would be voluminous. The materials would be transferred to Rwanda in various formats, but much of it is likely to be in hard-copy format. Rwandan prosecutors would have to familiarise themselves with all case materials properly and speedily in order, for example, to determine whether all of the materials collected years ago by the ICTR and to be used at trial are sufficiently up to date, which materials to bolster through further judicial-police or prosecutorial investigations in Rwanda,[72] which materials to rely on at trial, and in relation to which protected materials, if any, to approach the ICTR for variation orders. Whether the materials not transferred to Rwanda by the ICTR prosecutor (for example, because they were not considered to be relevant to the transferred cases) and to which Rwandan prosecutors and other parties may have to seek special access (for example, in order to look for additional supporting information from other cases, or to look for exculpatory materials), would be voluminous is unclear. Nevertheless, faced with volumes of materials and such tasks, Rwanda's prosecutors and other parties may be overwhelmed. Such risks could be avoided or managed, to which end especially Rwandan authorities might want to consider drawing up a realistic strategic and action plan as soon as possible.[73]

H. RIGHTS OF ACCUSED AND RELATED ISSUES

(i) Protection against genocide-denial prosecutions?

80. Article 13 of the Original Transfer Law – which pursuant to TL article 24 seemingly applies to both ICTR transfers and extradition cases[74] – has been amended. The amended article spells out the rights of accused more clearly and forcefully. The amendment also contains a new clause added at the end. It states that "no person shall be criminally liable for anything said or done in the course of a trial" (subject to the law on perjury and contempt).

81. This amendment seems to seek to address concerns about the risk of accused and witnesses being prosecuted for genocide ideology, genocide denial/negationism, revisionism, divisionism, etc, based on, e.g., their written statements and testimony. The reference to "no person"

[71] See ICTY manual section C.2.1 par 24, in relation to some certification issues.

[72] The authors understand that the CPC provides that the judicial police and prosecutors in Rwanda are to look for evidence favouring the defence too when they investigate a case. See e.g. CPC arts 19 and 28. What is the relevance, if any, of this for transfer cases? ICTR investigators and prosecutors are under no obligation to look for exonerating evidence when they investigate ICTR cases, but when they come across such evidence it must be disclosed to the ICTR defence. See e.g. ICTR rules 66 and 86. Rule 68(A) reads: "The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence." In relation to transfer cases, accused would not have had the benefit of a state-funded investigation aimed at collecting inculpating and exculpating evidence.

[73] This also touches on the possibility, raised above, of Rwandan prosecutors approaching ICTR prosecutors with requests to trim ICTR indictments.

[74] Notwithstanding the reference only to ICTR-transfer cases in the preamble of TL art 13. If such interpretation is open to question, the issue may need to be assessed in more detail.

suggests that parties other than accused are covered as well, notwithstanding that the new provision appears in the context of an article on the rights of accused, although this is open to debate. It is unclear whether the protection against criminal liability only (excluding civil liability) is relevant and significant. It is also unclear how broadly or narrowly "in the course of a trial" could be interpreted. It potentially excludes, for example, statements given prior to trial. At least in relation to witnesses, TL article 14 is also of relevance to these issues.[75]

(ii) Witness participation and video-link testimony

82. Issues surrounding the participation of defence witnesses in particular featured strongly in ICTR refusals thus far to transfer any cases to Rwanda. The Transfer Law has been amended and practical measures are being put in place by Rwandan authorities to address such concerns.

83. TL article 14 and 14bis seemingly apply not only to ICTR-transfer cases, but also to extradition cases, pursuant to TL article 24.[76]

84. TL article 14 largely speaks for itself. How the High Court would interpret its power to order protective measures "similar" to those set out in ICTR rules 53, 69 and 75, remains to be seen, but such issues would be very important in the monitoring of proceedings on behalf of the ICTR as well as by other observers. See the notes on ICTR rule 75 in section G above, which are relevant to articles 14 and 14bis too.

85. At first glance, the terms of article 14bis are relatively straightforward. How it would be interpreted and implemented in practice would be central to transfer proceedings. Issues raised by the provision include the following:

- Were few witnesses to be able or willing to testify in Rwanda, alternative mechanisms such as depositions or the recording of viva-voce testimony in foreign jurisdictions (something which the author understands Rwanda has never done) could be time-consuming and costly. Early planning, including proper budgeting and putting in place agreements with foreign jurisdictions at the earliest opportunity, would be required.
- In respect of video-link testimony, the rulings of the ICTR appeals chamber to the following effect would have to be borne in mind: "… the availability of video-link facilities is not a completely satisfactory solution with respect to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony, and that it would be a violation of the principle of equality of arms if the majority of Defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person.[77]

(iii) Foreign defence counsel

86. Generally, accused are entitled to counsel of their choice (TL article 13(6)).

87. The wording of TL article 15 – which pursuant to TL article 24 seemingly applies to both ICTR transfers and extradition cases – suggests that foreign counsel would in principle be able to defend accused in transfer cases: "Without prejudice to the provisions of other laws of Rwanda, Defence Counsel and their support staff shall have the right to enter into Rwanda and move freely within Rwanda to perform their duties…"[78] This does not seem to be a reference only to Rwandan-registered defence counsel based abroad.

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[75] That it applies even to witnesses who may have outstanding criminal charges against them in Rwanda, is underscored by the Munyakazi TC amicus curiae brief of Rwanda, par 29.

[76] Notwithstanding the reference only to ICTR-transfer cases in TL art 14. If such interpretation is open to question, the issue may need to be assessed in more detail.

[77] See e.g. Hategekimana AC decision par 26.

[78] As far as the author understands, it is not unusual for foreign defence counsel to appear before Rwandan courts.

88. Law No 3/97 of 19/3/1997 Establishing a Bar in Rwanda also appears to be relevant to the possible participation of foreign defence counsel and related issues.[79]

89. The author has not attempted to ascertain whether existing immigration, customs, foreign-labour/work-permit and laws provide a sufficient framework for the entry, exit and in-country work of foreign defence counsel who may wish to participate in transfer cases.

90. TL article 15 could be read to apply only to foreign defence counsel and their foreign support staff. The question arises whether the range of rights and protections under the provision would also extend to/are provided to Rwanda-based defence counsel and foreign staff under other Rwandan laws.

91. Regarding the ICTY, rules were specially approved in Bosnia to allow for defence counsel who have appeared before the ICTY to appear before Bosnian courts in transferred cases, helping to ensure continuity and speedier trials.

(iv) Trials in absentia

92. Accused have a right to be tried in their presence (see e.g. TL article 13(8)).

93. According to Rwanda's CPC,[80] fugitives convicted in absentia but who later give themselves up or are arrested "before the time limit for enforcement of sentence"[81] are to be fully retried in their presence (CPC article 204). While on the run, it would seem possible for such fugitive accused to be tried in absentia. Rwanda would then be able to request foreign states to locate, arrest and extradite/surrender such convicts.[82]

94. TL article 13(8) does not necessarily seem to be incompatible with the CPC provisions permitting trials in absentia. The former could be interpreted as applying when an accused is in custody and can in principle attend proceedings, the latter when an accused is on the run. If so, there would be no inconsistency between TL article 13(8) and the CPC provisions permitting trials in absentia. As long as someone earlier convicted in absentia is retried in his/her presence once arrested, such a course of action on the side of Rwanda may not necessarily fall foul of the fair-trial provision or other provisions of the Transfer Law, or of international human-rights law. However, this issue seems to be moot, in the light of the following.

95. In its amicus submission in the Kayishema-transfer case, Rwanda noted:

> In further response to the Trial Chamber's question whether [Rwanda] would try Fulgence Kayishema *in absentia* if he were not apprehended, [Rwanda] submits that a trial *in absentia* is not permissible under Article 13(7) of the Organic Law on the Transfer of Cases, which guarantees an accused "...the right to be tried in his or her presence", and mirrors article 20(4)(d) of the ICTR Statute. The operative law for the prosecution of

[79] See e.g. (a) Article 3: "No person shall hold himself out as a lawyer or practice law unless the person is registered on the membership, list or articling students' list for the Law Society…" (b) Article 5: "No person may be admitted to the profession of law or exercise any of the rights and privileges of a lawyer unless the person satisfies the following conditions: (1) The person must be a Rwandese citizen. However, a person who is a citizen of a state other than [Rwanda] may have access to the profession where there is reciprocity or under an international convention…" (c) Article 6: "Subject to any international convention, a lawyer who is a member of a bar of a state other than [Rwanda] that has provided in its national legislation for reciprocity may provide legal services in Rwanda on an occasional basis in accordance with Rwandese rules respecting the regulation of the profession."

[80] See e.g. arts 155, 156, 196-205.

[81] The author is unsure what the significance of this phrase is.

[82] Emmanuel Bagambiki, former prefect of Cyangugu prefecture, was acquitted on genocide charges at the ICTR, where the prosecutor examined the possibility of bringing rape charges against him but determined that the evidence was insufficient. After his acquittal, according to Human Rights Watch, Rwandan prosecutors brought charges of rape against Bagambiki and obtained his conviction in absentia on 10 October 2007. At the time of the publication of the Human Rights Watch report (*Law and Reality: Progress in Judicial Reform in Rwanda*, July 2008), Rwanda was seeking his *extradition* from Belgium where he was living (ibid pp 49-50).

persons referred to Rwanda by the ICTR is the Organic Law on the Transfer of Cases, which, pursuant to Article 93 of the Constitution of the Republic of Rwanda, takes precedence over ordinary laws in the case of conflict.[83]

96. The ICTR trial chamber consequently noted:

> The Chamber recalls that the Accused is currently at large. However, it is clear that Rule 11*bis* also applies to the transfer of accused at large. As a preliminary matter, the Chamber is satisfied that should his case be referred to Rwanda the Accused would not be tried *in absentia*. While the Criminal Procedure Code provides for trials *in absentia* in certain circumstances it is not the applicable law in the case of transfer cases like that of the Accused. The Transfer Law as the *lex posterieur* and the *lex specialis* in the field of transfer is the applicable law and it states in Article 25 that its provisions shall prevail in the event of any inconsistency with other legislation. The Transfer Law guarantees the accused the right to be tried in his or her presence, mirroring Article 20(4)(d) of the Statute. The Chamber is therefore satisfied that as the Accused's case would be governed by the Transfer Law he would not be subject to a trial *in absentia* should his case be transferred.[84]

I. APPEALS AND REVIEWS

97. Based on the wording of Transfer Law articles 16, 17 and 24, it would seem as if these provisions apply to ICTR-transfer cases and extradition cases.

98. TL article 16, dealing with appeals, seemingly is based on article 24 (and especially on article 24(1)) of the ICTR Statute.

99. The two possible grounds of appeal – "an error on a question of law invalidating the decision" or "an error of fact which has occasioned a miscarriage of justice" – do not appear in those terms in other Rwandan laws. If necessary, Rwandan judges and other parties could seek guidance on the definition of the said grounds in ICTR/ICTY jurisprudence. To what extent these grounds constitute a departure from appeal grounds in other Rwandan criminal cases, is unclear.[85]

100. TL article 17 is not based on the review provision of the ICTR Statute (article 25). At first glance the former merits no particular attention here.

101. As in relation to other elements of the Transfer Law, unless it varies other Rwandan laws, those other Rwandan laws would seemingly apply. So, substantive and procedural Rwandan law relating to appeals and reviews would apply except to the extent that Transfer Law article 16 (and possibly article 17) may introduce novel elements.

J. MONITORING OF TRANSFER CASES

(i) ICTR transfers

102. ICTR rule 11bis(D)(iv) provides that the ICTR prosecutor "may send observers to monitor the proceedings in the courts of the State concerned on his or her behalf".

103. TL article 19 covers monitoring. It refers only to "individuals" who may be designated as observers by the ICTR prosecutor (i.e., it does not expressly refer to organisations or to observers other than those designated by the ICTR prosecutor). The ICTR prosecutor has agreed with the African Commission on Human and People's Rights that it would monitor transfer cases on the ICTR's behalf.[86]

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[83] Prosecutor v Kayishema, Amicus Curiae Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11bis, 1 Oct 2007, Case No ICTR-01-67-I, par 16 (some of original emphases removed).

[84] Kayishema TC decision par 8.

[85] See e.g. CPC arts 164-179. See also Organic Law no 01/2004 of 29/01/2004 Establishing the Organisation, Functioning and Jurisdiction of the Supreme Court (O.G No 3 of 01/02/2004), arts 43 and 63.

[86] See e.g. Munyakazi AC decision par 30: "The Appeals Chamber notes that the Prosecution has approached the African Commission on Human and People's Rights ("African Commission"), which has undertaken to monitor the proceedings in transfer cases, and monitors could inform the Prosecutor and the Chamber of any concerns regarding the independence, impartiality or competence of the Rwandan judiciary. The Appeals Chamber notes that the African Commission is an independent organ established under the African Charter on Human and Peoples' Rights and it has

104. ICTR rule 11bis arguably creates a legal duty for the ICTR to follow transferred cases sufficiently so that a referral order could be revoked under ICTR rules 11bis(F) and (G) and TL article 20, if necessary.[87] It is difficult to imagine how the ICTR could do so without properly qualified and experienced observers in Rwanda.[88]

105. Observers are seemingly granted access to more than just trial proceedings and documents and places of detention, judging by the terms of the second paragraph of TL article 19. They would have observer rights during the pre-trial and post-trial phases.

106. The author has not attempted to ascertain whether the treaty referred to in the third paragraph of TL article 19 is a sufficient basis for the entry and exit of Rwanda and other activities inside Rwanda of the observers, or if not, whether existing immigration, customs, foreign-labour/work-permit and laws provide a sufficient framework.

107. It is to be noted that ICTR chambers have not considered monitoring to be a sufficient safeguard against all potential problems and risks; they have assessed the ability of a monitoring mechanism to identify and address any potential problems and risks in relation to each potential problem and risk raised by parties.

(ii) Extradition cases

108. TL article 19 does not expressly apply to extradition cases. In law, there seemingly is no obstacle to Rwanda extending monitoring rights similar to those of the ICTR prosecutor to extraditing states. Whether the clear extension of such monitoring rights to potential extraditing states and/or others could strengthen the case for extradition in foreign jurisdictions, may be worth considering. To the extent that judges or other officials deciding on extradition may consider that such monitoring could serve as an additional fair-trial guarantee (due to increased international attention), it may.

109. The clear extension of such monitoring rights could strengthen perceptions in extraditing states and the global human-rights community about Rwanda's resolve to ensure fair proceedings in transfer cases. It would also strengthen the rights of accused, and potentially benefit victims.

K. HEAVIEST PENALTY AND DETENTION

(i) Heaviest penalty

110. TL article 21 provides that life imprisonment is the heaviest penalty imposed upon a convicted person in an ICTR-transfer case. The amended "death-penalty abolition law"[89] expressly extends that to extradition cases too. The same law also clarifies that the penalty of "life imprisonment with special provisions"[90] does not apply to ICTR transfers or extraditions. See article 3 of said law: "… However, life imprisonment with special provisions as provided for by paragraph one of this Article shall not be pronounced in respect of cases transferred to Rwanda from the [ICTR] and from other States in accordance with the provisions of [the Transfer Law]."

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no reason to doubt that the African Commission has the necessary qualifications to monitor trials. The Appeals Chamber finds that the Trial Chamber erred in failing to consider this in its assessment."

[87] See e.g. Mejakic AC decision pars 92-94 regarding authority of referring chamber vis-à-vis that of prosecution in relation to monitoring.

[88] These notes do not examine if and how defendants would be able to approach ICTR chambers directly with complaints about the fairness of Rwandan proceedings in order to, for example, secure revocation orders. Although ICTR rule 11bis and the Transfer Law are silent on this, arguments could be made in favour of defendants being able to do so if certain conditions were satisfied.

[89] Organic Law no 31/2007 of 25/07/2007 relating to the abolition of the death penalty, amended by law no 66/2008 of 21/11/2008.

[90] Art 4: "Life imprisonment with special provisions is imprisonment with the following modalities: (1) a convicted person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least twenty (20) years of imprisonment; (2) a convicted person is kept in isolation…"

(ii) Detention provision: applicable to extraditions?

111. It is unclear whether TL article 23 would apply mutatis mutandis to extradition cases too.

112. At a minimum, its first paragraph could apply.[91] In addition to or instead of the said UN principles, any conditions of detention agreed between Rwanda and extraditing states or agreed to by Rwanda through, for example, multilateral treaties, would also apply.

113. Unless agreements between Rwanda and extraditing states so provide, it would seem unlikely that the second to fourth paragraphs of TL article 23 would apply to extradition cases.

[91] It reads: "Any person who is transferred to Rwanda by the ICTR for trial shall be detained in accordance with the minimum standards of detention stipulated in the [UN] Body of Principles for the Protection of all persons under any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December, 1998."

ANNEX A – TRANSFER LAW

Chapter 1. GENERAL PROVISIONS

Article: 1 Scope of application

This Organic Law shall regulate the transfer of cases and other related matters, from the International Criminal Tribunal for Rwanda and from other States to the Republic of Rwanda.

This Organic Law shall also determine the procedures of admissibility of evidence in Rwanda collected by the ICTR in proceedings before a competent court.

Article: 2 [The Court with competent jurisdiction to try the cases]

«Notwithstanding any other law to the contrary, the High Court shall be the competent court to conduct on the first instance the trial of cases transferred to Rwanda as provided by this Organic Law.

At the first instance, the case shall be tried by a single Judge.

However, the President of the Court may at his/her absolute discretion designate a quorum of three (3) or more judges assisted by a Court Registrar depending on his/her assessment of the complexity and importance of the case».

Article: 3 Crimes triable in Rwanda

Notwithstanding the provisions of other laws applicable in Rwanda, a person whose case transferred by the ICTR to Rwanda shall be liable to be prosecuted only for crimes falling within the jurisdiction of the ICTR.

Article: 4 Indictment

The Prosecutor General's Office of the Republic shall adapt the ICTR indictment in order to make them compliant with the provisions of the Code of Criminal Procedure of Rwanda, and it shall be forwarded to the President of the High Court of the Republic.

The High Court of the Republic shall accept the indictments after verifying they fulfill the formal requirements of the Code of Criminal Procedure of Rwanda.

Article: 5 Arrest and detention of the accused person

Except as otherwise provided in this Organic Law, the arrest and detention of the accused persons shall be regulated in accordance with the Code of Criminal Procedure of Rwanda.

Article: 6 Right to information

Within a period of ten (10) days, from the time when the High Court of the Republic makes a decision, the Registrar of the High Court shall notify the Prosecutor of the ICTR of the decision made in accordance with this Organic Law.

Chapter 2. PRODUCTION OF EVIDENCE

Article: 7 General Principles in evidentiary matters

Evidence collected in accordance with the Statute and the Rules of Procedure and production of evidence of ICTR may be used in proceedings before the High Court of the Republic.

The High Court of the Republic shall not convict a person solely on written statements of witnesses who did not give oral evidence during the trial.

However, the High Court of the Republic may convict a person on the probative value of a written statement if it is corroborated by other witnesses.

Article: 8 Facts established by ICTR

The High Court of the Republic, at the request of a party, or on its own motion and after hearing of the parties, may accept facts established by the ICTR or may accept documentary evidence from proceedings of the ICTR relating to the matters referred to in the case under trial.

Article: 9 Evidence provided to ICTR by witnesses

Statements of testimonies of witnesses given before the ICTR and records of depositions of witnesses made before the ICTR in accordance with the ICTR Procedure and evidence, shall be admissible before the High Court of the Republic provided that the testimony or deposition is relevant to a fact in issue. The High Court may exclude evidence given by a witness under protective measures where its probative value is outweighed by its prejudicial value.

Nothing in this provision shall prejudice the right of the accused to request the attendance of witnesses as referred to in Paragraph One of this Article for the purpose of cross-examination.

When the testimony or deposition of a witness, who was subject to a protection order of the ICTR, is admitted into the record, the identity of the witness shall not be disclosed to the public unless the ICTR or the witness authorizes such disclosure. If such a witness is called for cross-examination, the fact that the individual testified at the ICTR will not be disclosed to the public unless authorized by the ICTR or the witness.

Article: 10 Statement by expert witnesses before the ICTR

The statement of an expert witness entered into the case file in any proceedings before the first Trial Chamber of the ICTR shall be admissible as evidence in criminal proceedings conducted in the High Court of the Republic without the appearance of the expert witness in the proceedings.

If the statement of an expert witness mentioned in Paragraph One of this Organic Law is admitted in the case file, it shall be admitted as evidence of fact or as an opinion the expert would have provided in the court.

Pursuant to Article 6 of this Organic Law, the High Court of the Republic shall admit in the file an expert witness testimony basing on the statements the expert adduced in the first instance Trial Chamber of ICTR in another case.

However, the expert is required to have been previously informed of his or her rights and obligations regarding his or her testimony and the testimony shall specify on the existence or non-existence of facts relevant to the case under trial. This Article shall not deny the accused person of the right to request for the summoning of an expert witness referred to in Paragraph One of this Article for cross-examination or to call an expert witness to challenge the statement of another expert witness given before the ICTR.

Article: 11 Testimony provided to ICTR officials during investigations

A transcript of signed statements given to ICTR officials during investigations may be admitted as evidence and in a manner that similar evidence would be admitted under the Code of Criminal Procedure of Rwanda.

The relevant investigator of the ICTR may also be examined with regard to the circumstances of the investigations conducted and information obtained during when it was being conducted.

When the signed statement of a witness, who is subject to protection by ICTR is admitted into the record, or an official of ICTR who conducted the investigation is asked on such a statement, the identity of the witness shall not be disclosed unless the ICTR or the witness authorizes such disclosure. No signed statement taken from a witness by an ICTR investigator shall be used to incriminate the witness in any proceedings before Rwandan courts in case the investigator did not explain to the witness about his or her rights.

The examination of the ICTR investigator is expressly conducted subject to the Vienna Convention on the Privileges and Immunities of the United Nations of 13 February 1946, which provides that UN Staff are not subject to legal process unless the UN Secretary General has waived the immunity provided by the Convention.

Article: 12 Documents and Forensic Evidence collected by ICTR

The High Court of the Republic may use original documents or their certified copies or forensic evidence provided by a doctor, or an expert and which are collected by ICTR and they shall be used by the High Court of the Republic and treated as if they were obtained by relevant national authorities.

Chapter 3. RIGHTS AND SECURITY

Article: 13 Guarantee of rights of an accused person

«Without prejudice to other rights guaranteed under the laws of Rwanda, including the Constitution of the Republic of Rwanda of 04 June 2003 as amended to date or Laws relating to the Code of Criminal Procedure of Rwanda and the International Covenant on Civil and Political Rights, as ratified by the Decree Law n° 08/75 of February 12,1975, the accused person in the case transferred by ICTR to Rwanda shall be guaranteed the following rights:

1° a fair and public hearing;

2° presumption of innocent until proved guilty;

3° to be informed promptly and in detail in a language which he/she understands, of the nature and the cause of the charge against him;

4° adequate time and facilities to prepare his/her defense;

5° a speedy trial without undue delay;

6° entitlement to counsel of his/her choice in any examination. In case he/she has no means to pay, he/she shall be entitled to legal representation;

7° the right to remain silent and not to be compelled to incriminate him/herself.

8° ° the right to be tried in his/her presence;
9° to examine, or have a person to examine on his/her behalf the witnesses against him/her;
10° to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her;

Without prejudice to the relevant laws on contempt of court and perjury, no person shall be criminally liable for anything said or done in the course of a trial».

Article: 14 Protection and assistance to Witnesses

In the trial of cases transferred from the ICTR, the High Court of the Republic shall provide appropriate protection for witnesses and shall have the power to order protective measures similar to those set forth in Articles 53, 69 and 75 of the ICTR Rules of Procedure and Evidence.

In the trial of cases transferred from the ICTR, the Prosecutor General of the Republic shall facilitate the witnesses in giving testimony including those living abroad, by the provision of appropriate immigration documents, personal security as well as providing them with medical and psychological assistance.

All witnesses who travel from abroad to Rwanda to testify in the trial of cases transferred from the ICTR shall have immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials. The High Court of the Republic may establish reasonable conditions towards a witness's right of safety in the country. As such there shall be determination of limitations of movements in the country, duration of stay and travel.

Article 14bis: Testimony of a witness residing abroad

«Without prejudice to the generality of Article 14, where a witness is unable or for good reason, unwilling to physically appear before the High Court to give testimony, the judge may upon request of a party order that the testimony of such witness be taken in the following manner;

1° By deposition in Rwanda or in a foreign jurisdiction, taken by a Presiding Officer, Magistrate or other judicial officer appointed/commissioned by the Judge for that purpose;

2° by video-link hearing taken by the judge at trial;

3° by a judge sitting in a foreign jurisdiction for the purpose of recording such viva voce testimony.

The request for the taking of testimony in any of the modes described above shall indicate the names and whereabouts of the witness whose testimony is sought, a statement of the matters on which the witness is to be examined, and of the circumstances justifying the taking of testimony in such manner.

The order granting the taking of testimony of a witness in any of the modes prescribed above shall designate the date, time and the place at which such testimony is to be taken, requiring the parties to be present to examine and cross-examine the witness.

Testimony taken under this Article shall be transcribed and form part of the trial record and shall carry the same weight as viva voce testimony heard at trial».

Article: 15 Defence Counsel

Without prejudice to the provisions of other laws of Rwanda, Defence Counsel and their support staff shall have the right to enter into Rwanda and move freely within Rwanda to perform their duties. They shall not be subject to search, seizure, arrest or detention in the performance of their legal duties.

The Defence Counsel and their support staff shall, at their request, be provided with appropriate security and protection.

Chapter 4. APPEALS AND CASE REVIEW

Article: 16 Appeals

Both the prosecution and the accused have the right to appeal against any decision taken by the High Court of the Republic upon one or all of the following grounds:

1° an error on a question of law invalidating the decision, or;

2° an error of fact which has occasioned a miscarriage of justice.

The Supreme Court may uphold or invalidate some or all of the decisions of the High Court of the Republic. Where necessary, it may order the High Court of the Republic to review the case.

Article: 17 Case review

The President of the High Court of the Republic shall, upon an application by a party in accordance with Article 180 and other provisions of the law relating to the Code of the Criminal Procedure, basing on new arguments, constitute a bench composed of three (3) judges in the High Court of the Republic in charge of taking a decision on the application for a review of case with new arguments the same court had tried. The review proceedings with new arguments shall be conducted pursuant to the relevant provisions of the Code of Criminal Procedure of Rwanda as well as the provisions of the Law determining the Organization, Functioning and Jurisdiction of Courts in Rwanda.

The President of the High Court of the Republic may, if considered necessary, assign the judge who heard the case with the designated bench of judges in a case which he tried in order to take a decision on the case for which was requested for review with new arguments.

Chapter 5. COLLABORATION BETWEEN THE GOVERNMENT OF RWANDA AND THE ICTR SUBSEQUENT TO TRANSFER OF CASES

Article: 18 Technical Assistance from the ICTR

The Government of Rwanda may benefit from technical assistance from the ICTR to meet the needs arising from the transfer of cases to Rwanda.

Article: 19 Monitoring of Proceedings

The ICTR Prosecutor shall have the right to designate individuals to observe the progress of cases transferred to Rwanda in accordance with article 11bis D) iv) of the ICTR Rules of Procedure and Evidence.

Observers appointed by the ICTR Prosecutor shall have access to court proceedings, documents and records relating to the case as well as access to all places of detention.

The Vienna Convention of 13th February, 1946 on the Privileges and Immunities of the United Nations shall apply to the observers so appointed by the ICTR Prosecutor in accordance with Article 29 of the ICTR statute.

Article: 20 Referral of cases to ICTR

In the event that the ICTR revokes an Order of referral of cases it had transferred to Rwanda pursuant to Rule 11bis of the ICTR Rules of Procedure and Evidence, the accused shall be promptly surrendered to the ICTR together with any files, documents, exhibits and all other additional materials as stipulated in the order.

Chapter 6. PENALTIES

Article: 21 The heaviest Penalty

Life imprisonment shall be the heaviest penalty imposed upon a convicted person in a case transferred to Rwanda from ICTR.

Article: 22 Credit for time spent in custody

Credit shall be given to the convicted person for the period during which he has been detained in custody, or pending for the appeal.

Article: 23 Detention

Any person who is transferred to Rwanda by the ICTR for trial shall be detained in accordance with the minimum standards of detention stipulated in the United Nations Body of Principles for the Protection of all persons under any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December, 1998.

The International Committee of the Red Cross or an observer appointed by the President of the ICTR shall have the right to inspect the conditions of detention of persons transferred to Rwanda by the ICTR and held in detention. The International Committee of the Red Cross or the observer appointed by the ICTR shall submit a confidential report based on the findings of these inspections to the Minister in charge of Justice of Rwanda and to the President of the ICTR.

In case an accused person dies or escapes from detention, the Prosecutor General of the Republic shall immediately notify the President of the ICTR and the Minister of Justice in Rwanda.

The Prosecutor General of the Republic shall conduct investigations on the death or the escaping of the person who was in detention and shall submit a report to the President of ICTR and the Minister of Justice in Rwanda.

Chapter 7. FINAL PROVISIONS

Article: 24 Applicability of this Organic Law to other matters of transfer of cases between Rwanda and other states

This Organic Law applies mutatis mutandis in other matters where there is transfer of cases to the Republic of Rwanda from other States or where transfer of cases or extradition of suspects is sought by the Republic of Rwanda from other states.

Article: 25 Application of this Organic Law

In the event of any inconsistency between this Organic Law and any other Law, the provisions of this Organic Law shall prevail.

Article: 26 Coming into force of this organic law

This Organic Law shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda.

ANNEX B – ICTR RULE 11BIS

ICTR RULE 11 BIS ("REFERRAL OF THE INDICTMENT TO ANOTHER COURT")

(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 a State: (i) in whose territory the crime was committed; ….

(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor …

(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) Where 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 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.

(E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred for trial.

(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.

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

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